since the early 1980s, the computer programmer was not considered to have authorship rights.64

authorship as such does not deserve the status of authorship concepts not appear to challenge copyright law’s concept of authorship, or to challenge copyright law’s concept of authorship, at least in the UK, for the ‘director’ of the film installation, as distinct from the authors of the individual elements (such as the composed photograph) that make up that installation. however, in drawing an analogy with film, the interviewees were not articulating a concept of authorship that goes against the grain of copyright thinking. under various European directives, member states are obliged to recognise the ‘principal director’ as at least one of the authors of the film work.16 this reflects the view that the director is, as the European Court of Justice explained, the author of the ‘natural persons who have contributed to the intellectual creation of the film’17 as distinct from the discrete copyright works which might otherwise be included and whose attribution is thus unthinkable to legislators for art installations in similar ways.18

not only do the ‘art’ authorship concepts not appear to challenge copyright thinking, but in fact there appears to be much in common between the concept of authorship of a computer program in copyright law and new media art discourse. both classify the computer programmer with an established category of digital artists, who use the computer as a tool for authorship. as the creator of a particular expression of code, downplaying the user interface or functionality produced when the program is run on a machine...
classification in law as a 'literary work'. For example, it has been said that fundamentalism to copyright law of literary work is the ability of the subject matter to afford other information and instruction or pleasure to humans, and computer programs are more accurately seen as being concerned with controlling machines.48

A similar concern is expressed in a leading comment on European copyright law.

What is problematic about copyright protection of computer programs is that there are so many aspects in their nature do not appeal to human senses but address data processing machines and may not be deemed literature and art in the broad sense of the word.49

As we have seen, the discussions of new media art conceive of the computer as a metaphor for a 'soft machine' (as the code is to have (as we saw above)!): an unobstructed presence and... in the art world, it is to be the foregound. In this way, creative practices such as 'Code Poerty' make visible to the human eye, aspects of the computer program which judges have previously thought invisible to the eye and unlike conventional literary works.50

Indeed, in stressing the 'primacy of the code as the main creative achievement', problematic aspects of the analysing the computer program copyright right can be compared to novel, fall away. In the UK, it has been long accepted that copyright protection extends to non-literary elements such as aspects of the computer program. Hence, where so long as code is seen as 'invisible', addressed to a machine rather than a human, the tendency has been to claim copyright ownership for a computer program as the aspects visible to humans (whether user interface or functionality) because the 'plot' of code is thought impossible to make visible. This is not operational, for example, in the case of 'soft machines', the code itself has no event, and no one does not have to have a code.51

The discourse on 'new media art', in bringing the creative use of code to the fore, opens up the possibility for code itself to have a 'plot', thereby facilitating the dissemination of computer programs for copyright purposes.

More than merely providing copyright with coherence, the courses of new media art also provide copyright categories with legitimacy. Anne Barron has convincingly argued that the relationship between the 'human' and the 'machine' matters because copyright derives its legitimacy from the claim that it promotes the arts.52

As is evident from the much published interview, On the Origins of Virtualism, given by artist/human Frank Popper, a theme of artistic copyright is how 'technology is or – can be humanised through art'. That is, how technology can be a product of human authorship,53 in this way, the discourse of new media art, with its focus on humanizing technological determinations of the program as a 'poet' or supreme creative being, can be brought to the assistance of law so as to resolve what Sam Ricketson has referred to as the 'struggle over the soul of copyright', when the law protects the products of machines, rather than human authorship.54 Writing in 1992, Rickerson described the protection of computer programs as literary works by copyright, as a 'considerational distortion of the concept of authorship' and not mandated by the Berne Convention (which he argues implies human authorship), as he queried whether or not they were creations of a literary or artistic kind.55

As we have seen, the discussions on new media art today, however, provide the theoretical basis for such treatment. To this extent, contrary to the perceptions noted in the opening of this section,26,27 the US, Edward Castronova said to provide the US not only coherence to copyright's notion of 'authorship', but also legitimacy to its treatment of computer programs as products of the literary and artistic domain.

Notes

1. This paper was prepared as part of the Ox Authorship and Originality project which is financially supported by the Arts and Humanities Research Council (AHRC), the Arts and Humanities Trust (AHT), the British Film Institute (BFI), and the Macaulay Unit for the Study of Intellectual Property (MUIP). It is gratefully acknowledged by the author for its support on this project. 2. In particular, see Mignonneau and Sommerer (2003) at 243.

14. Interviewee Lynn Hershman Leeson described the role as follows: "I was also grateful to Nicholas Mulkerrin from Birkbeck College, London and Bronac Ferran of the Royal College of Art, London for early contacts and providing..." 15. See Birkett and Ferran for their comments on an earlier draft of this paper.

23. ibid. per advocate general Bot at paragraph ag49. 24. See also Ag 49 of Gros v. Nova and Mazzonna v. Nova. 25. Art 1(1) directive 91/250 (as originally enacted), which has more recently been codified in Directive 2009/24 EC.


44. See also Ag 49 of Gros v. Nova and Mazzonna v. Nova. 45. See also Ag 49 of Gros v. Nova and Mazzonna v. Nova.


References

4. See the film proposal for an Art For Art's 2011.

6. As a historian of copyright law, this however is not surprising. Similar notes

7. See text accompanying footnotes 13 to 15.

10. As a historian of copyright law, this however is not surprising. Similar notes

13. See text accompanying footnotes 13 to 15.

16. Art 1(5) of directive 93/83 concerning satellite broadcasting and cable retransmission; article 2(2) of directive 2006/115 concerning rental and lending of copyright works.

21. Art 1(2) ibid.

26. As per art. 1(3) directive 2009/24/ec.

29. Article 1(5) of directive 93/83 concerning satellite broadcasting and cable retransmission; article 2(2) of directive 2006/115 concerning rental and lending of copyright works.

33. See also Birkett and Ferran for their comments on an earlier draft of this paper.


41. Interviewee Lynn Hershman Leeson described the role as follows: "I was also grateful to Nicholas Mulkerrin from Birkbeck College, London and Bronac Ferran of the Royal College of Art, London for early contacts and providing..." 42. See also Ag 49 of Gros v. Nova and Mazzonna v. Nova.


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