



## Old Town Road of Copyright's Subject Matter and Aesthetics

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The paper refers to the most discussed and controversial element of the copyright's legal system: the definition of subject matter and its interpretation. Inspired by some post-modern aesthetics theories, the aim of the paper is to open a discussion in respect to the notion of work in copyright and its impact on art and every-day life. The first part of the paper presents a brief analysis of copyright's struggles with its subject matter, followed than with an analysis of contemporary trends in aesthetics, in particular the functional and the institutional definition of art. The second part provides examples of manifestations and similarities between legal system and modern aesthetical concepts. Finally, the author considers whether - and if so, to what extent - the implementation of new aesthetic approaches could be helpful in the system of copyright.

**Keywords:** Copyright, Berne Convention, Digital Single Market, aesthetics, copyright subject matter, new technologies

At the beginning of December 2018, American rapper Lil Nas X published in the social video sharing application TikTok a song entitled "Old Town Road". The song itself is not particularly sophisticated (the author used someone else's sample,<sup>1</sup> the chorus consists of two sentences, and the whole song is based on simple repetitions), it is however very catchy. The song about American cowboy riding a horse became so popular that it quickly entered the charts from social media. However, when the song was removed after reaching number fourth on the Billboard magazine's "Hot Country Songs" list, because it "did not embrace enough elements of today's country music",<sup>2</sup> it became one of the hottest discussed hits concerning race, gender<sup>3</sup> and classification of artistic creativity. This short example shows the tendency of mismatch between the existing designs and classifications and the contemporary artistic forms and social needs. This trend can also be observed in the area of copyright law and it has become an inspiration for this paper. The purpose of this essay is to analyse and consider the inclusion of aesthetic concepts in the legal assessment of the work of art, and an attempt to solve the problematic issue of the definition of a work of art. Such a multidisciplinary approach could in fact improve the difficult situation in which the concept of copyright is today.

My theory, which I would like to discuss, is the possibility of referring to modern theoretical models

taken from aesthetics or combining such models, adapting them to the needs of the legal system. Why not choosing various, multidisciplinary ways of combining theoretically distant areas of social sciences?

In support of this theory, the arguments based on a brief analysis of contemporary trends in aesthetics are provided in first part, the manifestations or similarities between them in the existing legal interpretations are discussed in part two. In the final part, whether consider - and if so, to what extent - the implementation of new aesthetic approaches could be helpful in the system of copyright and what lessons can be drawn for the future are analyzed. It is not intended to present a ready-made and coherent legal and philosophical concept. The intention is only to provide an inspiration for further discussion and consideration of the redefinition of known and practically inviolable concepts of copyright. The assumption is the need to include a multidisciplinary and more holistic approach to legal interpretation of the issue, especially in relation to challenges posed by modern technologies.

### Copyright Law at the Crossroads

Neither international provisions (in particular the Berne Convention) nor EU directives determine how the work protected by copyright should be implemented into the legal system. However, we can make certain assumptions on the basis of these regulations: the originality requirement, idea/expression dichotomy, or the fixation. National legislators are supposed to deal

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with detailed solutions on the basis of developed legal traditions. However, due to the more widespread changes, solutions on a global scale<sup>4</sup> are required, regardless of whether the solution implemented is based on enumerative list of works<sup>5</sup> or an open catalogue of protected works.<sup>6</sup> Initially, it was exemplified by excluding from the protection significant artistic creations (e.g. works of M. Duchamp, R. Rauschenberg,<sup>7</sup> or Walter De Maria<sup>8</sup>), over time the tendency became visible in a number of decisions granting copyright protection to works with intended purposes entirely different from artistic (e.g. technical works, documentaries, utility or industrial products). It was due to the requirement of judicial aesthetic neutrality towards the work: a judge should never engage in judgement of aesthetic value of such work.<sup>9</sup> While this risk has been included in the legal system so far, nowadays it is higher as a result of technological changes and the emergence of new, "products" of key economic importance offered to users that basically are not protected, including: algorithms, big data, know-how or artificial intelligence products.<sup>10</sup>

Additionally, neither of modern legal models seems to refer to the recipient of the work: either in the process of determining whether we are dealing with a protected work or the scope of exclusive rights granted to its author, so far no consideration has been given as to what impact this will have on legal situation of the users.<sup>11</sup> In particular, it is not determined how it will affect the possibility of exercising the freedom of expression, the freedom of artistic expression or the freedom to conduct business. Legislative works on the latest EU directive regarding copyright and related rights in the Digital Single Market (DSM<sup>12</sup>) indicate, however, the growing importance of this overlooked element of the legal system.<sup>13</sup>

As a matter of fact, the construction of the subject of copyright protection fails on many levels. It is hard to imagine, however, that the existing regulations could be replaced with the new ones, deprived of abstract elements or not invoking doubts as to interpretations: to a certain extent generalisations are and will be indispensable, which will affect the lability of the case law. Emphasis should be put directly on the case-law itself and the manner of interpretation. This could be achieved through the development of permanent and unchanging copyright paradigms, to which the assessment of the facts could refer, as a last resort, such as a high level of protection

of creativity, respect for minority rights, etc. This solution, however, will actually shift the severity of the problem to other, equally undefined criteria, which - as can be seen, for example, taking into account the interests of users of works - are also constantly evolving. Therefore, it is necessary to ensure the balance between existing structures by broadening their interpretative field with factors that have been overlooked so far, which will remove to some extent the burden of interpretation from the case-law. Among the factors that can tip the balance are those taken into account in aesthetics when defining the concept of a work of art (WoA).

### **Aesthetics: A Highway to Modern Art?**

Two contemporary aesthetic concepts: functionalism and institutionalism arouse a lot of interest, although in addition to them other equally interesting theories are also discussed.<sup>14</sup> According to the first approach, a work of art can be understood by reference to the effect that an artistic product makes.<sup>15</sup> The main representative of this view was M. Beardsley, who defined a WoA as an arrangement of conditions intended to be capable of affording an aesthetic experience (at a later stage this definition was supplemented by: an arrangement belonging to a class or type of arrangements that is typically intended to have this capacity)<sup>16</sup>. According to this approach, the assessment of the work is determined by external factors, first of all (1) the author's intention to create a work capable of providing aesthetic experience or the intention to create a work that provides a possible aesthetic experience (2) aesthetic experience that results from the author's intentional actions.<sup>17</sup> According to M. Beardsley's theory everyday objects, technical works, industrial or functional works should not be considered WoA.<sup>18</sup> Subsequently the following provision was added stating that the definition of a work of art does not only refer to situations where the author's main intention is to create a WoA, but also includes the cases where the created work is intended for utility purposes, but at the same time the author of the work expresses the need to produce artistic effect (as e.g. in case of creating a unique furniture or clothing design).<sup>19</sup> The author's intention to provide an aesthetic character is the basic point of reference for the assessment of the nature of a WoA and may manifest itself in the use of appropriate means of artistic expression, in the title of the work or in the application of appropriate artistic conventions. So it's

not about the subjective intention, but its manifestations that can be verified by an external recipient.<sup>20</sup>

The concept of including the artist's intention into a WoA status is limited only to this status: the intention to create a work does not extend to the intention of giving it a specific meaning and it does not imply that the work will eventually be interpreted according to the meaning initially intended by the artist.<sup>21</sup> It means that the intention to create a work of art does not have to be successful. According to this view attention is paid to artistic conventions and the manner of creating a work of art.<sup>22</sup> They have material impact on the assessment of the intention expressed by the author - making reference to them, using typical means of expression is one of the visible manifestations of the intention to create a WoA. On the other hand, artistic conventions do not constitute an unchanging and constant group, imposed from the top down by the Artworld, they are always related to current trends and they undergo certain changes.

The functionalist approach was criticised mainly due to inconsistent definition of the second element of the concept of WoA: Aesthetic experience.<sup>23</sup> Although M. Beardsley presented various phenomenological approaches on how to determine whether we are dealing with an aesthetic experience, but these were not satisfactory solutions.<sup>24</sup> Interestingly, the criticism focused on the definition of the concept of aesthetic experience due to the conceptual engagement of third parties in the relationship with the work in order to determine its status as a work of art - it was criticised, *i.e.*, for being subjective and imprecise - but not the concept of including the study of the artist's intention or consciousness at the time of creating the work. As A. Danto rightly argued<sup>25</sup> an aesthetic experience is significantly affected by the recipient's awareness that he is dealing with a WoA - and this contradicts the objectivity of this criterion. The functionalist approach also fails as regards some of the works of conceptual art: especially those in which the author takes objects from real life and uses them solely for the purposes of criticising artistic trends (M. Duchamp, Fountain or Can Opener).<sup>26</sup> According to M. Beardsley's concept, the status of a WoA arises as soon as the work of art is constituted and is unchanged, while the use of elements already existing in real life and their accidental combination should not in itself determine the nature of the product.<sup>27</sup>

The implementation of the functional approach to the term of a WoA is not entirely possible under copyright law. Relying solely on the study of the creator's intention and the aesthetic experience of the recipient of the work can involve the risk of subjectivity and legal uncertainty, but also a particularly complex process,<sup>28</sup> which requires at least an expert's opinion. However, the functionalist approach has many advantages. First and foremost, it takes into account an intention of the artist, so far completely overlooked, as a key element when assessing whether the intellectual product has the properties of the work. This would allow the provision of copyright protection of works that have not been protected by copyright so far (such as conceptual art or intellectual products that were created with a high intellectual effort, but do not meet some of the requirements for copyright protection), and exclusion of copyright protection in cases where such protection was already used (*i.e.* everyday items or objects of a purely functional or technical character - providing them with copyright protection will result in an increase of economic costs).

As in any other case, certain specific modifications would be necessary to offer the best solution. We should exclude situations where objects of everyday use (created exclusively for functional purposes), after being placed on the market or being published, gain aesthetic value and this is the only reason why their creators should apply for a status of a work of art. Depending on the decision of the legislator (which would probably mean a refusal to protect such objects with copyright), such cases could be avoided by appropriate determination which moment is the most relevant in order to specify the artist's intention. It seems that the moment of creation of such object would be the most significant, not its publication or functioning on the market. Obviously, this means that the works that gained popularity long after their dissemination shall be excluded from copyright protection, unless it is proved that at the time of their creation an artist's intention was to create an artistic effect. However, it raises the problem, which may be exemplified by the song "*Threnody for the Victims of Hiroshima*" by K. Penderecki, its original title was "8'37" as a reference to the song "4'33" by John Cage, but the author decided to change the title after listeners' reactions who paid attention to the fact that certain sounds in the song resemble falling bombs and human screams.<sup>29</sup> In this case, it is hard to attribute

such an intention to the author, but on the other hand it can be argued that, from the point of view of copyright, the content or title of the work is irrelevant, what matters is the intention to make something creative and unique, regardless of the interpretation of the recipients. However, the application of this criterion does not fully solve the problem of the unclear boundary between idea/expression dichotomy: one can imagine cases in which the author's intention is the only expressive manifestation, there is no content or the work itself has no specific and clear shape or boundaries.<sup>30</sup> It seems to me that this problem can be avoided by applying a restrictive interpretation of the form of expression or fixation, verifying each time whether a perceptive object was created.

However, the case is different if the author's intention was to create a unique work, but the outcome does not meet the author's expectations. In such a case, the final effort of the author is eligible for copyright protection provided, however, that, firstly, it is suitable for perception (it has been determined) and, secondly, this effect meets the requirement of creativity regardless of whether its final shape corresponds to the original intentions of the author. The refusal of copyright protection in the event that the outcome is not in line with the original expectations of the author would make the copyright protection dependent on the actual effects of the author's work, which would violate the copyright paradigm and would lead to substantive decisions. At this stage, it can be concluded that relying solely on the intent of the author is absolutely insufficient to enable a full legal assessment. This condition, if implemented, should not be perceived as the main and decisive as far as status of the object of copyright protection is concerned - it can be used as auxiliary or subsidiary to the existing requirements.

The main argument that can be put forward against the functionalist approach is the inclusion of subjective elements to the assessment of the object of copyright which is already quite unspecified.<sup>31</sup> This solution may seem to be an additional obstacle to the already complicated process of verifying the fulfilment of the requirements of creativity or originality. This is particularly evident when we consider the example of Jason Pollock, who could not post factum say what were his intentions when creating his subsequent works.<sup>32</sup> Nevertheless, I believe that we cannot completely reject the

functionalist approach. The assessment of the intent of the law entity is present and has long been well verified in criminal law - without accusations that the assessment becomes subjective. The author's intentions can be assessed on the basis of specific circumstances, such as the means of expression used, the way the work is presented, the author's behaviour during the creation process or during the dissemination of the work, intentions related to the conclusion of contracts for the dissemination of the work, etc. In response to the accusation of subjectivity, M. Eaton suggested to include factors that could contribute to a more objective assessment of the author's intentions:<sup>33</sup>

- 1) Artistic activity: What kind(s) of activity or craft was involved in the production of the object?
- 2) Artist's life: What kind of person made it?
- 3) Artistic intentions: What are the intentions with which the object was made? (knowing an artist's intentions is relevant to the understanding of his or her work has been so widely and lengthily discussed in criticism and aesthetics)
- 4) Content of WoA: What does the object describe or express?
- 5) Function of WoA: What is the function of the object?
- 6) Setting of WoA: How does the object fit into its sociocultural setting? How does a work of art affect, and How is it affected by, this setting?<sup>34</sup>

In this context, determination of the author of a work of art seems problematic (point 3), it may lead to the exclusion from the scope of copyright protection of works created by amateurs or by random persons, but other factors are not particularly different from those which are included e.g. in criminal law. Therefore, we have mechanisms that allow us to verify the author's intention, without the need to reduce it to a subjective assessment.

Functionalist approach is often contrasted with the institutional approach (often referred to as procedural). According to the simplest description of S. Davies, the approach is the following: “[t]he proceduralist holds that it is a necessary condition for a thing's being an artwork that it is ‘baptized’ as art by someone with the authority thereby to confer art status on the piece. Such authority is vested in informally structured roles occupied by persons in the artworld. That a piece would produce ‘aesthetic experience’ were it to be an artwork is one excellent

*reason for conferring art status on it, but a thing is an artwork only if it has received the appropriate imprimatur, irrespective of its functionality".*<sup>35</sup>

In this sense, the status of a WoA is determined by the fact whether it is (1) an artifact and (2) a candidate for appreciation by some person or persons acting on behalf of the Artworld.<sup>36</sup> G. Dickie was the precursor of this approach, in response to criticism he tried to improve the definition many times.<sup>37</sup> In fact, this concept is particularly simple in its assumptions: the mere creation of a work is not enough to grant it a special WoA status, but only the reaction of the recipients - and not average recipients, but experts, members of Artworld<sup>38</sup> - will allow for the classification of the work as a work of art. The advantage of this approach over the functionalist approach is the solution to the issue of conceptual art and "readymades" (after all, it is considered by the Artworld as a work of art), as well as the art of using objects such as pieces of driftwood found by chance.<sup>39</sup> For example, the functionalist approach could not cope with the status of a "work" in case of a brick taken from a construction site and brought straight to the art gallery: such work was not subject to the process of "creation", so it is hard to determine in sufficient and possibly objectified way whether the author manifested his intention during the act of creation, while according to institutional approach the reaction of the Artworld would be decisive in this case.<sup>40</sup>

However, this concept has a number of very significant disadvantages. First of all, despite its structural simplicity, it will not cope with the cases of works created by children (according to functionalist approach, if the child is able to consciously manifest his/her intentions, there is a possibility of granting a WoA status to such work)<sup>41</sup> and counterfeit works.<sup>42</sup> In the latter case, there is an obvious weakness consisting in relying on the opinion of Artworld consisting of experts, however, they are not infallible. There are also doubts as to who belongs to the Artworld. One of the main supporters of the institutional approach, G. Dickie, repeatedly changed his mind as to who should belong to this group and under what terms and conditions.<sup>43</sup>

Despite these reservations, the concept of institutional approach towards a WoA draws attention to an important aspect that could be taken into account when considering the concept of a work: audience response to the work (i.e. the reaction of an average recipient or members of a specialised

Artworld. This key element of the assessment of the work draws attention to the fact that, above all, it reflects the real social and economic value of the work. It is mainly the users' perception that defines the demand for a disseminated product - and currently it does not affect the definition of the work itself in any way. I am not saying that this should be the only or the main criterion for the decision about copyright protection (there can always be differences between the reception by the specialists and the audience - as in case of the song the Old Town Road which was mentioned in the initial section of the paper) and certainly we should not rely solely on it (public mood may fluctuate and be dependent on too many external factors), but it may be helpful in the settlement of dubious cases, e.g. regarding the assessment of the case of taking protected elements from someone else's work.

The reference to reception of the work by an average recipient is not a revolutionary solution in terms of intellectual property rights: in industrial property law such an approach has been functioning for many years and - even though criticised - efforts are made to maintain such an interpretation. When combined with the opinion of external experts, it creates a particularly interesting and strongly objectified argument that may justify the awarding of copyright protection.

### ...Or Roundabout?

Copyright law, especially case-law, already uses to a certain extent the aesthetic concepts described above, in particular the functionalist approach referring to the author's intentions of creating a work protected by copyright. To some extent, references to other aesthetic theories are also noticeable, although in no event is it a reference directly to the concept itself, but only to some of its manifestations.

Examples of references made to the author's intentions can be found in the case-law of at least a few European countries as well as the United States. For example, in the Dutch case-law concerning copyright protection of industrial designs, courts typically examined whether the work expressed the artistic intent of the author or harmoniously combined functional elements with aesthetic appeal.<sup>44</sup> The purpose of this study was to determine whether the form of an industrial design was sufficiently creative or decorative, and not functional or technical.<sup>45</sup> On the other hand, in the Polish case-law the concept of

"subjective novelty" has developed, defined as the author's subjective conviction that the work he created is creative enough to be protected by copyright.<sup>46</sup> For example, in the case of copyright protection of the invented word "JOGI" (no meaning in Polish language), the Polish Supreme Court stated that "(...) the condition of work's "originality" is satisfied if there subjectively exists a new product of the intellect, (...) [a] one may say about the self-creativity only if the created work was not previously known in the same form, and thus it manifests itself in an objectively tangible result of creativity".

At the same time, the Supreme Court stressed that copyright law does not use the novelty condition in the objective sense (i.e. a new object appears in the ontological sense), but in subjective terms (this work is thus called the "subjective novelty") and if it is based on the declared subjective belief of the creator, it is subject to objective verification on the basis of the intended purpose of the intellectual product itself. Eventually, the Supreme Court refused to protect a single word, assuming that the work must have the ability to exist independently in various fields of exploitation, and the word JOGI was invented only for a specific purpose (advertisement of food products).<sup>47</sup> The reference to the concept of subjective novelty understood in this way is the dominant approach present in the case-law of Polish courts.<sup>48</sup> Moreover, this approach is not limited to the borders of the continental Europe: in the *Merlet v Mothercare*<sup>49</sup> (UK) case, concerning the children's raincoat design, it was held that copyright protection was denied because "(...) the question is primarily the intention of the artist-craftsman. If his intention was to create a work of art and he has not manifestly failed in that intent, that is all that is required."<sup>50</sup>

A particularly interesting case of making reference to the artist's intention as a constitutive criterion for the existence of a copyright protected work is the case of *Metix (UK) Ltd v G H Maughan (Plastics) Ltd*,<sup>51</sup> where Laddie J rejected a claim to artistic copyright in moulds used for making cartridges. In the decision, Laddie J made some general observations (at pp 721-722): "The law has been bedevilled by attempts to widen out the field covered by the Copyright Acts. It is not possible to say with precision what is and what is not sculpture, but Mr Meade was close to the heart of the issue. He suggested that a sculpture is a three-dimensional work made by an artist's hand. It appears to me that there is no reason why the word 'sculpture'

in the 1988 Act, should be extended far beyond the meaning which that word has to ordinary members of the public".

Viscount Maughan expressed a similar opinion in the case of *King Features Syndicate Inc v O & M Kleeman Ltd*.<sup>52</sup> The main issue in that case (which was concerned with "Popeye" dolls derived from published comic strips enjoying artistic copyright) was the time at which the intention of use for industrial production had to be formed. The Lords decided that the intention must have been there from the start.<sup>53</sup> References to the functionalist approach can also be found in the case of *Hensher Ltd. v Restawile Upholstery (Lancs) Ltd*.<sup>54</sup> In the judgement four separate opinions were expressed on how to understand the concept of "work of artistic craftsmanship," of which opinion of Lord Kilbrandon seems to refer to the functionalist concept most accurately: "The meaning of "artistic" is a matter of law for the judge and not for witnesses. The first essential of a work: of art is that it shall have come into existence as the product of an author who is consciously concerned to produce one. A decision on artistic merit is not required".<sup>55</sup> In the US case-law, in the *Brandir International, Inc. v Cascade Pacific Lumber Co*.<sup>56</sup> case an independent artistic judgement was subject to verification, understood precisely with reference to the subjective intention of the creator.<sup>57</sup> In turn, in the *Burrow-Giles Litographic Company v Sarony*<sup>58</sup> case, reference was made to the analysis of the state of mind of the creator at the time of creating the work.<sup>59</sup> Interestingly, reference to the author's intention is also present in other copyright issues: first of all in assessing whether the use of the work was transformative.<sup>60</sup> The ruling in the *Kieselstein-Cord v Accessories by Pearl* case was also based on internationalism and institutionalism.<sup>61</sup>

However, not only the author's intention is a significant factor in case-law in the context of granting the status of a work of art. In the *Vermaatv Boncrest* case, it was stated, for example, that not only the artist's intention is important for the concept of the work of art, but the work itself must also have some artistic quality, in the sense of being produced by someone with creative ability and having aesthetical appeal.<sup>62</sup> Lord Morris expressed a similar opinion in the *Hensher v Restaville* case, referred to above: "In deciding whether a work is one of artistic craftsmanship, I consider that the work must be viewed and judged in an attached and objective way.

The aim and purpose of its author may provide a pointer, but the thing produced must itself be assessed without giving decisive weight to the author's scheme of things (...).<sup>63</sup> In a few cases under the Polish case-law we can also notice reliance on expert's opinion. For example, in the case regarding the copyright protection of choreography to popular songs for kids, the expert's assessment constituted the basis for refusal to consider it the object of copyright protection.<sup>64</sup> In other case in the Polish Supreme Court, copyright protection was provided to the dictionary of difficult words (the so-called lexemes) only because the selected vocabulary was deemed by an expert as creative and unique.<sup>65</sup> In the British case-law, expert witnesses are often appointed to participate in trials concerning substantive similarity.<sup>66</sup> This approach is also presented in literature.<sup>67</sup>

Judicial decisions based on the reaction of average recipients (typical for industrial property rights) are also very popular. In the Supreme Court judgement (13.01.2006, III CSK 40/05) in the case concerning the copyright protection of shoulder-straps for uniforms, the Supreme Court stated that "For an average recipient, the image of the Eagle and military ranks insignia do not poses individual character, i.e. they do not represent any special relation with the creator of these images and they do not reflect his "creative personality". A similar opinion was expressed in the judgement of the Court of Appeal in Poznań (18.05.2006, I ACa 1449/05) in the case concerning copyright protection of the furniture design made in the "maritime" style: "This furniture has certain (...) distinguishing features that make it unique as compared to (...) the furniture of other producers designed in the marine style (...). Reactions of customers towards both the shape and finishing elements of this furniture (...) clearly indicate that it is the product of the company "V.", which proves its distinct, specific and unique character". Similar opinions are expressed by courts in the British legal system - in case of the degree of similarity between original works and their imitations (as part of the "substantial similarity").<sup>68</sup> For example, the concept of substantial similarity in relation to musical works is very often based on comparing fragments of the original work in question and verifying whether an average recipient will recognise fragments taken from a different work in the work in question.<sup>69</sup> On the other hand, creating a work that gives a completely different visual appearance cannot be considered as

substantial similarity.<sup>70</sup> A similar example is the judgement in the *Gromer, Acullf v Cambell* case, the assessment was made according to a four-stage aesthetic evaluation, including reference to the reaction of the audience and assessment by the artworld regarding both musical works.<sup>71</sup> On the basis of the *Plix Products v Frank M. Winstone* case it is argued that the limit of copyright protection is the attribution of certain specific (protected) ideas to the work by its recipients.<sup>72</sup>

Certain reminiscences of the institutional approach to the object of copyright protection can also be found in the construction of a parody. This exception allows the use of someone else's intellectual property to create a new work that is a parody of the reality. However, there are certain complications associated with this construction: the distinction between a parody and the ordinary use of a protected work requires a reference to the average recipient or a definition of a parody, based on expert judgement. Similar attitude was assumed by the Court of Justice of the EU in the *Deckmyn* case: According to its interpretation, a parody should be deemed as a work that displays noticeable differences with respect to the original parodied work, that it could reasonably be attributed to a person other than the author of the original work itself, that it should relate to the original work itself or mention the source of the parodied work<sup>73</sup> (paragraphs 21 and 33 of the judgement in the *Deckmyn* case). A similar approach can be found in the concept of fair dealing/fair use: for example, in the British case of *Hyde Park Residence v Yelland*<sup>74</sup> adopted the perspective of audience, meaning whether a „fair-minded and honest person” would regard the dealing in question as fair.<sup>75</sup>

### **“If You Don’t Know Where You Are Going Any Road Can Take You There”<sup>76</sup>**

Modern aesthetic models are looking for answers to the question concerning the definition of a work of art in external elements to the work itself: in the intention of the author, in the reaction of the audience, or in the opinion of the Artworld, including the one published by a group of experts. This means going beyond the popular so far phenomenological model, based on the verification of the structure and ontology of the work itself. Abandoning this construct was justified by the maladjustment to contemporary artistic forms, the development of art, the need to redefine the old concepts in the new reality. Contemporary legal solutions, in turn, bring the

copyright law closer to phenomenological aesthetic attitude towards a work of art. Similarly, as in case of aesthetics, copyright law is considered maladjusted to the new social and artistic reality, the development of technologies and digitized artistic forms. The analysis showed that - again: as in case of aesthetics - also in case of law, new interpretations are sought to help us cope with the problem of copyright and bring the final legal assessment closer to the public's expectations.

Considering the author's intention to create a work could at the same time limit and extend copyright protection. On the one hand, it would include outstanding works of contemporary art in the definition of the work, legally disregarded or marginalised as far as copyright protection is concerned and at the same time it would exclude works that are contrary to the paradigm of copyright protection of real and significant creative contribution, such as technical documentation, utilitarian objects, etc. This limitation, however, would require a very precise specification of what the author's intention would refer to: whether to create a new work in genere (which would significantly extend copyright protection and bring it closer to industrial property law due to the criterion of novelty), or to create a creative work (which would mean the requirement to verify the author's state of knowledge and awareness at the time of creation of the work and could in some cases exclude the protection of random works, as well as those created with the use of existing works, e.g. collage), or the creation of a work subject to copyright protection (which in turn could exclude protection of works of people unaware of legal regulations, such as children, as well as works created for the purposes of forgery or normatively prohibited works, such as those promoting specific political opinions). The author's intention may also be considered in a subsidiary way, i.e. in case where the previous methodology failed, leading to unfair results or not taking into account all paradigms of copyright. A similar effect could be obtained taking into account expert judgement as an element of the structure of the object of copyright protection. The institutional approach, however, allows the opening of copyright law to new technologies, in particular products of artificial intelligence. Evaluated solely on the final product itself, it could be deemed by experts or an average recipient as a result of creative activity. Such a solution would bring copyright closer to industrial

property rights and significantly increase the costs of legal proceedings, but it should be remembered that in contemporary legal proceedings these tendencies are becoming more noticeable, regardless of the implementation of suggested aesthetic interpretations. Especially with regard to the latter threat, the increasing costs of legal proceedings concerning copyright protection might have a discouraging effect. Moreover, there is also a problem with appointing experts as entities de facto deciding about the status of the work (author of the institutional approach, G. Dickie, also faced this problem, trying to reformulate the definition of the Artworld many times), as well as the problem of recognition by the experts of unconventional, controversial or contradictory manifestations contrary to the current development of art or science. Abandoning the objectified expert judgement for the so-called readers-response would enable avoidance of problems related to the increased costs of the proceedings, but instead would make the assessment less reliable and more vulnerable to manipulations.

Reliance on the opinion of an average recipient could be a solution, but its assessment would again require expert analysis. In this case, therefore, the institutional approach has more disadvantages than advantages over the functionalist approach, despite the obvious advantage associated with the objective nature of this concept. On the other hand, combining two approaches, i.e. functionalist and institutionalist, could help to solve the problem of copyright protection by including hybrid, complex and heterogeneous works. In such cases, taking into account both the original intentions of the author and the final public perception of the presented product could facilitate the classification and, consequently, the application of appropriate legal regulations.

This does not mean, however, that it is possible to implement aesthetic concepts directly into the legal system. The main obstacles are constitutional constraints and principles which every normative construction should follow, and which do not at all involve aesthetic concepts. Such limitation includes, for example, avoiding substantive aesthetic assessments of the work, reduction of subjective elements in the legal assessment, respecting the trust of third parties in legal transactions, or the principle of legal neutrality. The following rules may result from international provisions, such as the Berne Convention (e.g. prohibition on introducing additional



formalities to obtain copyright protection) or EU directives and CJEU case-law (e.g. adopting a uniform construction of the object of copyright protection for all types of works, including interpretation of the work as a two-component construct of form and expression and author's own intellectual creation). It seems to me that on the basis of all these rules and restrictions we could try to redefine the existing components of the work's structure and create a model that could be more in line with contemporary technological and artistic trends. This task seems possible, if we take into account the results of the above analysis.

The functionalist approach based on the study of the artist's intention is already visible in the interpretation of the concepts of originality or creativity. If we consider the example of the Polish case-law, it can be noticed that the concept of originality also involves the analysis of author's awareness and intention when creating a new work, previously unknown. In the British law, classification as an "artistic work" is almost entirely dependent on the author's intention, while in the US case-law it is noticeable that reference is made to the author's intentions while determining the scope of creative freedom of the author. All this leads to the conclusion that the functionalist approach can be effective if we try to adapt it to the current copyright law. We can assume that only the intention to create an original work should be relevant to the assessment - leaving behind the author's awareness of whether he would be entitled to exclusive rights to the created work. A similar conclusion can also be drawn with regard to the institutional approach, taking into account in the final evaluation the reaction of the audience or the expert judgement, however, the reference to such factors will be justified under the free assessment of evidence carried out during a lawsuit, i.e. without obligatory character. Without implementation of normative changes, it seems that the obligation to refer to external evaluations of the work could be considered as contrary to international and EU provisions.

It would also be necessary to specify the model of an average recipient - as is the case with some regulations in the field of industrial property rights. Consequently, in the absence of proposals for legislative changes regarding the construction of the object of copyright protection, the reference to external evaluations still remains possible, provided

that it would be treated as auxiliary evidence in legal proceedings and not the major one on which the final decision shall be based.

## Conclusion

Contemporary copyright law is not in line with the surrounding reality: it does not guarantee the protection of both outstanding works of art and the current manifestations of new technologies of great social importance and economic value. So far, the risk that outstanding and valuable creative works could not be covered by copyright protection has been incorporated into the system and worked until the final decisions on granting/refusing protection satisfied the society in the overwhelming majority of cases. This trend seems to change and a more serious debate on the copyright paradigm seems to be inevitable.

After thorough analysis, certain irrefutable assumptions are made: A judge cannot decide on aesthetic value or economic significance of a work (these values can be taken into account alternatively at the end of the assessment) and legal regulation should correspond to the basic normative and constitutional principles. While analysing modern aesthetic concepts I concentrated on two most important ones: functionalist and institutional approach. Their common element is reliance on external criteria for assessing the status of the work in terms of its structure or ontology. The common advantage of both concepts is taking into account the values that were previously ignored in copyright law: social importance of the work, its economic values, the intentions of the author. This, however, can be a double-edged sword: why should we require the judge not to take into account the social importance or financial value of the work, and allow to refer to them as part of a functionalist concept? The solution to this dilemma is granting subsidiarity character to criteria referring to external factors: they should not serve as the only measure of the level of creativity, but "support" the final evaluation, it should help to dispel doubts or find a balance between the interests of all relevant parties.

These solutions pose several threats. If improperly adopted, may lead to subjective judgements based on elusive premises, justifying unfair decisions. Therefore, they require a very careful and meticulous study of either the author's intention or the opinion of the Artworld. Modern legal systems have the right

tools to carry out such evidentiary proceedings in accordance with the legal provisions and constitutional guarantees. In fact, the construction itself would not require many changes. In some cases (e.g. under the general definition system), amendments would not be particularly necessary: the current concepts and interpretations provided by the courts are sufficient.

On the basis of the Old Town Road song, we can observe the most important problems related to copyright protection that we face: the scope of using someone else's creativity, the problem of qualifying the work within the existing categories, the issue of granting normative protection. It seems to me that the discussion on the redefinition and reinterpretation of the existing legal structures cannot continue without making reference to external factors, such as reception by the audience or intentions of the author. These factors are already taken into account by the courts in different countries. For a long time, they have also been a point of reference for aesthetics, which faces similar problems as the copyright law. Multidisciplinary approach is required to improve the situation of the existing copyright law and to introduce modifications to the system which has been in use since the beginning of the 19th century.

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