

# Kluwer Copyright Blog

## Born to be authors: the copyright of the child

Maria Mercedes Frabboni (University of Sussex) · Thursday, November 24th, 2022

Children provide a unique contribution to the discourse on creativity, copyright and intellectual property. From their ability to engage with colours and sounds as babies to the rich and extensive portfolio of works they create during their school years, children are constantly engaging in the process of authorship. A systematic study on the copyright of children is yet to be attempted. This is not to say that legal analysis has neglected this area completely though. More frequently, the commentary addresses copyright or intellectual property protected commodities created for the child – rather than by the child – for the purpose of entertainment, learning or as practical everyday objects (J Bellido & K Bowrey, 2022). The prospective research project as described in the piece below was presented at the [Society of Legal Scholars 2022 Annual Conference](#).



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### The work by the child: acknowledgements and safeguards

Many readers may relate to a situation where children run to their parents or carers, showing their latest masterpiece with immense pride, and ask: “Do you like it?”. Invariably and without hesitation, the adult will answer “Amazing!”, “Wow!”, “Fantastic!” With this expression of appreciation for the creativity of the child, the adult acknowledges the creative choices of the child as an author (C-145/10 – *Painer*) and implicitly recognises that the core criterion is met for copyright protection according to the EU copyright *acquis*, which rejects any requirement of artistic merit (P B Hugenholtz & J P Quintais, 2021, p.1197 and C-683/17 – *Cofemel*).

In that same role, any adult caring for a child is called to act as steward of that property – the intellectual property of the young author. The notion of stewardship (H R Howe, ‘Copyright limitations and the stewardship model of property’ (2011) 2 IPQ 183-214) is instrumental to

expanding the scope of the analysis on vulnerable authors (e.g. with orphan works, see [U Suthersanen & M M Frabboni, 2021](#)) and other non-mainstream, non-institutionalised forms of creativity ([E Bonadio & N Lucchi, 2018](#); [J Gibson, 2019](#)). At a time when critical questions are being raised about the legal recognition of creativity by sentient machines, the advancement of a discussion on authorship by young human beings is aimed at recognising how primordial, natural and immediate creativity is when expressed by the child.

A key goal of the analysis is the reconciliation of the structure and legal tests applied in copyright law with the way authorial creativity develops as a process. A copyright lawyer will be familiar with legal issues on subject matter, originality, authorship and ownership. Unintentionally, a parent or carer will often ask a child questions relevant to these issues, such as: “What is it?”; “What does it do?”; “Did you do it all by yourself?”. The child will not necessarily engage with the formalism of these questions. The child, as the ultimate author, will just create. This will be addressed in the three questions considered below.

### **Creativity in the early years**

The analysis of authorship in the early years provides the opportunity to appreciate creativity in its elemental manifestations. The early years may be said to involve the learning and development of a child from birth to five years old (e.g. [UK Government National Curriculum](#)). The paradigms formulated by leading educators such as Montessori and Steiner are instrumental to the understanding of the meaning of creativity and learning during specific periods or stages of a child’s growth and development ([P van Alphen, 2011](#); [D J Fleming, B T Culclasure, and D Zhang, 2019](#)). As Dr Maria Montessori explains: “[I]t is a delight to watch with what enthusiasm the child works when he is given freedom, and when he finds to hand suitable objects with which to satisfy his desire for activity” ([‘An Environment for the Child’, 1931](#)). The study of young children’s creativity and their concurrent ignorance of cultural and societal paradigms provides access to the least imitative, most ingenious, spontaneous and original forms of creative expression.

### **Copyright paradigms and creative practices**

The underlying hypothesis for the analysis of children’s authorship is that many adults and lawyers ask the wrong questions on subject matter, originality, authorship and ownership in an attempt to translate into ‘grown-up’ legal terms the very special process of creativity by the child.

#### *What is it?*

This question resonates with copyright lawyers as it focuses on the statutory or non- statutory definitions of subject matter, according to both the common law and civil law approaches. From a European perspective, as the *acquis* shaped an autonomous concept of a copyright work ([C?683/17, Cofemel](#)), the ‘what is it?’ question remains crucial. There are difficulties in evaluating whether a pile of toys left on a rug in the living room by siblings preparatory to play-time projects after a day at school is a work of art ([Lucasfilm Ltd & Ors v Ainsworth & Anor \[2008\] EWHC 1878 \(Ch\)](#)). The truth may be that – as they left for school – they had not planned what that pile of

toys was going to be; or maybe they had decided that the pile of toys was going to be the finished masterpiece. It is possible that the adult will never know because the adult was not part of that special process of ingenious and spontaneous creativity.

### *What does it do?*

A parent or a carer looks at the masterpiece created by a child and might say *sotto voce*: “it does not do very much but it fills my heart with joy and the child will definitely exhibit at the Royal Academy of Arts one day”. Conversely, the child may loudly affirm that the masterpiece is a car, a den, a bicycle or a drawing for their next dress-up costume, using the imagination that went into its creation (*Lucasfilm v Ainsworth* [2011] UKSC 39, 44). Given *inter alia* the low level of technical knowledge children have in their early years, it could be argued that the masterpiece is unlikely to be very functional or imitative. Accordingly, it could be argued that the object in question is a copyright work because of the kind of skill, labour and judgement that went into it (*Interlego AG v. Tyco Industries* [1989] AC 217, 268). Significant empirical work could be undertaken in this respect to test this idea. A copyright lawyer looking at the interface between functionality and intellectual property could consider the work of the child as the absolute case study.

### *Did you do it all by yourself?*

This third question speaks about authorship, originality and the exercise of rights. The driving argument of creativity and copyright in the early years is that imitation can only be minimal at the start, while it increases as creative languages (including literacy and music education) become a mixture of cultural and societal paradigms and are absorbed as part of the learning experience. The legal question of ‘Who did the writing?’ (*Kogan v Martin* [2019] EWCA Civ 1645) ought to be investigated through the interpretative lens of educators in order to appreciate e.g. how play and imagination become creative contributions to a work by a child in the early years. This will expand the understanding of the free and creative choices that go into the creation of a work during the evolution of authorial skills.

## **A critical reflection**

The development of the ‘Born to be authors’ project focuses on the non-industrial author. The aim of the research is not to support the enforcement of further boundaries or forms of control on copyright works. Rather, it focuses on the just safeguards that should exist around the exploitation of those works, both in relation to economic and moral rights. “While IP is increasingly conceived as being little more than a certain class of business assets held by companies, this is not all they are” (Dutfield & Suthersanen on *Global Intellectual Property Law*, 2<sup>nd</sup> edition, 2020, p. 22). Authorship by children epitomises this view and the significance of building a systematic legal scholarship on a just copyright system for all authors.

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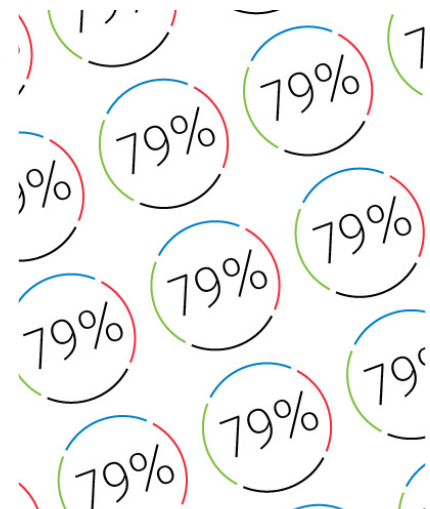
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