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Baby Shoes and the Copyright Work: A Comment on Brad Sherman's What Is a Copyright Work?

A Comment on: "What Is a Copyright Work?" by Brad Sherman.

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Consider the following short text, comprised of only six words:

"For sale: Baby shoes. Never worn."

This text is a short story, attributed by many to Ernst Hemingway.¹ According to the popular version, Hemingway, who was challenged by a friend to write a six-word short story, responded by writing *Baby Shoes*, and considered it his best short story ever.² In that context, *Baby Shoes* is probably a copyright work. Yet, would this very same text be considered a work were it a real entry appearing in a newspaper ad-section, comprised of hundreds of items?

The example, which came to my mind after reading *What Is a Copyright Work?*, illustrates the complexity of the question raised in Prof. Sherman's article. Indeed, *What Is a Copyright Work?* is a thought-provoking work. By the mere presentation of the question, it highlights the difficulties entailed in

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1 For different accounts of this tale see, for example, *Life In Six Words*, BBC RADIO 4, http://www.bbc.co.uk/radio4/today/reports/misc/sixwordlife_20080205.shtml (last visited Dec. 22, 2010); *Very Short Stories*, WIRED, Nov. 2006, available at <http://www.wired.com/wired/archive/14.11/sixwords.html>; *To Cut a Long Story Short*, GUARDIAN, Mar. 24, 2007, available at <http://www.guardian.co.uk/ed.books/2007/mar/24/fiction.originalwriting>.

2 See *supra* note 1. As is evident from these and other references, Hemingway's story has inspired numerous contemporary writers to engage in writing six-word short stories.

a topic that has received relatively little scholarly attention: what constitutes a "work" under copyright law?

I entirely agree with the article's insight, that under modern copyright law the "work" has become a transparent element. In other words, the departure from the physical object, together with the lack of statutory definition and lack of formalities, creates a hidden presumption that the subject matter in question is indeed a "work," so that courts, scholars and policymakers tend to focus on other copyright thresholds. The article also convincingly illustrates that those other thresholds — "originality," specific subject-matter, and even the requirement for a "substantial part" in the context of infringement — cannot always replace the need to determine whether a "work" subsists.

The question, it seems, can become acute in at least two sets of circumstances: The *first*, which is the primary focus of the article, concerns the use of a portion of a larger whole (the larger whole undoubtedly being a copyright work): a page from a book, a few notes of a song,³ or a frame from a movie.⁴ Arguing that each such portion constitutes a separate copyright-protected work can form a basis not only for a copyright infringement claim, but also for claiming a multiplicity of statutory damages, royalties, etc. In this latter sense, the recognition of the portion as a distinct work can yield different practical results than the recognition of that same portion as a "substantial part" of a larger work. The *second* incident in which the subsistence of a work is particularly significant concerns the case of "micro-works" (a term coined by Justin Hughes), where the initial subject matter is very small and does *not* constitute a part of the larger whole, such as very short texts or brief musical compositions.⁵

The article uses the image of the "quasi-object" to describe the nature of the copyright work. Indeed, the quasi-object metaphor is helpful in highlighting that the work is (also) a "genre," a "code," and a signifier, rather

3 Compare the recent Australian decision *Larrikin Music Publishing Pty v. EMI Songs Australia Pty* [2010] FCA 29, in which it was held that the use of two bars of an iconic Australian song ("Kookaburra") in the famous hit "Land Down Under" by "Men at Work" constituted copyright infringement. Notably, the discussion concentrated on the question of "substantiality."

4 Compare the U.S. case of *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (concerning the copying of several frames of the renowned *Zapruder* film which documented the Kennedy assassination, by the author of a book about the assassination).

5 Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005) (describing U.S. law's reluctance to protect "small" works, and arguing that the lack of protection should be based upon the notion of a "work" rather than upon lack of originality).

than merely a physical object or a "natural" legal kind.⁶ Describing the work as a quasi-object further shifts the focus from the "author" and the "origin" of the work to the work itself, its function and its role in social relations.⁷ Indeed, like the "genre," the copyright work, too, is fluctuating, constantly changing, and is "doubtless lacking stability."⁸

And yet, the modernist use of categories, as described in the article, is unavoidable if copyright law — or any other law for that matter — wishes to be general and forward-looking. Returning to the pre-modern "glorious muddle" (to use Prof. Sherman's words) which referred only to specific subject-matter ("books") without using an organizing concept would deprive the law of its much needed flexibility on the one hand, but is unlikely to spare us the need to establish definitions and guidelines on the other hand. Indeed, problems of definition, flexibility and borderline cases arose even under the pre-modern regime.⁹ Therefore, although the concept of the work is unstable and even if one cannot hope for bright-line rules, the need to provide guidelines as to "what constitutes a work" is inescapable.

The challenge which the article raises, then, is whether these insights can be translated into doctrinal guidelines. Can the metaphor of the work as a quasi-object assist us in outlining the contours of the work in the difficult cases? Despite the somewhat skeptic tone of the article, I suspect that using its insights may provide a positive answer to the latter questions. In the following paragraphs I do not attempt to propose a complete analysis, but merely a few provisional thoughts in that direction.

First, viewing the work as a quasi-object implies that the test for "what is a copyright work?" cannot be purely quantitative or technical: one cannot decide, for example, that a text consisting of 11 words is a work, while one

6 Cf. Jacques Derrida, *The Law of Genre*, in *ON NARRATIVE* 58 (W.J.T. Mitchell ed., 1981) (pointing out that genres are not "natural," "ideal," preexisting forms, but are developed by the creation of particular works, and highlighting the reciprocal relationship between the "form" and "content").

7 Cf. Abraham Drassinower, *From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law*, 34 J. CORP. L. 991 (2009) (arguing that copyright law should be viewed as a dialogue between authors and users, rather than as a "balance" between the two, and further demonstrating how the metaphor of a "dialogue" can influence the interpretation of various copyright concepts, including the "work").

8 ALISTAIR FOWLER, *KINDS OF LITERATURE: AN INTRODUCTION TO THE THEORY OF GENRES AND MODES* 11 (1982) (referring to literary genres).

9 Cf. Hughes, *supra* note 5, at 602 (demonstrating how the term "books" under the Statute of Anne was interpreted broadly by the English courts, so as to include subject matter which was beyond the regular use of the term, such as musical sheets and musical compositions).

consisting of only 6 words is not. Rather, *if the work is both a product of relations and social conventions, and also defines such relations, then context and relations should be taken into account.* Therefore, the determination whether a work subsists should be a *relative* one, and an identical subject matter may be considered a work in one context but not in another.

Obviously, the risk of such a relativist approach is ambiguity and lack of predictability. In order to reduce those, we should try to identify the relevant contextual and relational factors. In this context, it seems that one inevitably has to turn to copyright's meta-narratives and underlying rationales for guidance. Thus, for example, in systems which regard incentive as the prevailing copyright narrative, the following factors, though certainly not exhaustive, may be relevant to the distinction between a "work" and a "non-work":

First, when the subject matter in question constitutes a *part of a larger whole* — such as a sentence in a poem, a frame out of a film or the title of an article — an incentive may not be required for its production, as the incentive for the production of the "larger whole" may be sufficient. The ensuing conclusion may be that the portion is not a separate "work."

Justin Hughes in his article, *Size Matters (or Should) in Copyright Law*, proposed a *market-based test* in this context: the production and distribution of the subject matter "as such" by the copyright owner indicates that an incentive for its production and dissemination "as such" is required, thus implying the possible subsistence of a separate, independent "work."¹⁰ This proposed test can shed light on the wide recognition of fictional characters as "works," even when detached from the literary, dramatic or artistic context in which they originally appeared.

And lastly, and here I differ from the article's position, it seems that a context-based, incentive-oriented approach does direct us towards tests of *integrity, independence, completeness*, and perhaps even significance. If the subject matter in question possesses independent qualities and inherent integrity, then an incentive for its production would normally be required, in addition to the personality interest which — as the article correctly observes — would also subsist in such circumstances. Indeed, this last proposed factor requires some judgment of merit and meaning, but only in a very limited sense, which is not alien to copyright law and is prevalent in additional tools in the copyright toolbox, such as the concepts of "fair use" and "substantiality."¹¹ It seems, then, that courts which have tried to determine the subsistence of a copyright work by referring to its "discrete"

¹⁰ Hughes, *supra* note 5, at 622-27.

¹¹ See, for example, the numerous cases holding that the test for a "substantial part" is

versus "artificial" nature,¹² to the "independence" of the subject matter,¹³ and perhaps even to its ability to convey "information, instruction or pleasure" (in the renowned *Exxon* case)¹⁴ — have been pointing in the right direction.

To conclude, let's return to the *Baby Shoes* text, which well illustrates, I believe, these latter points: First, it demonstrates that the test for a work cannot be purely technical, but should be relative and context-related. And it also indicates that "integrity" (and perhaps even "authors and origins"¹⁵) cannot be completely ignored when determining whether a work subsists.

"qualitative" rather than "quantitative." *E.g.*, *Larrikin Music Publishing Pty v. EMI Songs Australia Pty* [2010] FCA 29, at paras. 35, 42, 54, 112.

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

13 See the Israeli Supreme Court case CA 2392/99 *Ashraz Data Processing Ltd. v. Transbeton Ltd.* 57(5) PD 255 [2003] (Isr.), in which the court used an "independence" test to determine whether software modules forming part of a computer program constituted separate works.

14 *Exxon Corp. v. Exxon Insurance Consultants International Ltd.* [1981] 3 All E.R. 241 (Court of Appeal). (Notably, the discussion focused on the meaning of "a literary work," rather than "a work.")

15 The phrase, of course, follows the title of the book *OF AUTHORS AND ORIGINS, ESSAYS ON COPYRIGHT LAW* (Brad Sherman & Alain Strowel eds., 1994).