The Demise of Geniality

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> "Genius is the introduction of a new element into the intellectual universe: or, if that be not allowed, it is the application of powers to objects on which they had not before been exercised."[1]

Genius, as an individual quality, has a chequered history in intellectual property. The US Supreme Court seemed to have been hit by a passing flash of incantation in 1941 when it stated that private property in technology should be reserved to geniuses.[2] But it seems that Congress preferred a less lustrous requirement in patent law, and the more pedestrian non-obviousness standard was born in 1952.[3]

Other intellectual property authors may instead quote Lord Camden in his 1774 opinion.[4] According to that opinion, the quality of genius does not necessarily qualify for private property, but it does create obligations towards society. Genius, in short, creates public goods.

Some current legal thinking questions these extreme notions of what genius means to intellectual property. Martha Woodmansee and Peter Jaszi produced a vigorously critical discourse on the matter of *individual* romantic authorship.[5] Margaret Chon also recently analysed the curious notion of present-day *collective* romantic authorship.[6]

Essentially, Professor Chon noticed that setting aside the old notion of individual genius[7] in favour of a myth of collective origination would not overcome the romantic aftertaste. Beyond geniality, what characterises as authorial romanticism would be the fact that the author is taken as the *arbiter elegantiarum* of culture and scientific knowledge. In the context of *collective* authorship, the *collective* author would become the arbiter.[8]

[1] William Wordsworth, "Essay, Supplementary to the Preface" in *The Prose Works of William Wordsworth* (Oxford: Clarendon Press, 1974) (1876)), as taken from Margaret Chon, "The Romantic Collective Author" (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829. This article may be deemed an extended dialogue with Professor Chon's article.

[2] *Cuno Engineering Corp v Automatic Devices Corp*, 314 U.S. 84, 91 (1941): "That is to say the new device, however useful it may be, must reveal the flash of creative genius not merely the skill of the calling. If it fails, it has not established its right to a private grant on the public domain. Tested by that principle Mead's device was not patentable. We cannot conduce that his skill in making this contribution reached the level of inventive genius which the Constitution (Art.1, § 8) authorizes Congress to reward."

[3] Giles S. Rich, "Laying the Ghost of the 'Invention' Requirement" in Robert P. Merges and Jane C. Ginsburg, *Foundations of Intellectual Property* (New York: Foundation Press, 2004): "On the point of Section 103 being 'codification' it is interesting to consider the last sentence of the section which says: 'Patentability shall not be negatived by the manner in which the invention was made.' The specific intent of that sentence, which courts universally accepted with out question, was to overrule the Cuno case dictum that a 'flash of genius was necessary.'"

[4] Lord Camden, Donaldson v. Beckett, *Proceedings in the Lords on the Question of Literary Property*, February 4–22, 1774: "Those great men, those favoured mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock."

[5] Martha Woodmansee and Peter Jaszi, "Introduction" in Martha Woodmansee and Peter Jaszi (eds), "The Construction of Authorship: Textual Appropriation in Law and Literature" (Durham: Duke University Press, 1994) pp.10–13.

[6] Chon, "The Romantic Collective Author" (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829.

[7] The consequence of raising the idea of genius would be the "current copyright law's excessive reliance on possessive individualism". Chon, "The Romantic Collective Author" (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 830.

[8] "[T]he collective author functions as a type of certification authority, whether of authenticity (as in the case of cultural claims) or of truth (as in the case of scientific claims). In both cases, the author serves a pivotal role of shaping culturally acceptable norms." Chon, "The Romantic Collective Author" (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 841.

These discussions are certainly relevant to the ongoing reconstruction of author's rights. They also pass through the unstable border between cultural and legal theories. In Brazil, authorship law has seen the same theme developing in a somewhat different manner, probably because law and culture share very distinct borders here in the country.

Professor Chon's main subject of analysis is Wikipedia, which is certainly the result of *collective* origination. Brazilian law, however, distinguishes this kind of collective construction, where there is an *editor* (an individual or collective arbiter), from the more protean notion of *collaborative* authorship. Wikipedia, from a Brazilian standpoint, would be as collective as a Hollywood film—but for the fact that, as an ongoing work, authors or contributors cannot be displayed in the closing credits.[9]

This collective kind of creation is *organised* and utilised under the organizer's trademark or trade name. That is to say, there is actually some kind of *fuhrerprinzip* (Leader principle), albeit a mild one, to include or exclude contributions. Someone chooses what everyone contributes. Even though he or she is not identified, there is an *arbiter elegantiorum* in Wikipedia, as Professor Chon rightly observed.

From a cultural standpoint, neither genius by the grace of God nor the arbiter by the grace of geniality are new phenomena. What is baffling Brazilian law, and probably many other legal systems, is the multi-author kind of creation. This type of creation may be classified as being *collaborative*,[10] and not only *collective*.[11] Collaboration here means something more than the simple joint creation of a work.

The structured collaborative work

Let us explore the notion that some collaborative creative processes involving multiple originators but only an individual or multi-person arbiter are occurring in virtual space—especially but not exclusively there.[12]

Sometimes this happens under some sort of by-laws—for example, "regulations" concerning the appropriation or destination of the work, as stated in GNU/GPL or GFDL licenses. Here, the *fuhrerprinzip* is substituted by an abstract rule. This species of multi-person origination is perhaps more republican than creation under the "initiative, organization and responsibility of a person or entity who publishes it under its name or mark" (as the Brazilian law defines collective works). Nevertheless, there do not seem to be essential differences.

Authorship laws usually do not force benefits upon authors. Except in those circumstances when such laws provide special protection to authors or performers vis-a-vis more privileged editors or other

[9] The Portuguese IP author Jose Oliveira Ascensão classifies this multi-person creation as an open collective work. See, José de Oliveira Ascensão, *Modelos Colaborativos em Direitos Autorais in Ensaios sobre o Direito Imaterial: Estudos dedicados a Newton Silveira* (Rio de Janeiro: Lumen Juris, 2009).

[10] With no legal definitions in this context, it would seem adequate to explore the general sense of these words. But this does not work. In *Shorter Oxford English Dictionary*, "collective" brings the quotation from W. Lippmann: "The socialist contention that the collective ownership of the means of production will produce … men who are purged of acquisitiveness and aggression". Collaborative has two curiously opposite meanings: "1. Work jointly (with), esp. on a literary or scientific project. 2. Cooperate traitorously with (or with) an enemy."

[11] In continuing this discussion, some concepts provided by the Brazilian Authorship Law (9.610/96) are used. Article 5(VII)(h) of the statute defines this kind of work as "collective—[the one] created by the initiative, organization and responsibility of a person or entity who publishes it under its name or mark, which is constituted by the participation of different authors whose contributions merge into an autonomous creation". There is in the statute no concept of collaborative work, even though co-authorship is defined as the joint creation of a work by more than one author. In Brazil, a compilation is pretty much regulated as it is in US law, but compilation under a collective work system would follow this latter rule. For a recent revision of Brazilian law in this context, see Eduardo Tibau de Vasconcellos Dias, *Autoria e Titularidade nas Obras Colaborativas*, master degree dissertation submitted to the Brazilian PTO Academy, September 27, 2012.

[12] Virtual space is only one effect of technology on the collectivization of creative production. Rochelle Cooper Dreyfuss, "Commodifying Collaborative Research" in Neil Netanel and Niva Elkin-Koren (eds), *The Commodification of Information* (The Hague: Kluwer Law International): "Lost in this debate is the effect of technology on the ways that information and cultural goods are actually produced, particularly on the extent to which individual creativity has been replaced by collaborative effort. In fact, the artist starving in a garret, the scientist madly experimenting in the garage, and the reclusive professor burning midnight oil are all rapidly becoming myths. In a world of increasing technical complexity and intensifying specialization, interdisciplinary investigation has become crucial to progress."

commercial agents,[13] pre-existing by-laws may limit or require the surrender of patrimonial rights provided that authors or owners voluntarily submit to them. Such by-laws may provide private ordering for the authorship and ownership of creations produced within its scope and authority. These by-laws will also be enforceable without affecting the otherwise applicable statutory regime.[14]

Therefore, the scope of present authorship law might easily be wide enough to cover collaborative works resulting from the *participation of different authors whose contributions merge into an autonomous creation according to a preexisting set of rules that filter the included contributions*. Every contributor has an abstract *right of inclusion* according to this pre-existing set of rules, yet the relevant by-laws should regulate exclusion rights, if any such rights exist.

Open to all according to internal by-laws, this collaborative environment would provide a fertile field of research in cultural theory, or perhaps political science. Some IP-related economic studies have also dealt with the notion of congestible public goods,[15] which may enlighten a number of aspects of such *structured* collaborative works.

Collective ownership in IP law

It should be noted that, although the by-laws of structured collaborative works relate essentially to authorship, they must necessarily govern ownership—be it positive, negative or neutral. Some other IP rights may also facilitate structured open ownership.

José Oliveira Ascensão indicates that under Portuguese law (and probably also Brazilian Law), geographic indications (GIs) are *owned* by a plurality of persons, and one can become an owner without the actual sharing of title: anyone in the assigned geographical limits may be entitled to defend the GI as intellectual property, provided that the owner follows the specific by-laws.[16]

Some GIs necessitate the following of a complex set of technical rules, which arguably would preclude authorship. Other GIs, however, are recognised simply on account of the well-known properties of the geographical set.[17] Well-knowness, or fame, is to the same extent the result of a deliberate, continuous creation by the interested parties.[18]

[13] Such protective restrictions are not limited to moral rights. For instance, German and French authorship laws tend to make all assignment of authorship rights null and void. So does the Brazilian law, which provides additional restrictions on the neighbouring rights of some performers. Brazilian law also states that authorship contracts shall be restrictvely interpreted, that is to say, to protect authors.

[14] The legal grounds for such private ordering may be found in different legal theories. For RAND commitments in standard setting, Jay Kesan and Carol Hayes suggest that voluntary restrictions from statutorily protected IP rights may take the form of servitudes: "Thus, even if patent licenses are viewed as covenants not to sue, this does not detract from the argument that a patent license is a property interest. In the law of servitudes, for example, a 'real covenant' is a promise to do or not do something with one's land, and it is viewed as a property interest, but it is enforceable at law instead of in equity." Jay P. Kesan and Carol M. Hayes, "Patent Transfers in the Information Age: RAND Commitments and Transparency", available at *http://sites.nationalacademies.org/xpedio/groups/pgasite/documents/webpage/pga_072485.pdf* [Accessed October 28, 2012]. In *Tratado da Propriedade Intelectual*, I describe the effects of a GNU/GPL license as a public offer binding the offeror under the theory of unilateral obligations—not as a real covenant, just as a patent license provided alongside his offer: "No caso de modelos colaborativos abertos, o titular dos direitos estabelece uma proposta obrigacional receptícia: a renúncia ao seu poder de excluir é uma oferta, que simultaneamente impõe a sujeição daquele que a aceita regras específicas. Nada de novo neste modelo jurídico: a oferta de licença de patentes prevista na lei 9.279/98 (art.64) é um exemplo dessa proposta obrigacional receptícia Os efeitos econômicos de tal oferta de licença foram extansamente analisados por Edith Penrose. A singularidade do modelo colaborativo é que não só se oferta o uso mas também a co-autoria num processo sucessivo e aberto. Para facilidade negocial e padronização de um negócio sucessivo, a oferta remete a um conjunto de normas que constituem não só um contrato padrão mas um estatuto. Vale dizer, uma norma abstrata e impessoal, mas privada." Denis Borges Barbosa, *Tratado da Propriedade Intelectual*, Vol. 3 (Rio de Janeiro: Lumen Juris, 2010), p.2443.

[15] E.g. David W. Barnes, "A New Economics of Trademarks" (2006) 5 Nw. J. Tech. & Intell. Prop. 22.

[16] José Oliveira Ascenasão, "Questões problemáticas em sede de indicações geográficas e de denominações de origem" (2005) 46 RFDL 253.

[17] The recognition of an "Indicação de Procedência" in Brazilian law does not require compliance with any technical standards, but only evidence that the general public knows that the geographic area is the source of the products or services protected by the relevant IP right.

[18] For the deliberate, continuous creation of fame in publicity rights as being analogous to authorial creation, see Denis Borges Barbosa, "Do direito de propriedade intelectual das celebridades", available at *http://www.denisbarbosa.addr.com/arquivos/200/propriedade/pi_celebridades.pdf* [Accessed October 28, 2012].

Creation of fame is an essential element of trademark law[19] and especially publicity rights.[20] Through the establishment of a consumable myth, fame is a fictional creation through a deliberate, continuous effort of recognised or recognisable persons.[21] Therefore, the creation of GIs in these specific cases could lead to both collaborative authorship *and* ownership.

Collective ownership of expressive or technical creations may also be discerned in the new and presumably forthcoming protection of traditional knowledge. Some relevant comparison may be drawn here with GIs, although this analysis might be held as politically incorrect.[22] Here, a cultural approach would more adequately explain the protection than the idea of creation through genius.

Unstructured collective authorship

Professor Chon's text goes beyond Wikipedia, however. There would be collective authorship even without any *fuhrerprinzip* or its republican version:

> "These cultural practices include appropriation art. Artists' appropriation of other artists' works is an integral and longstanding part of creative production. But appropriation art came of age in the 1980s as a term used to describe a certain stance towards originality."[23]

Why would this kind of production be considered *collective* (or collaborative)? The appropriated and transformed work represents the sum of two or more productive efforts—the older work is the input of the new, and the new can be "specified" from the prior. *Specificatio* in Roman law covers the transformation of a prior element by someone who is not its owner, with the changes to the new entity so relevant as to

[19] Alex Kozinski, "Trademarks Unplugged" (1993) 68 N.Y.U. L. Rev. 960: "The originator of a trademark or logo cannot simply assert, 'It's mine, I own it, and you have to pay for it any time you use it.' Words and images do not worm their way into our discourse by accident; they're generally thrust there by well-orchestrated campaigns intended to burn them into our collective consciousness. Having embarked on that endeavor, the originator of the symbol necessarily—and justly—must give up some measure of control. The originator must understand that the mark or symbol or image is no longer entirely its own, and that in some sense it also belongs to all those other minds who have received and integrated it. This does not imply a total loss of control, however, only that the public's right to make use of the word or image must be considered in the balance as we decide what rights the owner is entitled to assert". On the other hand, see Jason Bosland, "The Culture of Trade Marks: An Alternative Cultural Theory Perspective, Intellectual Property", (2005) 10 Media & Arts L. Rev. 99: "Stephen Wilf suggests that by associating a symbol with an object, the public contributes to the authorship of trade marks. Because the meaning of a mark results not from the efforts of an individual trader but the interpretive acts of the public, Wilf argues that the public should be attributed ownership. Trade mark law, on the contrary, is said to incorrectly formalise the trade mark originator as the arbiter of meaning by recognising only the efforts of the originator in generating the meaning and interpretation of a trade mark". See also Denis Borges Barbosa, *Developing New Technologies: A Changing Intellectual Property System—Policy Options for Latin America* (Caracas: Sistema Economico de la America Latina, 1987): "Some authors have remarked that the building up of a trademark by means of massive advertisement has much in common with the construction of a character in a novel; in both cases only sometimes the result is a 'roman a clef' bearing any resemblance to reality."

[20] Rosemary J. Coombe, "Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders" in Martha Woodmansee and Jaszi Peter (eds), *The Construction of Authorship* (1994), pp.101–122: "Star images must be made, and, like other cultural products, their creation occurs in social contexts and draws upon other resources, institutions, and technologies. Star images are authored by studios, the mass media, public relations agencies, fan clubs, gossip columnists, photographers, hairdressers, body-building coaches, athletic trainers, teachers, screenwriters, ghostwriters, directors, lawyers, and doctors. Even if we only consider the production and dissemination of the star image, and see its value as solely the result of human labor, this value cannot be entirely attributed to the efforts of a single author. Moreover, as Richard Dyer shows, the star image is authored by its consumers as well as its producers; the audience makes the celebrity image the unique phenomenon that it is. Selecting from the complexities of the images and texts they encounter they produce new values for the celebrity and find in stars sources of significance that speak to their own experience. These new meanings of the star's image are freely mined by media producers to further enhance its market value. As Marilyn Monroe said in her last recorded words in public, 'I want to say that the people—if I am a star—the people made me a star, no studio, no person, but the people did.'".

[21] "Barthes defines a myth as 'the complex system of images and beliefs which a society constructs in order to sustain and authenticate its own sense of being'. Myths are carved out of signs, although will provide the symbol with new meaning beyond that of the original sign. As Barthes argues, the associative total of the pre-existing sign equals the signifier, or 'form' of the myth. This, in conjunction with its signified, or 'concept' forms the signification". Samuel Londesborough, "Should Colours Be Protected by Trade Mark Law? What Problems May Arise in Protecting Them?", available at *http://www.kent.ac.uk/law/ip/resources/ip_dissertations/2004-05/Samuel_Londesborough_IP_Dissertation.doc* [Accessed October 28, 2012].

[22] "There are three broad ways in which the protection of GIs appears to offer the possibility of providing legal mechanisms to protect traditional knowledge. These are the collective nature of the protection, the indefinite availability of GIs and the connection that GI owners associate between their products and their land. Those seeking protection of traditional knowledge also seek a collective and an indefinite interest and frequently the relationship between their knowledge and the land is important for indigenous peoples. Yet these similarities are superficial. GIs protect names and are used by western farmers and sometimes rural communities to promote their products." Susy R. Frankel, "The Mismatch of Geographical Indications and Innovative Traditional Knowledge" (2011) 29 *Prometheus* 253.

[23] Chon, "The Romantic Collective Author" (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 832.

transfer the property to the transformer. An example is the picture on a canvas, which makes the painter the owner of the canvas.[24]

This rule was included in art.1270 of the modern Brazilian civil law, art.570 of the Code Napoleon,[25] and probably in many other systems, in cases where the transformer makes the changes in good faith.[26] In Brazil, this is certainly the general rule applicable to immaterial creations, whenever a specific IP rule is not present.[27] It is applicable especially when the *new* thing is an intellectual creation that builds on or *appropriates* prior works.

It must be noted that, in some systems where a patent building upon another may be subject to non-voluntary cross licenses, those licenses require that the new technology be contributive and go beyond simple non-obviousness. The same criterion that the new must be valuable in the face of the old thus applies. In such legal systems (Brazil's being one of them), reinterpretation of technical art is deemed to be legal, and possessive individualism must give way.

The issue here is that authorship laws tend *not* to follow this default Roman rule. However valuable the new or *derivative* work is, it infringes on the old when the owner of the prior work has not granted permission. In this context, the transformer's good faith does not matter much. Therefore, the appropriation art described by Professor Chon is probably a misnomer in most, if not all, legal systems: the artist may have taken from prior art, but he does not appropriate it at all.

Culture does not cease to be culture on account of infringement of some legal rules. After some time and impact, infringing culture sometimes comes to coalesce with mainstream society considerations. Judges may consider legal whatever culture is accepting, cajoling and consecrating[28]—that is, the shrewdness and knowledge of Justinian or the theological public interest of Lord Camden may eventually win the day.

Now, again, let us suppose that appropriation art—in whatever form—becomes legal. The societal interest in new things or the post-modern proclivity for reinterpretation overcomes the prior owner's objection (as if he or she were to consent there would be no infringement). This hypothetical presumes that the value-added standard of Roman law is present—that is to say, the appropriation artist created a *transformative* and not a *reproductive* new thing.[29]

To continue with this hypothetical, a new genius who concocts a new entity out of an old one earns the right to express himself or herself legally. But more than that, that genius becomes the owner. The subtle rebalancing of a mandatory cross license in dependent inventions in patent law does not exist here.[30]

[24] "Si quis in aliena tabula pinxerit, quidam putant tabulam picturae cedere: aliis videtur pictura, qualiscumque sit, tabulae cedere. sed nobis videtur melius esse, tabulam picturae cedere: ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere" Institutiones Justiniani, II, 1, 34.

[25] E.g. German BGB § 950; Italian Code art.940.

[26] E.g. Portuguese Code art.1336 ff; Spanish Code art.383; Swiss Code art.726 II.

[27] Borges Barbosa, *Tratado da Propriedade Intelectual*, Vol. 1 (2010), [4] § 2.4.

[28] Chon, "The Romantic Collective Author" (2012) 14 *Vanderbilt Journal of Entertainment and Technology Law* 829, 831. Peter Jaszi suggested recently that, as a result, judges "may be absorbing an attitude of skepticism about fixed identity and stable point of view—recognizing what has been clear for some time in arts practice and aesthetic theory: that … constructed culture is fair game for reinterpretation …". Peter Jaszi, "Is There Such a Thing as Postmodern Copyright?" in Mario Biagioli, Peter Jaszi and Martha Woodmansee (eds), *Making and Unmaking Intellectual Property Law* (Chicago: University of Chicago Press, 2011), pp.414–415, 421.

[29] "The Supreme Court [in *Campbell v Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994)] has drawn a distinction between derivative uses that are 'reproductive' and those that are 'transformative'. Reproductive uses are those that simply make a verbatim copy of the original work. As such, they are thought to be more likely to compete directly with the original work on which they are based. Transformative use combines the existing work with other elements to create a new work. Derivative uses that are transformative are often thought to be less likely to compete with the original. In addition, protecting transformative uses is often regarded as being more consistent with the goals of copyright, since they necessarily involve additional creativity. Narrowing the derivative use right with respect to transformative works would arguably foster new creativity while having less of an adverse impact on the incentives to create the original work." Christopher S. Yoo, "Copyright and Public Good Economics: A Misunderstood Relation" (2007) 155 *University of Pennsylvania Law Review* 635.

[30] David Lange and Jennifer Lange Anderson, "Copyright, Fair Use and Transformative Critical Appropriation", available at *http://law.duke.edu/pd/papers/langeand.pdf* [Accessed October 28, 2012]: "There is no question of enjoining the transformative critical appropriation, and no question of punishment, either, for the very idea of punishment is unwarranted; and this is so though harm from the appropriation is possible, even likely, even to be presupposed. Suppression and damages do not sensibly figure in this scenario, then, and cannot sensibly be required. But there may still be reason in some cases to contemplate some provision for sharing with the proprietor of rights in the antecedent work an equitable portion of such profits, if any, as may be reaped from an appropriation."

Does society actually benefit from this battle among geniuses? An old Brazilian story tells of a truckload of turtles being seized by tax inspectors. The driver explains that this is a gift for the Governor. The Governor is called to check on the information and tells the taxman, "Gubernatorial gifts must be complete: turtles with tax paid."

Appropriation artists should perhaps follow the same standard: any objection from the owner of the old right should be waived in the name of free expression, to the benefit of the public and free domain. This kind of collaboration should, therefore, be held perhaps as purely cultural: a joint labour exercise where one of the creators is forced to lend their creation to the enrichment of the other would seem to be unequal and outside the boundaries of law or equity, at least in those cases where the purveyor of the unwanted new entity does not dedicate its expression to the general public.

Legal systems would probably be more faithful to the traditions of Justinian or Lord Camden in yielding to the value of new creations by instituting a balanced system where free expression of art and knowledge cannot be hampered by objections founded on patrimonial reasons. However, any new art allowed cannot impact on the integrity of the moral rights of the old, probably by requiring a strong disclaimer of allowed succession.

Do those "genius v. genius" wars exhaust the field of unstructured collective authorship? Abstraction and experience in virtual space indicates that even more protean authorship occurs, if it is authorship at all. Originators of new entities do not bind themselves to a previous by-law, nor are they subject to arbitration. The only applicable rules would be the technical norms of the virtual, or other technical, environment. Collaborative cohesion and consistency are the sub-products of creation, but this phenomenon is too complex for legal analysis at this moment, or at least in this article.