Born to be Authors: Children, Creativity and Copyright

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Abstract

This article analyses the role of the child as an author and creative individual, according to the paradigm of Maria Montessori, to expand the question of whether the law provides a sufficient and just safeguard to this category of copyright authors. Montessori's exploration of the creative freedom of children shows how irresistibly strong and indomitable their creativity is in the early years. This article submits that the early years are a most significant phase when children, in their exercise of creative authorship, are able to express the utmost freedom and originality. Accordingly, a scholarship of copyright law "of" the child and, significantly, authorship "by" the child should be at the core of a just and balanced legal system that brings together the rights and safeguards embedded within international rules and the copyright framework.

Keywords: children; creativity; copyright; education; United Nations Convention on the Rights of the Child; Montessori; ingenuity; expression; originality; creative choices.

[A] INTRODUCTION

> *It 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* (Montessori 1931: 784).

Authorship is a universal notion. It cannot disregard the junction between creativity and education as epitomized by the authorial work of children in their physical, social, emotional and cognitive development. The language of Dr Maria Montessori is propaedeutic to focusing on creativity in the early years as a lesson on authorship. It provides several analytical themes detailed in this article: (1) what constitutes creativity from the eyes of the child; (2) the role of the law—copyright law specifically—in the safeguarding of the creativity of the child; and (3) the need to build a scholarship on children's copyright to recognize their fruitful contribution to the understanding *inter alia* of authorship and originality.

Invariably, a parent or guardian would be looking at the creative works authored by a child under their care while honestly holding the belief that the child will become the most excellent writer, dancer, composer, painter, sculptor, singer of their time. Nevertheless, it is rare for a parent to be aware or raise concerns on how copyright protected works created by the child sit within the relevant legal framework. The gap between children's perspectives on creativity and legal fictions is especially manifest when considering the early years. The copyright framework provides a structured terminology for the interests involved. The education model which inspires this article points at the finding that the early years will be those when children express themselves in the least derivative ways, making free and creative choices with a degree of ingenuity that is particularly unaffected by prior knowledge and experience of creativity as expressed by others. Born to be authors, children are the most original of all creative minds, being able to express their personality. This calls for a systematic analysis of children's copyright, starting from its foundations in the policy that underpins copyright protection of any types of creative endeavours, in the literary, dramatic, musical, artistic and other expressive forms.

By looking at sources within and beyond the realm of copyright law, this article advocates for a correct recognition of children as authors and participants in creative communities from their early years. The first section of this contribution discusses the interdisciplinary component that needs to be present in the discussion of children's authorship. This is done by looking at sources from international legal bodies, authorities from international and comparative copyright law and literature from education studies. The second section addresses the meaning of what it is to be an author, with a specific emphasis on the shift that is required in copyright scholarship in order to fully respect the rights that emerge with the expressive contribution of the child. The third section of this article questions the problematic approach of how copyright is currently exercised when children are concerned. It provides exemplars of how copyright practice needs to improve in the recognition of the role and contribution of the child as a copyright author.

[B] POLICY PERSPECTIVES

The study of this topic must be an interdisciplinary exercise. The analysis below shows the need to learn from a variety of sources—exemplified in different frameworks—in order to establish the long-term policy aims and objectives for such new streams of copyright

scholarship. It also shows the potential impact of copyright scholarship on the recognition of children's authorship in education and other disciplines. This aligns with the objectives of Articles 12 and 13 of the United Nations Convention on the Rights of the Child (UNCRC), whereby a child should be given the right to be heard, to seek and to receive information and ideas of all kinds, but also to impart them as forms of expression. Such an approach is fully contemplated under copyright law (Geiger & Izyumenko 2020: 288).

The first guiding framework approached in this section comes from the United Kingdon (UK) Government's Department of Education. The UK standards for learning, development and care for children from birth to five consider the matter of arts and design by acknowledging the following:

> The development of children's artistic and cultural awareness supports their imagination and creativity. It is important that children have regular opportunities to engage with the arts, enabling them to explore and play with a wide range of media and materials (Department for Education 2023: 10-11).

From an early age, children have the opportunity to perform music and this is encouraged within the education sector: "Early years settings and schools should start from the premise that all children are musicians—embracing music in their provision, sparking children's musical curiosity and developing their ability and interest" (Department for Culture & Ors 2022: 15). Musical composition is also a tenet of this approach (ibid 31).

A second and further type of recognition is not limited to children but contains a specific focus on them as a key category of persons. The 5 Music Rights set out by the International Music Council founded by UNESCO read as follows:

> 1 The right for all children and adults to express themselves musically in all freedom.
>
> 2 The right for all children and adults to learn musical language and skills.
>
> 3 The right for all children and adults to have access to musical involvement through participation, listening, creation and information.
>
> 4 The right for musical artists to develop their artistry and communicate through all media, with proper facilities.
>
> 5 The right for musical artists to obtain just recognition and remuneration for their work (International Music Council 2001).

It is particularly compelling that the list above addresses the participative role of children for three out of the five headings. This emphasizes children's ability to express, learn and access musical content.

The third framework at the core of the discussion is the recognition of creativity within intellectual property law, and copyright specifically. What is acknowledged is an abundance of legal analysis concerning toys, "helmets, juvenile T-shirts, or ride-on kids' suitcases, as there is a profitable industry based on children's entertainment and their special attachment to the commodities associated with that entertainment" (Bellido & Bowrey 2022: 1). There is value in the understanding of intellectual property matters for the benefit of the child, for the commodities that surround the child's physical, social, emotional and cognitive development. Overall, however, it could be argued that there is a focus on the commercial exploitation of commodities geared towards the entertainment of children. In other words, such a focus is on an intellectual property system for children rather than the legal recognition of copyright or intellectual property works as devised by children.

On this basis, a fourth component concerns the legal safeguards needed when children approach and interact with content, media and technology as users or consumers. Access to creative content is only one element of a child's interaction with media. Arguably, there is another element that is impossible to neglect: that is the participation of the child as author of creative works. To return to the UNCRC, children's rights should not be limited to them seeking and receiving information and ideas. Children must be able to act as rightsholders and be safeguarded as they impart content in the form of creative expression. An example of this approach is evidenced in a report by the British Academy on its Reframing Childhood programme:

> Children have a right to protection – an imperative that is obviously a primary motivation for the regulation of particular kinds of media content. Yet they also have a right to the provision of material that meets their needs and reflects their experiences – a right that many would argue is only partially met in an increasingly commercialized media and cultural environment. And they also have a right to participation – to be able to use the media and other cultural forms to create their own content, and to have their voices heard (British Academy 2019: 53).

The selection of interdisciplinary sketches on the authorship of the child shows the significance of creativity in the development of the child, the expressive potential flowing from a child from or even before birth (Pound 2022) and the need to safeguard such potential in all areas of creativity.

Nevertheless, the different pictures continue to present a focus on the ability of children to be the recipients of content in order to facilitate their development. The emphasis remains that only through access will they be able to engage in the development of their artistry. This appears to be insufficient in light of their ability to express themselves and impart content.

Also highlighted in this section, research on children and creativity can go beyond the recognition that children approach and interact with creative content, with an industry that craves their attention on the basis of their curiosity and creativity. The step to be made for a full recognition of children's creativity starts with the acknowledgment of broader, urgent and inclusive research that fills a gap:

> Too often, intellectual property is either left out of lessons or the focus is on how students can stay out of trouble; for example, by avoiding infringing copyright rules around film or music (TES Magazine 2021).

A comprehensive analysis of children's creativity from a legal perspective can embrace the wider array of issues, with intellectual property and copyright laws being capable of transforming and innovating the landscape. This is based on the recognition of the innocence of children in their creative efforts—possibly presumed, initial, variable—as expressed particularly in their approach to play, drawing, writing, dramatic expression (eg mime, dance, pretend play), music *et cetera*.

[C] A SHIFT: THE RECOGNITION OF THE INTELLECTUAL CREATION BY THE CHILD

Children are born to be authors. The thesis put forward in this article is that a rigorous understanding of authorship in copyright law—internationally, regionally and domestically—requires a shift in perspective to fully respect, value and embrace the contribution that children make among other categories of authors. A development in copyright scholarship is capable of working as a driver in the protection of any forms of creativity by a child, starting with the most elemental expression children make in their early years and, subsequently, later in life. This is the profound and changing role that copyright law can play, including within the scenarios set out above and the right to freedom of expression enshrined in Article 13 of the UNCRC.

There is a specific methodological basis in the choice of focusing on creativity by children in the development phases that attach to the early years. This resides in the types of skills that children acquire during

different periods of growth, with regard to physical, social, emotional and cognitive development. In stressing the importance of the early years, it has been submitted that:

> [t]he science of early childhood development reveals that the period from conception to the age of 5 plays a crucial role in lifelong development. Throughout this period, the brain is changing rapidly. During the first year after birth the size of a child's brain increases by 101% on average … By the age of 3, a child's brain is estimated to be twice as active as an adult's brain (Ipsos MORI 2020: 9).

This stream of research informs the nature of what children can do as authors. This ought to be linked and evaluated in conjunction with many pedagogical approaches. The Montessori view is only one of the lenses and analytical tools that can be adopted in this exercise, when the adult should act as spectator to the discovery process of the child in this developmental phase. To explain this approach, I will use Buckley's scenario, which serves as an epitome of the gap between the perspective of the authorial child compared to what adults see in the art of offsprings (Buckley 1969: 460).

The following portrayal depicts a child who was going to paint a picture and told the teacher that he was going to paint the sky. Starting with the colour blue, the child included many other different colours, lines, mixtures of experiences of how the sky might have looked: "All the blue and the pink and the purple; All the white and the black: All the red and orange and green: All the yellow that had turned brown." The next part of the depiction addresses the significant gap that this article focuses on. The teacher stated: "'I thought you were going to make the sky'. 'I did' said the boy" (Buckley 1969: 460).

The paradox arises at the junction presented in the introduction. It is often the case that copyright experts are asked to play the part of *abritri* or legal *personae* and wear the spectacles of such individuals in order to provide an artificial but neat assessment of what copyright or other forms of intellectual property should or should not protect and safeguard (*Philips Electronics BV v Remington Consumer Products* 1998: 318). They are called to establish what may be thought to qualify as literature, drama, music or art under the law. When, in fact, it is the child who delivers a creative form of expression.

There needs to be a recognition that an assessment by an adult on creativity as expressed by the child does not align necessarily with the fulfilment of the objectives of the recognition of authorship. A question needs to be raised as to whether an adult as *arbiter* can leave aside

any subjective perception of intellectual or artistic merit (Brown & Ors 2023: section 3.25) when looking at the work of a child. Accordingly, the development of a copyright scholarship of the child as an author will offer a unique opportunity for the world of adults to be able to approach the creative effort of children. In this respect, the tension between copyright and freedom of expression as addressed by, for example, Geiger & Izyumenko (2020) can be enhanced by the implementation of the principles and balance as set out in the UNCRC. This approach will identify the rights and safeguards that attach to the creative expression of children as authors with an accurate account and consideration of their creative contribution, regardless of their age.

Authorship and authorial works in the early years

> *Qu'est-ce qu'un auteur?* (Foucault 1969: 777).

The recognition of children as authors is connected to the definition of authorship to various degrees. Commentators found that the roots of the term "author" could be found in the Greek word *autentim* or *autentin*. This means that the author is "worthy of faith and obedience", someone who possesses credibility and knowledge. The Latin word *auctor* has been translated as "the originator". In turn, *auctor* comes from augere ("to increase, to enlarge, to augment" but also "to enhance, to exalt") (Ascoli 2008: 15). From *augere*, there is an element of continuity that defines the author that, in their role as someone who enlarges and augments, they are also someone who contributes to the birth of new processes and growth in value. Both *auctor* and *augere* appear to be relevant to the notion of the copyright author to illustrate its role also in the context of a legal analysis. There is nothing that prevents a child from being an author under any of the definitions or exemplifications set out above, however adult-centred they might have been when devised. Significantly, there is no anachronism in children being authors in their ability to create metamorphosis through ingenuity (Ascoli 2008: 21).

The question "*Qu'est-ce qu'un auteur?*" by Foucault remains relevant to all types of authors: with the development of a scholarship on the copyright of the child, further research needs to be undertaken to consider how Foucault's question—among others—shapes the understanding of creativity also for children and other vulnerable authors. The copyright author is someone who starts a process within himself or herself, but also promotes the development of something that is already existing, enhances the raw material and elevates it in the process (De Santis 2018). As the paragraphs below establish, the child is no different when

involved in creative processes. Children share the same characteristics as adults, in the way they express their creative choices and personality, through their authorial works. The sections below explain how the copyright system is formally favourable to the recognition of rights, but how the ability to exercise those rights diminishes their significance and effectiveness.

The recognition of what qualifies as authorship is a process that goes through key steps on the analysis of the copyright work. For the purpose of this contribution, the approach will look at authorship in the context of harmonization of copyright within the European Union and, particularly, the approach by the Court of Justice of the European Union (CJEU). This is to demonstrate the strength of the standing of authorship by the child within the copyright framework in different jurisdictions.

Sterling explains that, following the determination that the item in question is within the sphere of copyright protection, it is necessary to establish whether the necessary criteria of protection are fulfilled and, for the purpose of this piece, particularly in relation to the originality criterion (Sterling 2022: section 6.07). In other words, this means that the first step is to consider and apply the definition of what constitutes an authorial work; then it is necessary to identify the "properties" that such work must possess in order for copyright protection to arise, and the degree such properties must feature as embedded within the relevant subject matter. To a large extent, the relevant issues and definitions have been established formally as a question of law (Pila 2021: 66)

To qualify as works, the relevant objects need to have unity and stability of expressive form (Pila 2021: 68). Depending on the jurisdiction, this does not mean necessarily that such works need to be fixed in a material form. In some jurisdictions, the law provides broad categories and lists of examples of what might be protected. In others, the works in question should fall into set statutory categories of, for example, literary, dramatic, musical or artistic works (Sterling 2022: section 6.05). By analogy, the sketches a child creates on a tablet or similar device while waiting in an airport lounge could easily fulfil the first step under both approaches.

Before reaching a conclusion on whether an item created by a child qualifies as an authorial work, it is helpful to return to the Montessori model and the day-to-day creative engagement of a child in the early years, with particular regard to the role of art materials. It is in her later contributions that Maria Montessori approached the role of art, describing the activity of "painting leading to drawing as means of self-

expression" by the child (Lillard 2011: 30). There are other educational models which emphasise the role of such materials linked to children's imagination to a more significance extent (van Alphen 2011: 23). The question to be answered is whether the work of children with art materials, for example, could be considered an expressive form worthy of copyright protection.

Courts have made attempts to decide what should be the definition of "artistic" in the context of authorship and copyright laws, not just in relation to fine art but also with regard to applied art and useful objects such as costumes for film productions (*George Hensher v Restawile Upholstery (Lancs)* 1976; *Lucasfilm Ltd & Ors v Ainsworth & Anor* 2011). Academic commentary provides direction in the interpretation of the meaning of those definitions (Dutfield & Suthersanen 2020: 237). In the shift of perspective recommended in this piece, there is an alignment with the relevant case law which states that the subjective intention of the author should not be taken into account. Ultimately, the child does not know the details of what constitutes a work of art. The child just creates. The fact is that the child—through unconscious, absorption and conscious efforts—engages with information and ideas and transforms them into creative expression.

There is a controversial element to a child's expression of creativity that show the paradox between copyright law and a child's free and creative choices. In *Lucasfilm Ltd & Ors v Ainsworth & Anor* (2008: 118), the Court stated that:

> [a] pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of [a] driveway for 2 weeks preparatory to a building project is equally plainly not.

The work of a child may be done with the author's mindset (ie of the child) of the mountain of modular bricks to be for the purpose of a building projects. However, when the adult looks at them without the eyes of the child, that pile of bricks looks more like a work of art rather than a functional work-in-progress towards a building renovation. In the eyes of a teacher, the school project of a child is an educational tool. It would be wrong to deny copyright protection to works that possess objective qualities of creativity. This is how the requirement of originality as discussed below works as a necessary property in the recognition of authorship and authorial works for children as well as other types of authors.

Originality

Authorial works need to be original for copyright or author's right protection to arise. Originality is a key property for an author to be able to rely on the safeguards reserved to copyright authors. In the language of the CJEU, this means that an output must be the author's own intellectual creation (*Infopaq International A/S v.Danske Dagblades Forening* 2009; Rosati 2023: 216). CJEU case law develops the concept of originality in establishing that this encompasses the making of free and creative choices and the reflection of the personality of the author (*Brompton Bicycle Ltd v Chedech/Get2Get* 2020: 461). It could be argued that the relevant approaches do not suggest that these criteria should be the outcome of meticulously calculated decisions. This is deeply relevant to the creativity of children. In its drafting, however, the language reflects experiences of creativity by an adult rather than a child.

The understanding of originality is only rigorous if it considers the paradigms of educators and their scholarships. Dr Maria Montessori engaged with the characteristics that apply to different periods of growth. She explained that:

> typically, for the age group between 0 and 3, the growth of the child will be unconscious and characterised by the absorbent mind of a child of that age. Following that period, the child begins to bring knowledge on his unconscious to a conscious level. This is the environment of primary classrooms (for 3- to 6-year-olds) where children also have the practical life exercises, as well as materials for sensorial, math, language, culture, music, art, and geography education (Salkind 2005: 845-847).

The Montessori approach calls for an analytical understanding of what the creative effort by the child means, in their unconscious phases and following such phases. The reason for a necessary exploration of a scholarship of the child lies with the way originality materializes in the early years, how copyright law may possess the necessary tools to interpret what free and creative choices are, and how to identify the reflection of the personality of the author during such a key time of the physical, social, emotional and cognitive development of the individual. Dr Montessori explains that:

> the child is not interested in understanding things through the medium of others, but has within him an uncontrollable motor force that urges him to grasp them for himself, and that only when his mind is allowed to work in its own way can it develop naturally (Montessori 1932: 64).

In accepting these findings, it is submitted that children (especially in the early years) are the quintessential authors, imparting ideas and information in an expressive mode, and not really externally constrained when they make free and creative choices. This process reflects their personality according to their age and/or period of growth.

[D] A NEW PERSPECTIVE FOCUSED ON STEWARDSHIP

For a systematic understanding of authorship residing with children's creativity, there is also a necessity for the copyright system to draw upon Article 12 of the UNCRC and provide the tools for such authorship to be exercised in a participative and competent manner. This is normally implemented by parents, guardians, teachers and other stewards on behalf of the child. It can be argued that any form of expression by a child, also within the copyright system, would not be fully recognized unless it is heard, seen, perceived.

The model of stewardship in copyright has been addressed in a seminal contribution by Helena Howe who emphasized how the copyright system involves both rights and duties (Howe 2011: 200; Howe 2013: 298-301). A key duty for the steward is to "manage and conserve" the relevant resources for the benefit of future generations. This model is enforced in the way children's works are shared with and by parents, guardians and teachers on behalf of the authors of the relevant works. Stewardship, in the context of this article, develops across two dimensions: firstly, the protection of a child's authorial interests in the work; secondly, the ability to share a child's authorial effort with a wider community, from the classroom to the metaverse, as set out in the examples below. Through this model of stewardship, there could be a better understanding of the rights pertaining to children as authors.

Often, the child's contribution to a school poetry collection will require a parent or guardian to provide a copyright licence or assignment to the school or publisher, with the name of the child credited below the text of their poem. Parents or guardians will feel rewarded by seeing the names of their children on the publication. In fact, parents happily contribute to the cost of the publication. Arguably, many other authors share the same type of gratification, particularly in academic publishing. This does not diminish the need to form a rigorous understanding of authorship within the relevant groups of individuals who act as stewards of the child author (parents, guardians, teachers, governors *etc*) and exercise or influence the recognition of their rights. Such understanding is the

premise for the ability of the relevant stewards to exercise rights on behalf of children and to influence the overall recognition of children as authors.

It is uncommon but not unheard of that stewards may exceed the limits of what it is within the scope of their role with regard to exercise of copyright. By way of example, this was made apparent in the form of a lawsuit brought by a group of parents in Canada, following the actions of an art teacher who allegedly uploaded and was selling the artwork of pupils without their permission. Gendreau from the Université de Montréal commented on the news by stressing how "[o]ne rarely thinks about minors as authors, but this situation reminds us that the Copyright Act applies to all those whose works display originality regardless of their age" (Gendreau 2024). The current lack of a scholarly recognition and established practice of the copyright by the child in the early years should prompt a change. Moreover, the observation of the current copyright licensing terms and conditions show the urgency. Art or writing competitions would often start when children are five years old or younger (and further along in the course of primary education).

Two exemplars show the impact of copyright licensing and a steward's ability to control and share the copyright of the child. In the case of an artwork, even when the piece is produced by a five-year-old child, the following may apply:

> By entering the competition, each winning entrant grants the GLA [Greater London Authority], the competition sponsors, and all media partners an irrevocable, perpetual license to reproduce, enlarge, publish, or exhibit, mechanically or electronically on any media worldwide (including the internet) the entrant's winning artwork (Mayor of London 2023).

The additional insight to these terms and conditions concerns the exercise of rights:

> Entry to the competition must be made by a parent, guardian, teacher or play scheme leader on behalf of a child. Teachers and play scheme leaders must ensure that they have the necessary parent/guardian permission before making the entries (The Mayor of London's Christmas Card Competition, 2023).

This shows another decisive action to be analysed with regard to the copyright of the children as exercised by their stewards.

By way of comparison, similar wording is found in a writing programme promoted by the BBC for its "500 Words" competition:

> Entrants retain the copyright in their entries but their parent or guardian grants to the BBC a perpetual non-exclusive royalty-free licence to publish, broadcast (across all media) and post the entry online and on any other platforms yet to be envisaged … By submitting a story, the entrant's parent or guardian agrees that the BBC may at its sole discretion edit, adapt, abridge or translate the entry (BBC 2023).

It is clear that, without the permission of a steward, a child will not be able to disseminate the relevant authorial output. Royalty-free also indicates the lack of remuneration for this type of licence.

A scholarship on the copyright of the child need not view the individual who exercises copyright on behalf of a child as an antagonist to the author, but rather see that person as someone who enables copyright works to be recognized for their status. In light of the stewardship model, it could be argued that the means of exercising copyright are not uniquely based on a liberal and individualistic model, but present many instances where the role of the steward is essential in order to achieve economic objectives and public interest objectives.

[E] CONCLUSION

This article has presented an interdisciplinary perspective to obstacles which exist in the recognition and exercise of rights of children as authors in various sectors and forms of expression. There are some key, impellent questions and directions that a copyright scholarship of the child should resolve, given the call for the most appropriate recognition—currently lacking—of the child as the most original author. Methodological questions should continue to be asked: *cui prodest*? Who are the beneficiaries? Are there significant policy and commercial objectives to be attained in law and policy that are neglected in the current copyright framework, in conjunction with the principles of the UNCRC?

Koempel provides an insightful perspective on creativity, prompting a reflection on the link between the creativity expressed by children and the current focus of regulators on artificial intelligence. He writes: "AI applications themselves need to become more like children with their innate curiosity and creativity" (Koempel 2024). The two key criteria which should drive the copyright discourse on this matter ought to be curiosity and creativity. With originality continuing to be a threshold of the utmost significance and yet an artificial one in some cases, it is critical to discover how creativity by children can shape copyright law in its different facets. From the encouragement of learning (Statute of Anne 1710), to the progress of science and useful

arts (Constitution of the United States, Article I, section 8, clause 8), to the lack of formalities (Berne Convention for the Protection of Literary and Artistic Works 1886, Article 5). Just in the way children would see it, it is children who are the most irresistible and indomitable authors and the persons who should drive any understanding of their creativity and originality.

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Legislation, Regulations and Rules

Constitution of the United States 1787

An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned (the Statute of Anne) 1710, 8 Anne, chapter 19

Berne Convention for the Protection of Literary and Artistic Works 1886 (as amended on 28 September 1979).

United Nations Convention on the Rights of the Child 1989

Cases

Infopaq International A/S v Danske Dagblades Forening Case C-5/08 ECLI:EU:C:2009:465

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