
**COPYRIGHT BOUNDARIES, OR MAKING QUILTS IN THE SHADOW
OF THE COPYRIGHT CLAIMS BOARD**

by ELIZABETH TOWNSEND GARD*

How do we understand copyright from a maker or artist's perspective? Do we think about copyright as we create, or after the fact? What role does the new opportunity for small claims at the Copyright Claims Board impact on the choices we make as creators? This piece looks at the act of creating through quilt and fiber arts, and then turns to what we know so far about the Copyright Claims

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Board. In the end, it asks the question: what is the role of law in the process of creativity?

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INTRODUCTION

In the end, it all comes down to this: making something again is easy, making something new is brave and making something personal is essential.
Tula Pink, artist, famous quilter and commercial fabric designer¹

Formally trained as a painter, [fiber artist Bisa] Butler constructs her work from an intricate array of textiles, choosing the needle as her paintbrush and fabric in place of paint.

Michèle Wije, “Photograph and Quilt Making Transformed”²

It is the Fall 2021. I am sitting on a bench in the Impressionist wing at the Art Institute of Chicago in front of that famous painting with people in the rain with umbrellas.³ I am waiting to see the Bisa Butler quilt show.⁴ There are so many people waiting to see the last weekend of the show that they have started a virtual line. To see quilts. It is amazing. Eight hours away, at the International Quilt Museum in Nebraska, there is a 50-year retrospective of the first major art show featuring quilts; it reenacts the Whitney Museum show that changed how we think about quilting.⁵ Between these two exhibits tells the story of quilts and art, and of course, for me, the underlying copyright story. I wonder what that painting is that I’m viewing. You would know it if you saw it.

¹ TULA PINK, *TULA PINK’S CITY SAMPLER: 100 MODERN QUILT BLOCKS* (Kraus Craft 2013).

² Michèle Wije, *Photograph and Quilt Making Transformed*, in *BISA BUTLER: PORTRAITS* (Art Institute of Chicago 2022).

³ Gustave Caillebotte, *Paris Street; A Rainy Day*, 1877, oil on canvas, 212.2 x 2.76.2 cm, Art Institute of Chicago, Chicago, <https://www.artic.edu/artworks/20684/paris-street-rainy-day>.

⁴ *Bisa Butler: Portraits*, ART INSTITUTE OF CHICAGO, <https://www.artic.edu/exhibitions/9324/bisa-butler-portraits>. (Nov. 2020-Feb. 2021).

⁵ “In 2021, the International Quilt Museum (IQM) at the University of Nebraska-Lincoln is celebrating the 50th anniversary of the groundbreaking exhibition, *Abstract Design in American Quilts*. The 1971 exhibition, presented by the Whitney Museum of American Art in New York City, was the first time a major New York art museum displayed historical quilts on walls more commonly used to display modern art such as abstract expressionist paintings. The Exhibition is remembered as a pivotal moment in the intersecting histories of art, craft, and design. The pieced antique quilts from the Jonathan Holstein and Gail van der Hoof Collection went on to travel across the U.S., and to Europe and Japan. A last-minute addition to the Whitney’s summer schedule, *Abstract Design in American Quilts*, far exceeded the reach and impact its creators initially anticipated. In short, it became a cultural phenomenon, attracting unexpectedly large and enthusiastic audiences, quickly selling out its catalog and garnering outsized praise from eminent critics”. “A stunning revelation.” —Hilton Kramer, *New York Times* art critic, July 3, 1971, *The Whitney Museum of Arts Quilt Exhibition at 50*, *THE QUILT SHOW*, <https://thequiltshow.com/blog/history/the-whitney-museum-of-arts-quilt-exhibition-at-50> (Jul. 6, 2021).



Gustave Caillebotte, *Paris Street; A Rainy Day*, 1877, oil on canvas, 212.2 x 276.2 cm, Art Institute of Chicago, Chicago.

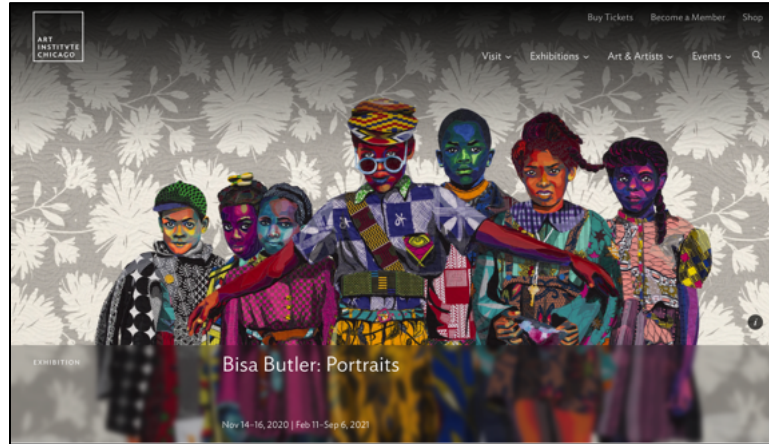
This is an essay about the process of creating and the relationship of creativity to copyright. And also about creating and enforcing one's rights associated with that creation. What role does copyright play in the creative process, and how might that be altered by the (now) Copyright Claims Board? We will use quilting as our guide.

I finally get into the exhibit. Bisa Butler creates portraits—huge portraits—using stunning solid colors for faces and hands, and her patterned fabric from Africa for the clothing. The portraits can take hundreds of hours to create.⁶ A theme based on Maya Angelou's *I Know Why the Caged Bird Sings* runs through the exhibit, depicting African-Americans across two centuries.⁷ Butler uses layering and thread painting techniques. It's clear that she began with a photograph, an underlying work, but we do not know how much she has changed it. Did she think about copyright? About fair use? Did she get clearance for the

⁶ Liz Logan, *Artist Bisa Butler Stitches Together the African American Experience*, SMITHSONIAN MAG. (July 24, 2020), <https://www.smithsonianmag.com/arts-culture/bisa-butler-stitches-together-quilts-african-american-experience-180975397>

⁷ For more, see *I Know Why the Caged Bird Sings ~ Bisa Butler* (Mar. 23, 2021), <https://www.jigidi.com/jigsaw-puzzle/16z6qhk7/i-know-why-the-caged-bird-sings-bisa-bulter>

photos she used? Did she inquire as to the public domain status? How much does the law impact on her choices as an artist? And how protective will she be if someone tries to reproduce the fabrics she has created or create knock-offs of her work?



The Art Institute of Chicago's website, introducing Bisa Butler: Portraits. The artwork used is called "The Safety Patrol," (2018). See <https://www.artic.edu/exhibitions/9324/bisa-butler-portraits>. This piece was also sold in the gift shop as a print.

It turns out that Bisa Butler used photographs from the Farm Security Administration Database, taken around World War II of African Americans, and photographs of anonymous African Americans from 1870-1910.⁸ In both cases, the photographs are in the public domain.⁹ She also uses fabric from Ghana, Nigeria, and South Africa, as well as cottons, wools, silks, and velvets.¹⁰ Based only on the photographs she used, it seems clear she thought about copyright, meaning the law impacted her choices as an artist. Her work is stunning. They are transcendent. There is no question they are art pieces. They are hanging on the

⁸ Grace Edquist, *Depth, History, and Reverence: the Intricacies of Bisa Butler's Quilted Portraits*, VOGUE (March 3, 2020), <https://www.vogue.com/article/bisa-butler-artist-interview>.

⁹ The Farm Security Administration Database government photos were not protected by copyright, and the others are likely out of copyright due to their age. See 17 U.S.C. §§ 105; 304, and 303(a).

¹⁰ See Artsy Chow Roamer, *Giving Back: History, Identity, & Legacy*, ARTSY CHOW ROAMER, <https://www.artsychowroamer.com/blog/2020/12/7/bisa-butler-giving-back-identity-history-and-legacy>.

walls of the Art Institute of Chicago—big banners outside advertise them.¹¹ They are *so* copyrighted.

As far as categorizing copyrightable works, art quilts are easy—they look like things that are copyrightable. They hang on walls. They look like paintings. Bisa Butler’s quilts are art quilts. But what about quilts that we generally think of as functional quilts? That quilt your grandmother or aunt made you to celebrate your birth, graduation, or marriage. How do they fare under the copyrightability test?

When this paper began, I wanted to explore the relationship of the role of law in creativity. It was a series of case studies, using fiber arts as a way of understanding the practice, process, and results of creativity in light of the law.¹² Then, just as I was finishing a first draft of this paper, the CASE Act passed in December 2020, and the paper became about the intersection of creativity and enforcement.¹³ I then waited to see just what the Copyright Claims Board would be, who showed up, what the claims themselves would be, and how the claims worked their way through the system. Now, once the CCB began, the wait was for the data to come in. Two years of data seemed reasonable. And as I was waiting, *Andy Warhol* was decided.¹⁴ With all of this, the question surrounding creating kept changing and expanding. We are now at the end of the second year of the CCB, as of June 2024. How are we to understand creating works and enforcing copyrights? What does copyright look like in 2024?

There is a physics to copyright, which includes how much room we have to create before we intrude on the boundaries of other copyrighted work. We all can use non-protectable elements, public domain works, and potentially fair use. We can ask permission to use works. We can also as makers ask the question of whether what is being created is too insignificant to be bothered with (e.g. not commercial enough, personal use, etc.) or if the borrowed use is actually a benefit to the original copyright holder (e.g. fan celebrating works, covers, snippets from a concert on YouTube or TikTok that all promote the original work).¹⁵ How will the new Copyright Claims Board (“CCB”) change that physics of *creating*? I would suggest not much. But perhaps down the road now with the addition of *Andy Warhol*? Perhaps.

¹¹ Bisa Butler Portraits, photograph of the Art Institute of Chicago by *Margaret Fox*. See Sarah Barnes, *Bisa Butler Is Exhibiting Over 20 of Her Amazing Quilted Portraits at the Art Institute of Chicago*, MY MODERN MET (Aug. 25, 2021), <https://mymodernmet.com/bisa-butler-art-institute-of-chicago/>.

¹² For this paper, my focus is on quilting, both in terms of traditional pieced quilts and art quilts, as they provide a window into the subject of underlying works, common public domain.

¹³ Copyright Alternative in Small-Claims Enforcement Act of 2020 (the CASE Act), Pub. L. No. 116–260.

¹⁴ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

¹⁵ See Sidne K. Gard & Elizabeth Townsend Gard, *Fame: A Conversation about Copyright, Borrowing and Soup*, UNIV. OF HOUSTON L. REV. (forthcoming 2024).

So, this is an odd article because copyright has become (or maybe always has been) odd. Part II looks at the spaces of fiber arts, and in particular art quilting and traditional quilting as a means of understanding the creative process. What does copyright tell us about what creatives can and can't do? Where are the boundaries in the act of creating? Part III then turns to look at what the CCB tells us about creating. What cases are being filed, and what signals are we getting from the Board relating to creativity? This is done with the final determinations to claimants. Part IV turns briefly to the *Andy Warhol* case: can we understand the boundaries between original artist and subsequent artist in a new light? In short, this essay asks how do we understand where creating fits within copyright? Let's step into the world of quilting as a means of exploration.

I. *QUILTING AS CREATING COPYRIGHTED WORKS*

Quilting turned out to be a perfect venue to look at copyright: there are millions of quilters each making dozens to hundreds of quilts, all using common blocks, patterns, photographs, and a myriad of techniques. They are making all kinds of quilts, from traditional to modern to art quilts. They are insanely resourceful. Quilting is done both by professionals and hobbyists, for charity, for families, and for sale.

My questions focused on where the law intersects with that creativity:

- When does something I make become protectable?
- When does something I create potentially infringe on someone else's work?
- When do community customs come into play?
- How does idea/expression actually work in practice?
- How does *thinking about copyright during the creative process* help or hurt the artistic process itself? And what role does the law play in the process of creativity?

In many ways, these are questions that could be asked of any art form—where are the boundaries of non-protectable elements and motifs, and what an artist creates? However, quilting provides a particularly useful area of review, as they have *numbered and cataloged* non-protectable quilt blocks, along with recognizing and labeling common techniques, types of artistic expression, and ways of working.¹⁶ And over the course of about six years, I made about 125

¹⁶ See Barbara Brakman, *Encyclopedia of Pieced Patterns*: “This book is the perfect resource for identifying blocks and getting inspiration for your quilts! You’ll find line drawings and colored versions of 4,000+ blocks, plus their names and publishing information! Sewing patterns are not included.” The book blurb gets it wrong, and believes that the author holds copyright on all of the blocks because she numbered them, and also

quilts in the process of thinking about these questions too. Creating quilts turned out to be a great space to also contemplate the meaning of copyright as part of the creative process. Let's return to the Art Institute of Chicago.

A. Back to Butler and Other Quilters

Bisa Butler did not start out as a typical quilter. She earned her BFA from Howard, and an MFA from Montclair State University.¹⁷ It was during a fiber arts class that she found quilting as her medium.¹⁸ But she is using techniques that all quilters do: starting with an idea, choosing fabrics, creating the top, stitching it together. Her story is both magnificent artistry beyond words and also, like many quilters, an example of an artist doing their craft. Butler's work sits within a larger world of both art and quilting.

Many reading this may not realize that quilting is expected to approach being a \$5 billion industry by 2026, with over 12 million quilters.¹⁹ The larger craft industry reached \$85 billion "active creatives" in North America (people who have done at least one creative project in the last year) and generates \$35 billion dollars in annual sales.²⁰ That's a lot of creativity. Butler's work sits, in part, within that tradition.

Quilting can be all encompassing, from books and magazines to an Internet filled with YouTube tutorials, podcasts, and Pinterest boards, from exhibits at museums to the local 4-H clubs, from Joann's Fabric to small locally owned quilt shops. There are national and local quilt shows, along with over eight quilt museums in the U.S.²¹ Major companies like Brother, Bernina, and Singer dominate the market in sewing machines, along with niche companies like

that the numbering system is protected by copyright, which is questionable. The blurb also believes that the blocks that are older than 1970 are not protected by copyright, again, a weird cut-off and not based on any legal principle. The blocks are common blocks, made over a number of centuries. The book identifies the year and source the author found when doing research in the 1960s and 1970s. The system is also used by the Quilt Index, a national repository of images of quilts from institutions and states.

¹⁷ *Bisa Butler: Portraits*, ART INSTITUTE OF CHICAGO, <https://www.artic.edu/artists/116361/bisa-butler> (last visited July 30, 2024).

¹⁸ Bisa Butler, *About Bisa Butler*, BUTLER ART, <https://www.bisabutler.com/about-5> (last visited May 19, 2024).

¹⁹ Abby Glassenberg, *The Size of the Quilting Market: Quilting Trends Survey Results 2021*, CRAFT INDUSTRY ALLIANCE (Apr. 3, 2021), <https://craftindustryalliance.org/the-size-of-the-quilting-market-quilting-trends-survey-results-2021>.

²⁰ *Id.*

²¹ This includes the International Quilt Museum, the New England Quilt Museum, the Virginia Quilt Museum, San Jose Museum of Quilts & Textiles, The National Quilt Museum, Rock Mountain Quilt Museum, Wisconsin Museum of Quilts, Iowa Quilt Museum, the Pacific Northwest Quilt & Fiber Arts Museum, Missouri Quilt Museum, Kona Hawaii"ian Quilt Museum, Levy County Quilt Museum, The Southeastern Quilt & Textile Museum, Quilt Heritage Museum, Great Lakes Center, Textile Center, Latimer Quilt & Textile Center, and Texas Quilt Museum.

Handquilter, Juki, Grace, Janome, and others. There are large and small quilt-related companies, many family run, and interestingly, many that are multigenerational. One of the largest fabric companies, JafTex, has as its president a fourth generation fabricator.²² We have the American Quilt Study Group,²³ and one university, University of Nebraska-Lincoln, even has a Quilt Studies program, as well as being home to the International Quilt Museum.²⁴

This doesn't even begin to describe the passion, personal investment, and time each quilter dedicates to not only the quilting, but building and stocking one's studio with fabric, thread, and accessories, traveling to quilt shows, taking classes, joining guilds, making charity quilts (we are a very giving community), and talking about quilting, whether with our online Facebook friends (where there are small to huge communities), at quilt guild meetings, or the friends we make along the way. We are often working professionals, empty nesters, or moms with small kids quilting when they sleep. We see quilting as our own time, and we take up "A Room of One's Own" and as much space in our homes as we can find.²⁵ We often become aggressive hobbyists and many start businesses that relate to quilting in one way or another. We come in all shapes and sizes, gender identities, and backgrounds. We sew in many styles - modern, traditional, improv, art, and with many techniques - piecing, foundation, English paper piecing, and applique, to name a few.

Traditional Quilts. This is probably what you think of when you think of quilting. Blocks repeating, or a sampler quilt. Think *Boisson v. Banian*, 273 F.3d 262 (2d Cir. 2001), a case about an alphabet quilt. These come in many forms and ways of construction from machine piecing to paper piecing and foundation piecing. There are a number of software programs that help design quilts using traditional blocks, including Electric Quilt, QuiltPro, and QuiltSoft. And many pattern makers make their bread and butter off of rehashing traditional patterns for beginning quilters to purchase (and then get incredibly protective of their "original" designs). Traditional quilting is plagued with copyright questions. At what point is something considered to have enough creativity to gain copyright protection? Using one common block repeating enough? Is the selection, arrangement, and coordination of how they are repeating? Does it force us into a novelty-like conversation? If the basic traditional quilts are not protectable, then when is a pattern sufficiently original (the directions, etc.) to be protected? How does the system work, exactly? And when something does strike the community as original, how much of a property right is given to that originality? It is a

²² JAFTEX, <http://www.jaftex.com> (last visit Jul. 26. 2022).

²³ AMERICAN QUILT STUDY GROUP, <https://americanquiltstudygroup.org> (last visited May 12, 2024).

²⁴ INTERNATIONAL QUILT MUSEUM, <https://www.internationalquiltmuseum.org>. See also *Quilt Studies*, UNIVERSITY OF NEBRASKA, LINCOLN, <https://cehs.unl.edu/tmfd/textile-historyquilt-studies-distance-learning-option-iii> (last visited May 19, 2024).

²⁵ VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (Hogarth Press, 1929).

community that is created in mimicking, copying, and reproducing the same quilts. It's part of the DNA.

Modern Quilts. Beginning around 2010, a movement that defined itself as sparse, black-and-white, elegant, and distinctly “new” developed. Modern quilting was born, but while looking a bit more hip, uses the same shapes, language and tools as traditional quilting. Copyright questions come to mind instantly: will their works that are more like minimalist art be protected by copyright? At what point is their work protectable? And how much is the idea the expression? When does merger occur? There are certain motifs, scenes a faire and stock characters that we see in their work. When does something originally expressive turn into merely an idea? Can we trace that occurrence?

Art and Protest quilting. Art quilts come in every manner imaginable. Bisa Butler's quilts are an example. Related are protest quilts, often incredibly powerful. We see examples with Black Lives matter, and the work of Chawne Kimber, and also after the election of Trump. *Threads of Resistance* was a particularly important exhibit.

In the Summer of 2017—just after becoming a full professor—I decided to start a new, fun, (what I thought would be) simple project: copyright and quilting. I would sew and think about copyright. I was introduced to a woman, Judy Walker, who had immersed herself in quilting. She invited me to her home where she opened me up to a world of quilts, and also her “stash” of fabric. Me, along with two research assistants, spent three days cataloging the selvedge licenses on fabric, and soon it was evident that the world was a lot bigger than I had previously believed. Judy was just the beginning. Then, in the Fall of 2017, I went to the International Quilt Market in Houston, the main trade show at that time for quilting. A whole new layer of this world emerged of inventions, entrepreneurs, artists, and consumerism. Some copyright questions too. From there, I started interviewing more people, and soon I realized that I wanted to share these interviews with others— and so the Just Wanna Quilt podcast was launched on Feb 5, 2018. And starting in 2018, I started to ask quilters about the role of copyright in their process, through a Facebook group I created, Just Wanna Quilt, and also a podcast of the same name.²⁶ A small research project came first and then the podcast followed.

For the podcast, I wanted to understand the ecosystem that quilting sat in. And as part of this, I had the experience of running a booth at a one of the largest's quilt shows and also a booth at the main trade show, self-publishing books, gaining a four-book contract with a craft publisher (with my co-author, Sidne K.

²⁶ In 2018, I began the podcast, *Just Wanna Quilt*, which has over 300 public episodes and 25,000 subscribers. We have had close to 1 million downloads. This was always what we called a “research” podcast. We did no advertising. We discussed people's lives, hobbies and businesses, and at the end of the hour, for the last fifteen minutes, I asked them about copyright and other IP issues that might have arisen with their work.

Gard), sold longarm machines (yes!), and tried all kinds of tools, techniques, kits, styles, and ideas for quilts. I also purchased way too much fabric (a sign of an American quilter these days), and I even have two wholesale accounts to purchase bolts of fabric. Many of my closest friends now come from the quilting world, my quilting family. What started out as a small academic project changed my life. And Sid and I are now getting ready to put on an exhibit on copyright and quilting in January 2025 at the New England Quilt Museum.²⁷ I am in deep, and throughout all of this, I think about copyright.

Before delving into the copyright questions, let's learn a little more about quilting itself. Whatever the style, quilting is really two processes: 1) the creation of the quilt top, and then 2) quilting together the top, the batting (in the middle), and the backing. Just as paintings have categories such as Impressionist or Cubist, so do quilts. Quilts can be traditional (think of a repeating pattern called blocks or a sampler quilt), abstract, applique, or art. They can be from a particular cultural group - Amish, Gee's Bend, or Hawaiian. And they can be made with different techniques. Bisa Butler used raw applique as the main technique. All of these categories describe the top of the quilt. The quilting—the binding of the three layers together— can be done by hand (sometimes on big quilting hoops), free motion machine quilting (most common on domestic sewing machines), or automated on a longarm (the latest thing). Quilts can take months to make or merely hours. They can be meant to be used and cuddled, cherished as family heirlooms, or hung on a wall. Quilting is both an art form and a craft, full of common tropes, techniques, and a common language. It is historic and contemporary.

What drew me to quilting was its rich tradition of common (public domain) blocks and passed on techniques. When I started I didn't realize that there were protest quilts, social justice quilts, modern quilts, quilts for massive drives for charity, and so much more. The quilting world is so much bigger than most realize. Bisa Butler's work lives within this world. And yet it also lived, for a time, at the Art Institute of Chicago.

There is no doubt that the Bisa Butler show at the Art Institute brought into focus quilting portraits and art quilts in the same way the abstract show in the Whitney challenged our notions that quilts could be art.²⁸ The Whitney show, fifty years earlier, showed traditional quilts that resembled abstract art, or at least what qualified as abstract to the collectors Jonathan Hostein and Gail van der Hoof.²⁹ There were sixty-one quilts, and they were chosen because they matched the aesthetic of modern non-objective paintings of the 1960s.³⁰ The show was

²⁷ Copyright Through Quilting, New England Quilt Museum, January-March 2025.

²⁸ As included on the International Quilt Museum website INTERNATIONAL QUILT MUSEUM, <https://www.internationalquiltmuseum.org/exhibition/adaq50> (last visited July 26, 2022).

²⁹ *Id.*

³⁰ *Id.*

powerful. What is interesting is that the colors the quilters chose is what made them feel modern—that is still true. But the quilts themselves, mostly from the 19th century, represented very traditional, core patterns that form the backbone of quilting: log cabin, nine-patch, sawtooth, crazy quilt, basket, strip quilting, double Irish chain, square in a square, flying geese, baby's block, roman square, to name the most recognized blocks.³¹ Quilting has a strong tradition of naming blocks so that we have a common language. The quilts of the *Whitney* show were these kinds of quilts.



In many ways, quilts bring us to the most basic questions: when do we go from unprotectable to protectable? This is one of the questions I ask every night as I quilt. When do common blocks create something protectable? When do circles create a copyrighted work?

³¹ *Id.*

B. The Act of Creating with an Eye on Copyright



Long before Butler's exhibition at the Art Institute, I had begun a routine back in New Orleans. It started that summer of 2017 and continues to this day. At about 10 pm when the family is off somewhere else in the house and I'm done with the work I need to do, I stumble up to bed, having to pass the quilting "studio" to get there. Most nights, I detour and stay a few hours. I quilt and think about copyright. We've already found the heart of the struggle: When does something I make transform from a non-protectable element to a protectable, copyrighted work? My copyright musings are embedded in the process of making each quilt.

As I worked with Fred Yen (at the time the Editor-in-Chief of the Journal of the Copyright Society), we talked about how to convey this ongoing inner (and outer) dialogue, and how to write about thinking about copyright as part of the creation process. I've broken it down by some examples of concepts in copyright, familiar to us all. But there are many more.

1. Idea/Expression and Property Boundaries

These turn out to be a hard concept to understand in the quilt studio, or maybe any artistic practice. When does an idea turn into an expression that is protectable, and how far does that property right extend? How do you communicate what is protectable and what is not to others who might want to make what you have just made? And what happens when your idea is to borrow from a variety of patterns and techniques? How much have you created a derivative work, and could it be seen as unauthorized? What happens then, and how much do you need to alter to

make it legitimately either its own work or a derivative work? This is, in great part, what our book *Just Wanna Copyright for Makers* has ended up focusing on.³²

Let's go back to Bisa Butler's work. The idea of taking a photograph and using fabric to paint the contours is not protectable. The idea of taking purple, pink, and blue solid fabrics to use as skin is also not protectable. The idea of clothing having patterns but the skin being in solids is not protectable. And yet when she creates the work, there is no doubt that a copyrightable work has been born. If another artist comes along, how much of what Butler has done can he take and replicate?³³ What is the property right in her work? What is the boundary of that property right?

Take, for instance, Lyric Kinard, who also works with photographs and the same color palettes to create portraits. Lyric teaches techniques to average everyday quilters on how to create these portraits.³⁴ However, she is clearly not as careful about using copyrighted images as Butler is. She has even advertised with them. How do we understand the use? How are these portraits different from Butler's?



³² Sidne K. Gard & Elizabeth Townsend Gard, *Just Wanna Copyright for Makers*, C&T PUBLISHING (forthcoming Dec. 2024).

³³ Interestingly, at this moment, none of Butler's works appear to be registered with the U.S. Copyright Office, not even the exhibition catalog. One wonders if this oversight will change with the upcoming Copyright Claims Board under the CASE Act. Will artists recognize and take advantage of the new system, or does enforcing copyright not actually enter into their thinking? One more layer to a complicated story.

³⁴ She writes, "[P]lacement and proportions for making realistic shapes, what makes a photo good to work with, how to trace a photo to make a pattern for applique, how to use apps to speed the pattern making process, and tips for quilting human faces." 3rd Live Class Open Enrollment + Pioneer Quilt Guild, Lyric Montgomery Kinard, 2021.

And, similarly, award winning quilter Hollis Chatelain is famous for her courses for fiber artists. She teaches multi-week courses geared to the study of the technique on a more deeper level. Many fiber artists study for years with her to continue to work on their techniques. All of these examples use photographs and images, not just as inspiration but as the underlying work on which they build.



And finally, take the example of Gio Swaby.³⁵ In 2023, art quilter Gio Swaby also had an exhibit at the Art Institute.³⁶ Hers did not have banners outside, but was in the fiber area of the museum, in the basement. It was a beautiful exhibit. She uses photographs as well, but transforms them by using the longarm to stitch black lines that paint the outlines of a photograph and then adds bits of fabric as accents. They are in the same genre as Butler, Kinard, and Chatelain, but they are also entirely different.

³⁵ GIO SWABY, <https://www.gioswaby.com/> (last visited July 30, 2024).

³⁶ Gio Swaby: Fresh Up, ART INSTITUTE OF CHICAGO (April 8-July 3, 2023), <https://www.artic.edu/exhibitions/9869/gio-swaby-fresh-up>.



These four artists—Butler, Kinard, Swaby, and Chatelain—use the same techniques: photographs as a base, covered in fabric and thread painting techniques. But they produce very different works. Distinguishable. Copyrightable. Do we intuitively know the boundaries? Are there unspoken rules of how far one could go? Do harms like passing-off come into play, where copyright might fail? How do you communicate those boundaries to artists? Is it something one can communicate?

2. *Someone Else's Idea*

I have an idea to take a 3" square of every fabric I own and sew them together by color, otherwise known as an "inventory quilt." Actually, this was *someone else's idea*, a quilter that goes by Jessica Quilter.³⁷ I changed the shape of her version from hand-pieced hexagons to machined-pieced squares (out of laziness and efficiency). I arrange them by color, a kind of rainbow. But she did that first. I think most people would see that I had significant inspiration from her work. At what point is mine an infringement of hers?

But wait! Was that her original idea? I reach out to Jessica and ask for permission to create my own, and also to have my Facebook group create their

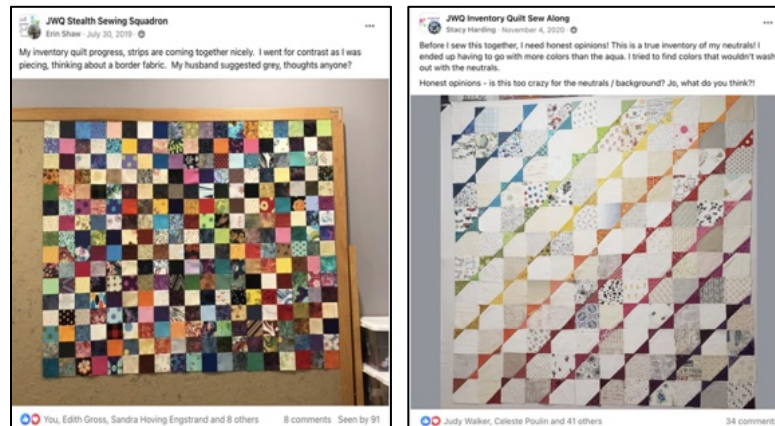
³⁷ Jessica Quilter, <https://jessicaquilter.com/>. The inventory quilt is featured on her website, as part of "Quick Tutorials: Four Scrap Quilt Projects," available for \$6. <https://jessicaquilter.com/products/quick-tutorials-four-scrap-quilt-projects-pdf>.

own as well. She is flattered. I give her credit for the idea of an inventory quilt. Did I need to do this? I think about the right of attribution (and does VARA extend to quilts?). The idea of the inventory quilt is, of course, not protectable. But where do copyright boundaries begin, and could my version of an inventory quilt have been considered infringing without these steps? Must we all be more cautious? Will the CCB make it so we have to be more cautious?



Jessica Quilter's original version *Mine*

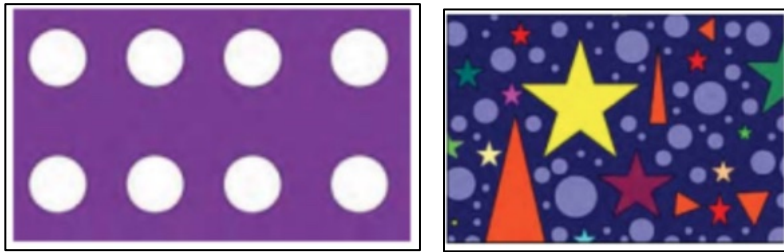
And here are some more. (We started a sub-Facebook group).



3. Modicum of Creativity

When does a quilt have enough modicum of creativity? With Butler's work, there is no question she has created a copyrightable work. Many times, it seems,

that is where we should begin the inquiry; not every quilt that is created, not every piece of art, rises to copyrightability. Let's go back to the quilt studio. I start with a set of fabrics—all solids—and decide I want to use a particular shape or set of shapes. I'm exploring geometry and color. I take unprotectable shapes and unpredictable solid color fabric, and combine them into my own version of something. At what point is what I create enough for copyright protection? Would a single color background with a single shape in a different color be enough?³⁸ Would the answer be different if you were a painter? The Copyright Office's Compendium III tells us that a domino-like drawing (two sets of four circles on two rows) is not enough to gain protection but a jumble of shapes is.³⁹ The first, the purple one, is, according to the Compendium, not protectable; the second one is.



What about this collection of circles by a fellow quilter, Misty-Anne Marigold. Are these quilts protectable? What if she disclaimed the decorative quilting? And we know that the more circles, the more likely of protection. When do Misty-Ann's circles have enough creativity to become something protectable?



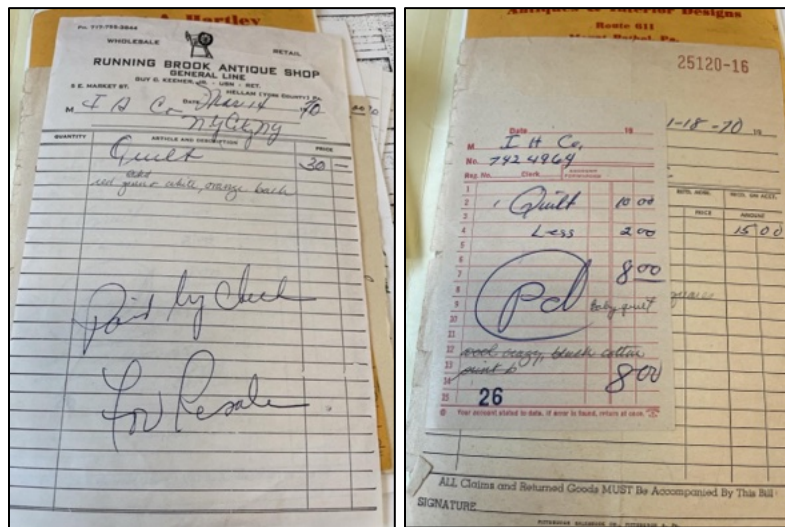
³⁸ A new paper that I'm working on asks these questions in more detail: when do we know when a work has risen to not just copyrightability, but registrability? We will be submitting a variety of quilts to the Copyright Office to see what response we get.

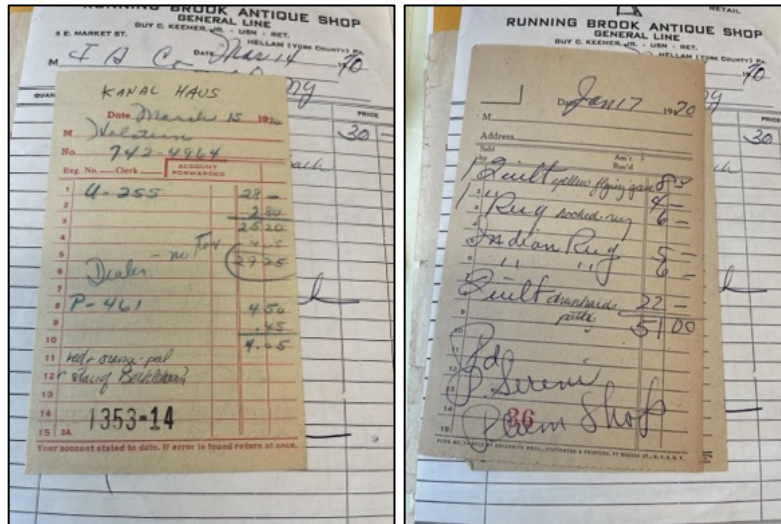
³⁹ U.S. Copyright Office, Compendium of U.S. Copyright Practices § 101 (3d ed. 2021).

And in the end, is copyright protection the end goal? Should this be something artists are reaching for? Or should they be focused on their artistic expression? Does it matter? (Brian Frye, an artist and law professor, believes it does not.) And what would the status be if this was a painting? So many paintings, including famous geometric paintings.

4. *Could Most Traditional Quilts be Unprotectable?*

This line of questioning becomes particularly important when you flash forward to wanting to reproduce old quilts. It is often impossible to determine the copyright status and so many of them are orphans, sold at auction and the author is long-unknown but they are not old enough to be fully cleared from potential copyright protection. For instance, a number of quilts were donated to the International Quilt Museum, but when you go to the archives connected to those quilts, you find handwritten receipts saying “quilt,” with no reference to which quilt. And the quilt that had been sold has no provenance or labeling on it, and certainly no copyright notice.



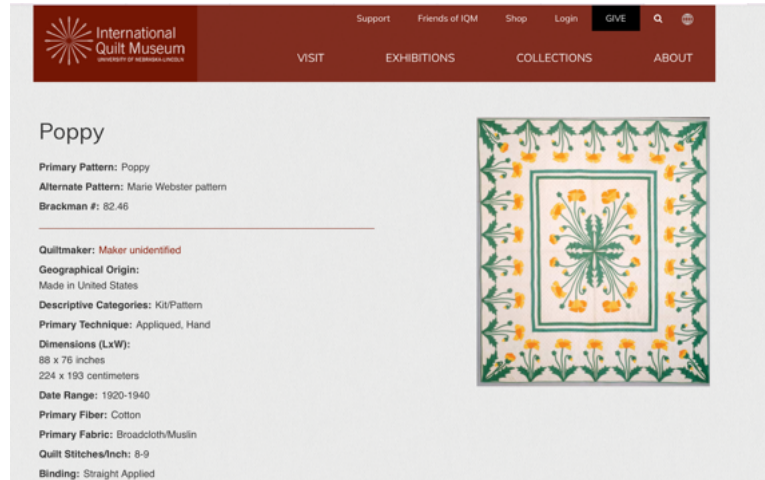


Without copyright notice and transferred in one way or another, eventually finding their way to an auction, a thrift store or antiques shop, is that enough for publication? Or are they all still unpublished, and therefore covered by Section 303(a)? And then there is the anonymity factor. If there is a name related to the quilt, do we take the copyright status more seriously? Copyright has a mechanisms to deal with anonymous works, but that would put these orphans under copyright for quite some time. These are the questions I ponder as we work on another project of reproducing patterns of quilts held by museums around the world. Sometimes the museums mark the quilts (or at least the images of the quilts) with CC0, while sometimes they are claimed to be under copyright. This doesn't seem to be based on solid copyright law, but risk from the museum's part. And so another layer is thrown in: how does someone coming to these quilts actually know the status? There is no consistency with what we are finding.

And another hiccup. We don't know if the quilt we are seeing in front of us is from a published pattern or is an original. I think about the early 1900s Marie Webster quilt kits, a famous quilter who had a huge commercial kit business.⁴⁰ With a bit of research, you would know these are out of copyright because they were published in magazines and kits were sold, and we can trace them back to their first publication or sale. Take these examples, the International Quilt Museum lists Marie Webster as the creator, but the *maker* (the one who put the kit together) is unknown. We know that the maker doesn't gain copyright (usually)—that they are just reproducing the kit under an implied license when

⁴⁰ See Marie Webster, Quilters Hall of Fame, <https://quiltershalloffame.net/marie-webster/>.

you purchase a kit. But we are not always so lucky with most patterns. I ponder and keep sewing.



An example of a Marie Webster kit made by an unknown maker. This version is housed at the International Quilt Museum.

I keep thinking about all of those not-famous kits out there, and patterns in all of those 19th/early 20th century magazines and newspapers. How would you ever know if the quilt you were looking at came from one of those? I think the saving grace is that so many of the patterns and motifs in quilting are so ubiquitous, no one would think they were under copyright, at least with patterns that have been around a long time.

5. Something New from Something Long Established

I have an idea to make a quilt that is a traditional pattern. A long known pattern. I choose a disappearing four-patch block, using two fabrics. We have many names for common blocks. I get a bit tired half way through and decide to do only half disappearing/half regular four patches. And I add unusual borders. I'm very pleased with my creation. I've taken something traditional and made it my own. I've fixed my ever changing idea into fabric. I think about the records I might need to keep to prove when and how I created this very simple quilt. Maybe I shouldn't post what I'm doing, just in case someone might "steal it." Someone might get upset that I subconsciously infringed their design; someone might steal mine (whatever); or maybe none of this is protectable, and so post, post, post. But maybe what I did is just not good enough, and might be ridiculed on social media. Maybe I shouldn't post.

6. *First Sale Doctrine and Licensed Sports Fabrics*

As mentioned already, part of the project has included starting the *Just Wanna Quilt* Facebook group, which now has over 4,500 members and who post about quilting and (yes) copyright. So, what's up tonight? "What about licensed fabric," someone asks. Good question. I ask the group about their experiences. Philipa C. commented:

I basically only use licensed fabrics. I sell [my creations using them] at markets and on Etsy. I've had two accounts suspended because of questions about licenses but that's 2 in 5 years. One was *Minecraft* fabric and Etsy got a complaint and they suspended the listing and I was told to work it out with the complainant. I just left it. The products sold at [in person] markets [instead]. The second one was some *Doctor Who* fabric—same story. Same action by me. I wasn't sure how to combat the complaint even though other *Doctor Who* fabric products weren't challenged in my shop and there was[sic] plenty of other products in the same fabric on Facebook....

Other quilters and makers comment that they use licensed fabrics including Kermit, Snoopy, Transformers, Disney Princesses, John Deere, Winnie the Pooh, Sports teams, Harry Potter, DC Comics, My Little Pony, among others. Will these kinds of disputes find themselves at the CCB? And who might bring them?

The question turns into a different conversation: how far can you go in what you make if you purchase authorized, licensed materials? I share my own experience. I buy a *Star Wars* quilt kit (I did), and I make it for the Public Interest Law Student auction (I did), and it fetches a mighty price (it did). I donated it. I paid for the kit. I mixed my labor with the directions given, and added a little bit more flair. Does this act of sewing give me the right—first sale—to do with it what I want? The local quilt shop thought it didn't. Couldn't I get in trouble, the owner asked? Never crossed my mind.

I purchased Saints fabric to make masks during COVID-19 (I didn't). I've paid retail for the fabric (I didn't). I sell the masks online (I didn't). Does this fall under First Sale, or does it violate the "personal use" license printed on the selvedge of the fabric? Some sellers of masks found themselves getting into trouble. But then there is the question of notice. What happens when the local quilt shops cut the same Saints fabric into fat quarters, where three of the four pieces of fabric will not have the license? How would the quilter know? Is this enforceable? Etsy will be the enforcer, of course, but how should I respond?

These are just a few examples of the sets of questions I've been asking every night for years. There are gobs more. I muse. I sew. I ponder. I've made about 125 quilts in six years. I've asked myself a lot of copyright questions. Throughout my time in the studio, I take breaks and I reach out to the Facebook group to see what they think and the experiences they have had. My Facebook group *Just*

Wanna Quilt has become a de facto headquarters for reporting problems and asking copyright questions. Sometimes they are quibbles that are silly. Some are more serious. And until the CASE Act, most of these were resolved by either Section 512, with a cease-and-desist letter, often public humiliation/social media pressure (it can get brutal), or the copyright holder and/or accused infringer just give ups. How will who we are and the actions we take change now that there is a place to claim small, alleged infringement? It's still too early to tell even two years in...we've not had a quilting claim, even though I try to encourage them to file. (Believe me, I ask.)

But the question is still there. How would the CCB impact on this balance of creating and creativity, and would it supply the compensation that smaller players were looking for when infringement occurs?

II. ENTER THE COPYRIGHT CLAIMS BOARD

If I actually gain copyright in one of my quilts, I have the right to enforce that copyright.⁴¹ Now we have an affordable means to do that, right? The jury is still out on that. But this is not an analysis of the CCB. We have a lot of those papers (even in the Copyright Society Journal in this issue!).⁴² What I wanted to know is do we get an indication on how the CCB is approaching creativity—and the boundaries of that—through the Final Determinations over the first two years. Now there are other ways to attack this question: the claims being filed, the noncompliance responses to those claims, etc. But the final determinations are claims that made it all the way through the process and the three-panel officers wrote an opinion about the situation. Do we find the kinds of questions I am pondering as part of those final determinations? Are makers like my quilters testing boundaries or thinking about the role of copyright within the making process? I imagine you would guess, no. I would say that some boundaries are being confirmed by the Final Determinations, and in at least one case, some of the questions I am asking here briefly entered into the conversation. Let's contextualize what the CCB is, and then look at some of the final determinations so far. The system was created for photographers and others who felt the current system gave them no place to have their infringement claims addressed. The nagging question remained: Would this work to alleviate that problem? And for me, would it support or hinder creativity?

A. Background

On December 21, 2020, Congress passed the Copyright Alternative in Small-Claims Enforcement Act of 2019 (the CASE Act), as part of the COVID-19 relief

⁴¹ One of my current projects aims at registering common, traditional quilts to see when the Copyright Office sees them as copyrightable.

⁴² See Katie Fortney & David Hansen, *Assessing the Copyright Small Claims Board After Two Years*, 70 J. COPYRIGHT SOC'Y 140 (2024).

package, and six days later, on December 27, 2020, Donald Trump signed it into law.⁴³ The law is spelled out in the new Section 15 of the 1976 Copyright Act, which lays out not only the subject matter and damages, but also the construction of the Copyright Claims Board.⁴⁴ It is dense and full of detail. In short, the system created a voluntary (you can opt-out), virtual, and less expensive alternative to federal court.⁴⁵ It also focuses on four kinds of subject matter: Section 106 rights, declaration of non-infringement of a Section 106 right; claims and counterclaims under Section 512(f), and “legal or equitable defenses related to the claim or counterclaims.”⁴⁶ Damages are limited.⁴⁷ The process is streamlined and online. And so the Copyright Office got to work on building a new adjudication system, the Copyright Claims Board.⁴⁸ This meant creating structures, an online platform, hiring a staff, and building resources that would communicate the new system not just for copyright attorneys, but the general public as well, as the new small claims system was billed as “pro se” friendly.⁴⁹ And as they built the system, they put out several “Calls for Comments” totaling nine in all.⁵⁰

The first Call from the Copyright Office was general and procedural focused; a kind of what do you think, y’all?⁵¹ The call itself focused on procedure: the opt-out procedures; initiating a procedure, including notice; service of process and

⁴³ Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, Div. Q, Title II, § 212 (2021).

⁴⁴ 17 U.S.C. § 1501, et. al.

⁴⁵ *Frequently Asked Questions, About the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://www.ccb.gov/faq> (last visited Jul. 27, 2022).

⁴⁶ 17 U.S.C. § 1504(c).

⁴⁷ *Frequently Ask Questions*, *supra* note 45.

⁴⁸ *Id.* See also, *About the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://ccb.gov/about/index.html#fees> (last visited Jul. 27, 2022).

⁴⁹ *Copyright Small Claims and the Copyright Claims Board*, COPYRIGHT CLAIMS BOARD, <https://www.copyright.gov/about/small-claims> (last visited Jul. 27, 2022).

⁵⁰ *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 Rulemakings*, COPYRIGHT CLAIMS BOARD, <https://www.copyright.gov/about/small-claims/related-rulemakings.html> (last visited Jul. 27, 2022).

⁵¹ *Comments and Reply comments*, CASE ENFORCEMENT ACT REGULATIONS, <https://www.regulations.gov/document/COLC-2021-0001-0001/comment?pageNumber=2>, and the usual players were there, and some others too: Google, Amazon, Verizon, Electronic Frontier Foundation, various library associations and individual librarians/general counsel representing academic libraries including Library Copyright Alliance, University of Michigan, University of Illinois, and AALL, Author Alliance, the American Bar Association, the Internet Archive, Patreon, Science Fiction and Fantasy Writers of America, Computer and Communications Industry Association, Public Knowledge, Engine, Songwriters Guild of America, Coalition of Visual Artists, MPAA, RIAA, Software and Information Industry Association, AIPLA, Spotify, University information Policy Officers, Association of Medical Illustrators, and the Copyright Alliance.

designated agent; library and archive preemptive opt-out; practice and procedure including discovery, protective orders, and Respondent's Default and Claimant's Failure To Prosecute; smaller claims; evidentiary rules; fees; permissible number of cases; conduct of parties and lawyers; and a catch-all category of "other subjects." Forty-eight comments and reply comments were posted.⁵² What I was curious about was how creative artists (broadly defined) responded to the new small claims and this general call.

The Copyright Alliance represented nearly every major creator group, including photographers, artists, and others.⁵³ That makes it important to understand where they stood. The Copyright Alliance outlined a step-by-step process that they believed the Copyright Office should adopt, and were most enthusiastic about a template to fill in the complaint.⁵⁴ They went so far as to suggest they need to include a docket number as well.⁵⁵ My question was, did they discuss *the what*: copyrightable subject matter, and making sure that the nature of creating was protected both from infringement and over protection. No. They did include their thoughts on fair use, however: "Several commenters suggest that claims involving fair use should be excluded from the CCB. This suggestion is completely unworkable and should be given no consideration by the Office. Suggesting that excluding any case that involves a fair use defense is simply these commenters' way of trying to undermine the CASE Act since many CCB cases may include fair use claims, regardless of the soundness of the claims."⁵⁶ They

⁵² *Copyright Alternative in Small-Claims Enforcement Act Regulation*, COPYRIGHT CLAIMS BOARD, <https://www.regulations.gov/document/COLC-2021-0001-0001/comment> (last visited Jul. 27, 2022).

⁵³ The Comments and Reply Comments by the Copyright Alliance represented the American Photographic Artists (APA), the American Society of Media Photographers (ASMP), the Author's Guild, Creative Future (a non-profit coalition with over 560 companies and organizations and more than 260,000 individuals from film, television, music, book publishing, photograph, and other creative industries), Graphic Artists Guild, Independent Publishers Association (IBPA), Music Creators North America (MCNA), National Music Council of the United States (NMC), National Press Photographers Association (NPPA), North American Nature Photography Association (NANPA), Professional Photographers of America (PPA), Recording Academy, Society of Composers and Lyricists (SCL), Songwriters Guild of America (SGA), Songwriters of North America, and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA).

⁵⁴ Copyright Alliance, Docket No. 2021-1, Comments of the Copyright Alliance, APA, ASCRL, ASMP, the Authors GuildS GUILD, Creative Future, DMLA, Graphic Artists Guild, IBPA, MCNA, NMC, NPPA, NANPA, PPA, The Recording Academy, SAG-AFTRA, SCL, SGA, AND SONA, COLC-2021-0001-0024

⁵⁵ *Id.* at 12.

⁵⁶ *Id.* at 20.

recognized also that fair use is part of the 512(f) analysis, which may also be overseen by the CCB.⁵⁷ That's it. Nothing else regarding subject matter.

The Coalition of Visual Artists added comments to their Copyright Alliance comment, with organizations focused on visual arts.⁵⁸ Theirs were also procedural. No discussion of how to address specific issues arising in visual arts. In general, they wanted the process to be accessible to pro se litigants.

The Songwriters Guild of America also joined the Copyright Alliance comments, and added their own.⁵⁹ Both SGA and SCL have been deeply involved in the legislative process concerning from the beginning (with SGA's advocacy concerning small claims initiatives stretching back nearly two decades), and have filed numerous and extensive comments regarding its enactment and implementation with Congressional Offices, the United States Copyright Office, and other US Governmental departments and agencies.⁶⁰ They were concerned with the opt-out procedure and filing fee burdens.⁶¹

The Science Fiction and Fantasy Writers of America (SFWA), which consists of over 2000 commercially published sci-fi writers, also shared their apprehension of the CCB: "Although it's difficult to envision exactly what kinds of cases will be brought before the CCB, we can say that it will not be useful for many if not most of SFWA's membership, that is, writers who publish novels and short fiction."⁶² In particular, they had three concerns: locating infringers, fearing the opt-out system, and fearing that to be successful, you would need a lawyer, which would be expensive.⁶³ They also discussed the procedural questions proposed, and end with larger warnings: "We do not want to see a process in which the only infringers who are caught up in the system are grandmothers or their equivalents, who post memes or other material on the Web under their real names and can be easily talked into opting in. It would be ironic and defeat the fundamental purpose of the CASE Act if the result was that the only people who find themselves before the CCB are those who are least likely to cause significant damage."⁶⁴ This is really the only place I found someone expressing these fears regarding creativity.

⁵⁷ *Id.*

⁵⁸ They include which include American Photographic Artists, American Society of Collective Rights Licensing, American Society of Media Photographers, Digital Media Licensing Association, Doniger/Burroughs PD, Graphic Artists Guild, National Press Photographers Association, North American Nature Photography Association, Professional Photographers of America, and Shaftel and Schmelzer.

⁵⁹ *Comments of the Songwriters Guild of America, Inc. Joined by the Society of Composers & Lyricists Endorsed by Music Creators North America, Inc.*, Songwriters Guild 2 (2021), http://columbialawreview.org/wp-content/uploads/2009/03/1_Simons.pdf.

⁶⁰ *Id.*

⁶¹ *Id.* at 3.

⁶² Science Fiction and Fantasy Writers of America, *Comments Concerning Proposed Regulations for the CASE Act*, COLC-2021-0001-0033_attachment_1.pdf.

⁶³ *Id.*

⁶⁴ *Id.* at 5.

One particularly odd configuration was related to fair use and the Electronic Frontier Foundation (EFF). EFF is also concerned about jurisdiction issues and fair use, and reminds the Copyright Office that jurisdiction is covered by Section 1506(a)(2). EFF wants the CCB to decline to hear cases where fair use applies.⁶⁵ In contrast, the MPAA, RIAA, and SIIA in their Reply Comment urge defenses be allowed, including fair use.⁶⁶ They recognize that not including defenses like fair use would “significantly diminish the utility of this forum.”⁶⁷

This is just a small sample of the comments. When I read this, I became concerned that the process of creation might get lost in the procedure of the system. How does a small claim court impact the process of creating? How will the CCB be able to quickly understand various areas of creative specialization, like we’ve seen with quilting? Will that be up to the plaintiffs or defendants? No one seemed that concerned that the CCB would help to draw micro boundaries of creativity.

B. Reviewing the CCB: Final Determinations

We have had a lot of articles evaluating the first year of the CCB, and likely we will have more with the close of the second year. What I want to focus on here is the CCB interpreting the boundaries of copyright. To do that, I decided to focus on final determinations.

The CCB process has many steps, and at any of those steps, the process can end. To reach the end of the game, so to speak, the last step is the Final Determination. So far there have been less than two dozen in the first two years. What I wanted to know is whether we see questions of creativity and copyrightability at the heart of any of the arguments. So far, we mostly see cases of unauthorized uses of professional photographs on commercial websites, where

⁶⁵ “Given the fact-intensive nature of fair use and the wide variation in fair use case law across different jurisdictions, the Copyright Office should consider instructing the CCB to decline to hear cases where fair use is or is likely to be raised. The Copyright Office should consider creating regulations that instruct the CCB to determine if a claim is likely to have fair use implications. If it does, the claim should not be accepted and the claimant should not be allowed to serve the would-be respondent.” *Id.* at Science Fiction and Fantasy Writers of America.

⁶⁶ Science Fiction and Fantasy Writers of America, *supra* note 62. “Congress clearly intended that CCB will adjudicate cases involving fair use. See 17 U.S.C. §1504(c)-1504(c)(5) (“The [CCB] may render determinations with respect to . . . [a] legal or equitable defense under this title or otherwise available under law, in response to a claim or counterclaim asserted under this subsection.”); see also H.R. Rep. No. 116-252,10 at 25 (noting in the context of default that “the Board [CCB] is expected to carefully scrutinize the available evidence, and consistent with district court practice, [] consider applicable affirmative defenses *such as fair use*, where warranted by the circumstances of the case.”) (emphasis added). Congress surely would not have intended that the CCB consider fair use *sua sponte* when the respondent defaults, but not when it appears to assert such a defense.”

⁶⁷ Science Fiction and Fantasy Writers of America, *supra* note 62.

the Board awards three times the licensing fee to the Claimant, with an average award of about \$1000 per work.⁶⁸ As noted, that was what the CCB was designed

⁶⁸ Of the 20+ final determinations so far, ten have been focused on unauthorized use of professional photographs on commercial websites. The CCB awarded \$1000 in statutory damages to David Oppenheimer, for unauthorized use of a photograph being used on a website. Final Determination, David G. Oppenheimer v. Douglas Pruttton, No. 22-CCB-0045 (Feb. 28, 2023). <https://dockets.ccb.gov/document/download/2220>. The Work in question was created for a client for PacifiCare, and she also uploaded versions of the shoot for licensing as stock images. Using a reverse-image tracking technology, claimant discovered that one of his photos was being used on a business website without permission. The Board decided as a deterrent to set damages as three times Hursey's lost licensing fee. Final Determination, Hursey v. Lavaca, No. 22-CCB-0056, (Aug. 24, 2023), <https://dockets.ccb.gov/document/download/4770>. Roger E. Quinney had committed copyright infringement, and the Board awarded to Dana Hurley \$3000. Same scenario in many ways as the previous one — Hursey finds an unlicensed photograph being used on a commercial website. Again, three times the licensing fee. Final Determination, Dana Hurley v. Roger E. Quinney, No. 22-CCB-0163, (Aug. 31, 2023), <https://dockets.ccb.gov/document/download/4845>. An award of \$3000 in statutory damages to Joe Hand Promotions for copyright infringement. Here the claimant specializes in commercially licensing sporting events to commercial locations. Here the work was a boxing event that was televised, and registered as a copyrightable work. Claimant collects a licensing fee from establishments to show the event. Respondent had not gotten a license. The Board granted statutory damages as 3 1/2 times the licensing fee, or \$3000. Final Determination, Joe Hand Promotions, Inc. v. Arif Skyline Cafe, LLC, No. 22-CCB-0098, (Sept. 22, 2023), <https://dockets.ccb.gov/document/download/5151>. There were others as well by Joe Hand Productions that had similar outcomes, including Final Determination, Joe Hand Promotions, Inc. v. The Village Restaurant, October 4, 2023, this time for \$3300 in statutory damages, which was between three and four times the licensing free. Final Determination, Joe Hand Promotions, Inc. v. The Village Restaurant, No. 22-CCB-0100, (Oct. 3, 2023), <https://dockets.ccb.gov/document/download/5377>. And there was a third case, Final Determination, Joe Hand Promotions v. Mary A. Dawson, No. 23-CCB-0071, (Jan. 2, 2024), <https://dockets.ccb.gov/document/download/6482>, but here the Board did not find personal liability against the respondent. Urbanlip, a UK photo licensing agency filed a copyright infringement claim against Faviana for using a photograph without a license on their commercial fashion website. The Board awarded \$2600, which was three times the licensing fee. Final Determination, Urbanlip.com LTD v. Farina International, No. 22-CCB-0137, (Sept. 26, 2023), <https://dockets.ccb.gov/document/download/5731>. Claimant received \$1350 in statutory damages for unauthorized use on a commercial website of claimants photographs. Again, this is three times the licensing fee. Final Determination, Dermansky v. Rule 72, No. 22-CCB-0005, (Nov. 1, 2023). Corjulo, a photojournalist took photographs on a four-month long project, and later he found them displayed without his permission on a commercial website. In this case, we see respondent make a fair use defense, which the Board does not aggr with. The Board awarded \$750 per image infringed for a total of \$2,250 in statutory damages. Final Determination, Daniel C. Corjulo v. Scott Mandrell, No. 22-CCB-0008, (Dec. 14, 2023), <https://dockets.ccb.gov/document/download/6285>. Claimant, a professional photographer, holds the copyright in two photographs of Columbia University gynecologist Robert Hadden, who was indicted for sexually assaulting his patients. Respondent owns a website

for: photographers. So we see many photographers upset that they are not getting paid a licensing fee when their images are used on websites—that’s a lot of what we see.

For me, this brings up a lot of questions. Photographs are easily registered (up to 750 under one application), and it appears that they have a very low threshold for copyrightability. Think quilt blocks. There’s a little bit of choice in what fabrics you choose when creating a quilt or a series of blocks. But is that enough? What is the right modicum? We also see that copyrightability in other areas is more arduous, including logos and jewelry, with many more application rejections.⁶⁹ We have now created a system of enforcement, focused on photographs which have sometimes the thinnest and most quickly reviewed for the purposes of copyright registration.⁷⁰ Is this system disproportionately benefiting one group? I think we might need to revisit the meaning of photographs, copyright registration and enforcement, particularly with the CCB’s triple damages for unauthorized use of photographs found on websites. One group gets protection and enforcement that is kind of out of balance with the rest. But at the moment, the new world and lesson seems to be: use an unauthorized photograph on your website? Play triple the damages in licensing fees, should the claimant file with the CCB, and you don’t opt out of the proceedings. Could this be something that happens with quilts and other creative areas? How would the CCB know what is non-protectable and what reaches copyrightability? And what happens if there isn’t a licensing fee involved? I am thinking again about the orphan quilts.

Besides the photographers, we know that others are also using the system. We have instances of literal coping including a final determination for a professor’s prompt uploaded to EssayZoo, an unauthorized broadcast of a boxing

www.scdaily.com, a Chinese language news publication, which used the image without paying a licensing fee, and placing the photograph near commercial advertising. Statutory damages of \$3600 was awarded, \$1800 for each photograph used. Final Determination, Steven Hirsh v. Southern Chinese Daily, No. 22-CCB-0255, , (Feb. 14, 2024), <https://dockets.ccb.gov/document/download/7037>. Tom Schirmacher, a professional photographer, discovered unauthorized use of a photograph on a commercial website. The Board awarded \$7,000, or three times Schirmacher’s lost licensing fee. Final Determination, Tom Schumacher v. Allora Medical Spa, No. 22-CCB-0183, (Feb. 16, 2024), <https://dockets.ccb.gov/document/download/7056>

⁶⁹ Zvi Rosen, *Examining Copyright*, 69 J. COPYRIGHT SOC’Y 481(2023).

⁷⁰ Elizabeth Townsend Gard and Blaze D’Amico, Comment for Artwork Group Registration Category, March 28, 2024, <https://www.regulations.gov/document/COLC-2024-0003-0001/comment>

match,⁷¹ a *pro se* musician that got a little confused,⁷² and we also had the first Final Determination of the system be a question of ownership.⁷³ So mostly literal copying. But there are two that are interesting, for our purposes.

We have had one Final Determination settlement related to a *craft!* Let's take a closer look.⁷⁴ Pinwheel Crafts created fairy silhouettes and registered them with the U.S. Copyright Office. The respondent, Mary L. Pettit, allegedly used Pinwheel's artwork and sold infringing products online. The CCB issued an order to Amend Noncompliant Claim. This happens a lot, giving us insight into what makes it over the basic threshold. In this case, the CCB was asking for proof of access and substantial similarity. And so, Pinwheel Crafts amended the claim.

We get a response from the respondent, Mary Pettit! She is making a non-protectable argument. There appears to be a check-box just for that "The portions of the work you used are not protected by copyright." She responds:

Fairy silhouettes of all types and in myriad styles and poses have been known long before Claimant's allegedly protected work was allegedly

⁷¹ Against an award of \$3000 in statutory damages to Joe Hand Promotions for copyright infringement. Here the claimant specializes in commercially licensing sporting events to commercial locations. Here the work was a boxing event that was televised, and registered as a copyrightable work. Claimant collects a licensing fee from establishments to show the event. Respondent had not gotten a license. The Board granted statutory damages as 3 1/2 times the licensing fee, or \$3000. Final Determination, Joe Hand Promotions, Inc. v. Arif Skyline Cafe, LLC, No. 22-CCB-0098, (Sept. 22, 2023), <https://dockets.ccb.gov/document/download/5151>

⁷² Michelle Shocked files to CCB claims, one that she was awarded \$750 for and the other that should never have been filed. Michelle Shocked was awarded \$750 in statutory damages for copyright infringement. Shocked is the copyright holder of a musical work and sound recording, both titled "Anchorage." Part of the song was played with authorization on an online show "Get Off My Lawn." Respondent asserted a fair use defense. The Board did not find fair use, and awarded the minimum in statutory damages of \$750. Final Determination, Shocked v. McInnes, No. 22-CCB-0263, (Feb. 8, 2024), <https://dockets.ccb.gov/document/download/6941>. Shocked filed a second CCB claim against James Billington. This one is more complicated. Someone bought at Goodwill a bootleg copy of Shocked works for a \$1, and resold it on eBay for \$13.95. She filed a claim against Billington. The Board found that this claim should not have been filed. Had the Claimant been represented by an attorney, the Board would have found bad faith and be made to pay Respondent's costs. But she was filing *pro se*. Final Determination, Michelle Shocked v. James Billington, (April 3, 2024). This is an example of more information being available to understand copyright (and the first sale doctrine) for *pro se* applicants.

⁷³ The first final determination was a Section 512(f) misrepresentation claim where respondent filed a knowingly false takedown notice to Google. At a settlement, the Respondent conceded that he did that, and promised not to do that again, and would inform Google. Final Determination, Michael Flores v. Michael Mitrakos, No. 22-CCB-0035, (Feb. 15, 2023), <https://dockets.ccb.gov/document/download/2124>.

⁷⁴ Final Determination, Pinwheel Crafts v. Mary L. Pettit, No. 22-CCB-0251, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

made “visible online” in 2018. As just one universally famous example, Disney’s Tinker Bell from the 1950s Peter Pan movie (based on a 1904 book replete with fairy images that is now in the public domain) has long been depicted in silhouette form in every conceivable pose for decades, including the bun hairstyle, pointed wings, wispy bangs, long eyelashes, short pointed skirt, and other allegedly expressive elements depicted in Claimant’s allegedly protected and allegedly infringed work.⁷⁵

This is thrilling!

The Pinwheel Copyright art image consists of approximately 23 separate silhouettes (e.g., crescents, stars, butterflies, mushroom, rabbit, grass, fairies), the vast majority of which do not appear anywhere in the allegedly infringing low-resolution “Petit-ArtSprk Product” image, and most of which plainly are not protectable under copyright law because they are basic artistic elements in the public domain. Therefore, Respondent has plainly not “Reproduce[d] the work” as alleged.⁷⁶

Again, a public domain and non-protectable image argument, and also the argument that the objects are different, not appearing in the claimant’s version.

Even assuming, for the sake of argument, that two of the dozens of images on Respondent’s artwork at issue are similar to two of the fairy silhouettes in Claimant’s allegedly protected work, they are not “identical fairy silhouettes” as alleged. Respondent’s artwork was created by a third-party supplier based in China, drawing on the vast existing body of fairy silhouette artwork in the public domain.⁷⁷

The works are based on works in the public domain and maybe from a third-party supplier based in China! An independent creation argument? Or maybe China is responsible?

Fairy silhouettes of all types and in all poses are unprotectable under the scènes à faire doctrine in the genre of fairy artwork, because they constitute expressions that are standard, stock, and common to the particular topic of fairy artwork and that necessarily follow from the common theme or setting of fairy artwork. Claimant may not claim

⁷⁵ *Id.*

⁷⁶ Final Determination, Pinwheel Crafts v. Mary L. Pettit, No. 22-CCB-0251,, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

⁷⁷ Final Determination, Pinwheel Crafts v. Mary L. Pettit, No. 22-CCB-0251, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

ownership of the entire genre of fairy silhouette artwork, as alleged. Even fairies with filigree wing patterns in all styles and poses have been known long before Claimant's earliest allegation in 2018 when the allegedly protected work was allegedly first "visible online." Fundamentally, Claimant's allegedly protected and allegedly infringed work so completely lacks creativity that it should not have copyright protection.⁷⁸

And the *scènes à faire* doctrine argument. This is a genre: fairy art. And one person can't claim it as their own.



Pinwheel Craft version



Petit-Artwork Spark's version

⁷⁸ Final Determination, *Pinwheel Crafts v. Mary L. Pettit*, No. 22-CCB-0251, (Oct. 19, 2023), <https://dockets.ccb.gov/document/download/5554>.

So, what happens? We don't know exactly what happened, but the respondent, Mary, seemed to have caved.⁷⁹ In this case, the CCB didn't seem to have to engage in a copyright infringement analysis.⁸⁰ Here is what we know:

RE: 22-CCB-0251, Pinwheel Crafts LLC v. Pettit

The parties have settled this matter and jointly wish the Board to dismiss the claims with prejudice. The parties jointly request that the Board issue the following settlement terms within a final determination:

1. Counter-Notices Removal and Communication with Amazon:

a. Mary Pettit agrees to promptly request the removal of all counter-notices and appeals against Pinwheel Crafts LLC and provide a copy of this request to Amazon via Brand Registry. All correspondence with Amazon regarding this matter shall be copied to elaine@pinwheelcrafts.com.

b. Mary Pettit will confirm that the infringing ASINs are B09NXLDTVF, B08HLHQ448 and recognize that the existing silhouettes infringed upon Pinwheel Crafts LLC's copyright VA2319579.

2. Copy of Signed Letter to Amazon:

a. Mary Pettit agrees to promptly provide Pinwheel Crafts LLC with a copy of the signed letter to Amazon, confirming the removal of counter-notices and appeals and any related actions.

3. Image Removal from Retailers:

a. Mary Pettit agrees to immediately remove all images and listings related to the copyrighted material from all online retailers, including but not limited to Amazon, as well as any brick and mortar retailers, if applicable.

So, despite the arguments of non-protectable, public domain and scènes à faire, Mary was convinced that her works were infringing. One wishes for a larger analysis. But we see the arguments being made. The question, for me, was how did Mary Pettit get there after the strong response? And what role did the CCB play in getting to this outcome?

There was a second Final Determination that focused on the use of snippets from an Andrew Dice Clay comedy special as part of a documentary. What is important is that the Board did a traditional fair use analysis, and found fair use. Why this is important is that it is the first indication of how the Board would apply the body of copyright law in a fair use setting.⁸¹ And it was very heartening to see.

⁷⁹ See 2023 Settlement, Pinwheel Crafts LLP v. Pettit, 22-CCB-0251, (Oct. 18, 2023) <https://dockets.ccb.gov/document/download/5528>.

⁸⁰ *Id.*

⁸¹ Yes, it happens. On March 8, 2024, the Board found for the respondent Store on Sunset. Comedy Spotlight Productions had filed a copyright infringement claim related to a forty-six minute long comedy routine, "One Night with Dice.", a special performed by Andrew Dice Clay in 1986. The Comedy Store created a documentary, where 18 seconds is used from the performance, one five second clip and the other, 13 seconds. The Board found fair use. The Board found that while it was for a commercial movie, the movie was a documentary, and that it was commenting and criticizing and not using it for the original entertainment purpose. The clips were looking at specific examples of homophobic

C. How Helpful is the CCB? Issues in Using the System

So, all along, there has been a call for a system to be used that is inexpensive and accessible without lawyers. Have they succeeded? We won't know for a while. The statistics show that we may have a few problems to iron out. But for now, I don't think the resources for makers and creators to understand the system are going far enough. My worry for the quilters near to my heart and other artists trying to figure out the system is real. Let's look at two resources: the Claimant Information Section of the CCB website and the CCB Handbook.

1. Claimant Information

Claimant information has two sets of categories: "information before filing the claim" and "what happens next." My concern at the moment is how to know when you should file a claim—that is, when is the work you have been creating actually protectable? So, let's look at the "what" category. Here, the CCB suggests that you need to determine which category your work belongs, and gives a one sentence example for each.⁸²

material that caused Clay's downfall. The first factor went to the respondent; the second factor normally would go to the claimant as a creativity work, but because of its transformative nature, the Board found it neutral. The third factor, amount taken, weighed in favor of fair use. The fourth factor, effect upon the market, notes no impact on the market. Fair use prevails!!! And I say, thank goodness. This is standard fair use analysis for documentary films' use of copyrighted materials. It would have been horrid had it gone the other way. Final Determination, Comedy Spotlight Productions, Inc. Store on Sunset, No. 23-CCB-0035, (March 8, 2024), <https://dockets.ccb.gov/document/download/7431>.

⁸² *Claimant Information*, COPYRIGHT CLAIMS BD., <https://ccb.gov/claimant/> (last visited Jul. 26, 2022).

Types of Works

First, you will need to determine the copyright category of the work of authorship involved in your dispute. These categories include:

- Literary, musical, and dramatic works
 - Examples include fiction or nonfiction stories, poems, textbooks, and computer programs.
- Sound recordings and musical works (including any accompanying words)
 - Examples include recorded songs, spoken words, or instrumentals and notations on sheet music. The [handout Musical Works, Sound Recordings & Copyright](#) explains the difference between a musical work and a sound recording.
- Pictorial, graphic, and sculptural works
 - Examples include photographs, paintings, drawings, sculptures, jewelry, maps, charts, and models.
- Motion pictures and other audiovisual works
 - Examples include movies, television shows, videogames, webinars, and television or computer advertisements.
- Dramatic works
 - Examples include plays, musicals, and operas.
- Pantomimes and choreographic works
 - Examples include a related series of dance movements, but not a single dance move, social dance steps (such as ballroom dances, folk dances, line dances) or simple routines.
- Architectural works
 - Examples include includes building design, but not individual standard building features.

Would a quilter whose pattern has been copied (text, images and templates in a small booklet) know that it is a literary work, rather than a pictorial, graphic and sculptural work? What about someone who created a one-page comic? What happens if someone gets it wrong? Why do they need to choose a type of work? Would that be sorted by the required registration? This is just not enough information, in my opinion. It's the rhetoric of the Copyright Office. But it doesn't stand in the shoes of the user.

Then, in just a few sentences, they write: "Please note that copyright protects only original works of authorship. This protection does not extend to any idea, concept, system, or process embodied in a work, as opposed to the expression used to describe them. Copyright also does not protect names, titles, short phrases, or slogans."⁸³ That's it. No explanations. Nothing specific for musicians or artists. Certainly nothing for crafters or quilters. They do cite two circulars, "Works not protected by copyright" and "Copyright basics."⁸⁴ But again, someone must know they need to go there and then process the general information. The same is true of the page claimants are sent to for Section 512, which includes a chart, but is

⁸³ *Id.*

⁸⁴ U.S. Copyright Office, *Circular 1 Copyright Basics*, U.S. COPYRIGHT OFFICE (Sept. 2021), <https://www.copyright.gov/circs/circ01.pdf>.

not specific to their needs.⁸⁵ Perhaps more will be added later, but we have no way of knowing. The explanation of fair use is most egregious, as it merely sends them to the Fair Use Index without an explanation.⁸⁶ The Fair Use Index is a database of summaries of fair use cases.⁸⁷ And while a lovely resource at the Copyright Office, it does not explain or walk through fair use at all. Again, all of this could be temporary—maybe they are planning to expand the explanation portion of the website, but at the moment makers need more. These are not materials designed with the claimant in mind.

This is true for the registration information section as well. The most troubling portion is the “Identifying the Type of Claim.” Here they have one paragraph each that incorporates very little information.

Identifying the Type of Claim

The CCB is able to hear three types of copyright disputes:

Copyright infringement claims. Copyright infringement occurs when a copyrighted work is reproduced, distributed, publicly performed or displayed, or made into a derivative work (such as a translation of a book or its adaptation into a movie) without the permission of the copyright owner, if the use does not qualify for an exception, such as [fair use](#).

Claims seeking a declaration of noninfringement. A party accused of infringement (who has received for example, “cease and desist letter”) can file a claim seeking a ruling from the CCB that its actions do not infringe copyright. This could be useful if a party is worried about continuing a project under the threat of litigation and wants clarity about the validity of the copyright owner’s rights or the application of an exception.

Claims regarding misrepresentations when filing a “takedown” notice or a counter-notice under the DMCA. The Digital Millennium Copyright Act (DMCA) establishes a “notice and takedown” system for removing infringing content from the internet. Under this system, a copyright owner can send a “takedown” notice to an online service provider (such as a content-sharing website) describing material that someone has posted through the online service without the copyright owner’s permission. To avoid potential liability, online service providers follow specified procedures when they receive these notices, as well as when they receive counter-notices seeking the re-posting of the allegedly infringing material. The DMCA also provides that senders of either a notice or a counter-notice may be liable for damages if they knowingly make misrepresentations. Visit the [section 512 page](#) for additional information about the law and the “notice-and-takedown” procedure.

[Determining What Relief to Request](#)

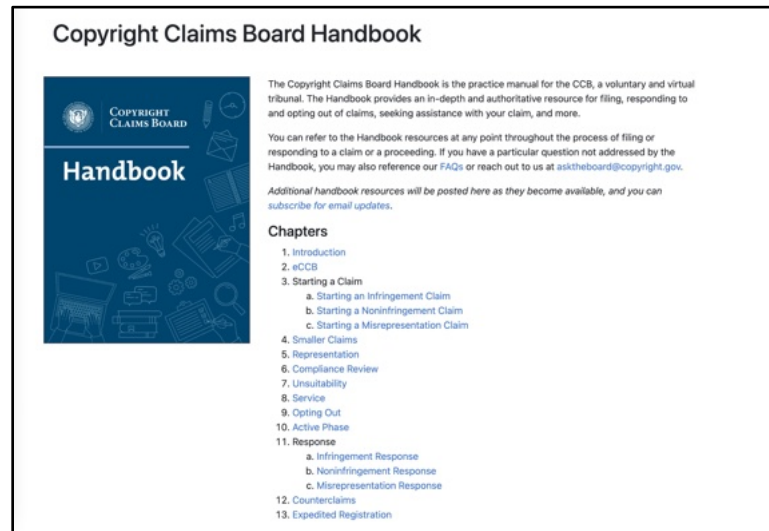
So, maybe the handbook will be more helpful? Let’s take a look.

⁸⁵ U.S. Copyright Office, *Section 512 of Title 17: Resources on Online Service Provider Safe Harbors and Notice-and-Takedown System*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/512> (last visited Jul. 26, 2022).

⁸⁶ U.S. Copyright Office, *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE (Jun. 2022), <https://www.copyright.gov/fair-use>.

⁸⁷ *Id.*

2. The Handbook



Let’s look at “Starting an Infringement Claim.” Again, we are trying to see how much information the Copyright Office provides for claimants to sort out if they *actually have a claim*, including whether what they are upset about is protected by copyright. Here they go into a little more detail about Section 106 (one example for each of the rights). But there is *nothing* about what constitutes copyright, non-protectable items, the public domain, idea/expression, first sale, etc. And certainly nothing on ownership, licenses, fair use or contracts. It’s like “you have all of these rights...” but it doesn’t define *what counts under copyright to receive* the rights, or any limitations to those rights. That is presumed. That’s what I was afraid of.

The claimant is given a drop-down menu to provide the list of wrongs, among other information. I have not seen anywhere where they disclaim what is not protected, or any underlying or derivative works, and certainly not that they are using a public domain work. Is this left up to the respondent to identify? Who carries the burden of proof that they have created a copyrightable work? Someone suggested that the registration process would sort it all out. But that’s not what the registration system has done in the past. At what stage is the work evaluated?

D. Monitoring the CCB: The Problem of Claim Noncompliance

Because the CCB has made its data publicly available, we see a lot of analysis of the claims and process right now. My favorite is a weekly data review by (our

own) Katie Fortney, available at <https://bibliobaloney.github.io/#about>.⁸⁸ We see from the data that most cases are infringement cases.

For example, on February 2, 2024, there were forty-one active cases, with thirty-nine infringement cases, one noninfringement, and one Digital Millennium Copyright Act (DMCA) misrepresentation. Of the forty-one cases, twenty-one were not represented by attorneys. Over half of the cases do not have someone to explain the CCB process. Of the current forty-one open claims, thirty-one of them are waiting for the claim to be amended, which means they didn't fill out the claim form properly. This is a serious problem.

Open Cases	
Cases that have not yet reached the active phase, but also have not yet been dismissed/closed. For an overview of the steps between a claim filing and becoming active, see this flowchart at the CCB website .	
Current status	
Status	Cases
Waiting for Amended Claim	31
Waiting for Scheduling Order/Expiration of Opt Out Window	28
Waiting for Proof of Service	25
In Abeyance	15
Waiting for Initial Review	10
Waiting for Review of Amended Claim	7

And from this data, almost forty percent of the cases dismissed were for failure to amend the claim. There are other problems, for sure, and understanding how copyright works is clearly one of them.

E. We All Can Evaluate Copyrightability and Potential Infringement When We Understand Copyright

Throughout the Just Wanna Quilt project, we have had a lot of questions in the Facebook group. We are, in a way, like our own informal CCB! But what is different is that we have developed a user community that understands the law *and the art/craft* in which the controversies sit. Here are a few scenarios that seem like they could have ended up at the real CCB. What this section is arguing is: 1) resources are needed that meet the maker where they are; and 2) communities develop standards and understandings of what is protectable and what is not, and how does that translate to spaces like the CCB? Let's look at some examples.

1. Home Depot and the Purloined Hexagons, and Public Shaming.

A quilt designer posted about her experience with Home Depot and their design team. She posted:

⁸⁸ See generally Fortney & Hansen, *supra* note 42.

Modern Handcraft
 January 26, 2019 · 🌐

I like to share this every year or so just to remind people how terrible of a company @homedepot is for ripping designers off. On the right is my geometric rainbow quilt and on the left is their modern paint color brochure. Call me crazy.... but it's a bit too similar for my taste. I mean - the missing hexagons / angle / color flow 🙄

@concretecottage has a whole list of designers that have been copied by Home Depot on her stories today.

Shame on you @homedepot!!!

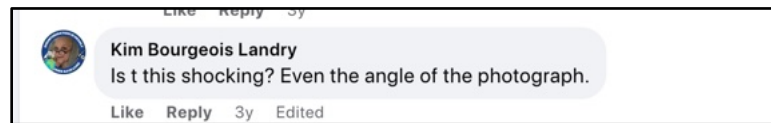
89



What is interesting is that this was the extent to the conflict. She did not register her work with the U.S. Copyright Office, and did not pursue the grievance. When I reached out to her, the response was: “Hi there! I sadly didn’t do anything to resolve the issue since it’s such a large company - I figured it would be too much hassle. If I can’t afford to sue them, publicly getting the word out is even better. Actually I have no clue about suing them or anything past that -

⁸⁹ Modern Handcraft, *Just Wanna Quilt*, FACEBOOK (Jan. 26, 2019), <https://www.facebook.com/groups/justwannaquilt>.

because I didn't really actively try anything. I did get an email from a marketing person who I am sure is in charge of their Instagram. Pretty much stated that they love working with people etc. let me see if I can track that down as well." I think this is typical. Outrage. And yet, without any idea what to do about it or how to evaluate the situation. In our *Just Wanna Quilt* Facebook group, there was great discussion about this controversy. Kim Bourgeois Landry's comment was typical:



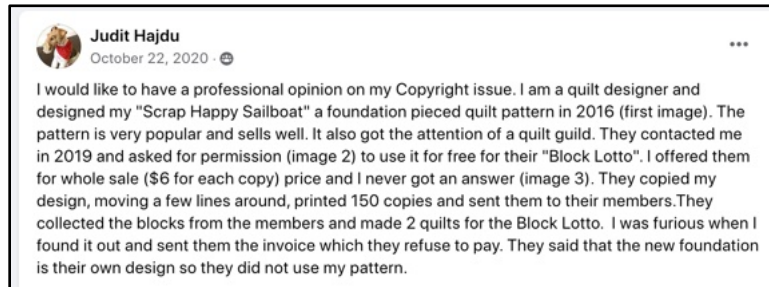
So, how would this play out at the CCB? Would Home Depot opt-out? Not necessarily. Many larger companies are not. Will artist and crafting communities see the CCB as a place of recourse, and what do we need to do to assist? What our quilter did was blast social media with the grievance, and many chimed in, told their own stories, and complained about big companies stealing. We see the public shaming in social media as a viable tool when there is nothing else. The court of public discourse: it may hold more sway. But does it impact Home Depot's behavior? Did they even know they were being shamed? Did they care? I think again about the photographers, getting three times their licensing fee. What would be the damage done for stealing a quilt design for a major advertising campaign? How would our panel at the CCB access this?

2. *The Property of Sailboats Shapes, or Public Domain Shapes Claimed by One and Offended by Others*

We see this a lot in quilting - someone takes very simple common blocks, puts them together, and then is offended when someone else does the same. The looking-only-forward effect. They don't stop and analyze where they gained their knowledge or that they have not produced anything that is copyrightable. Yet, they are outraged. This kind of claim seems to be ripe for CCB. The question will be: will the Board be aware that underlying works exist making the claim non-copyrightable, or alternatively, the offending work an independent creation? I think about to the silhouette fairy case. That wasn't the first time fairies had been made that way, but the claimant was able to convince the respondent that it was.

Here is another example. We had someone post this on the *Just Wanna Quilt* Facebook group, and I think the poster was surprised by the response. I, on the other hand, was very proud that our members applied their copyright knowledge, and got to the "right" answer.⁹⁰

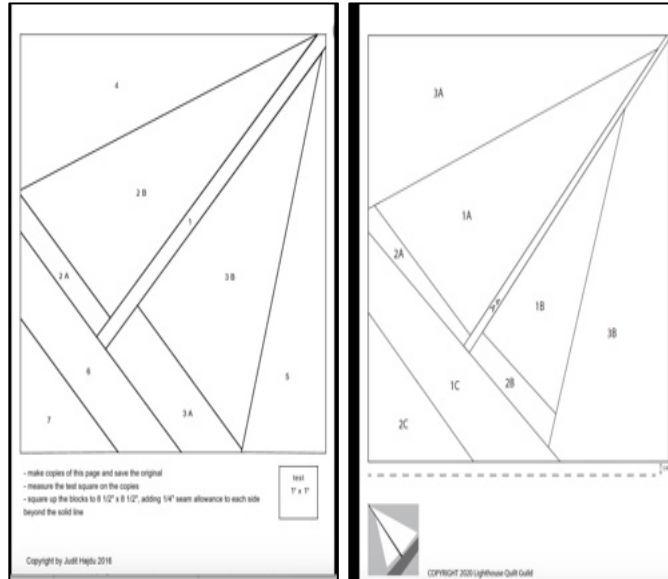
⁹⁰ Judit Hajdu, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt>.



Our members weigh in: both those that have studied copyright, and many that have not.⁹¹



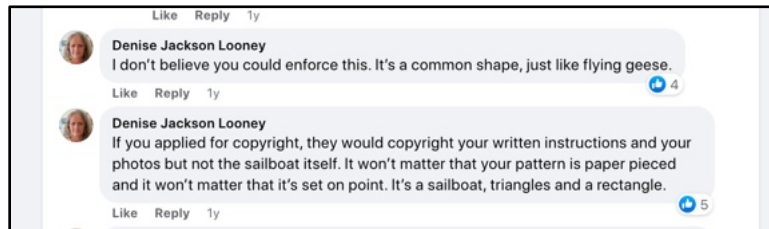
⁹¹ During COVID, we had a weekly copyright session, using a self-published book *Just Wanna Create*. We were supposed to meet for an hour on Saturday for a few weeks. We ended up meeting for two hours every Saturday for months.



Original Work

Alleged Infringing Work

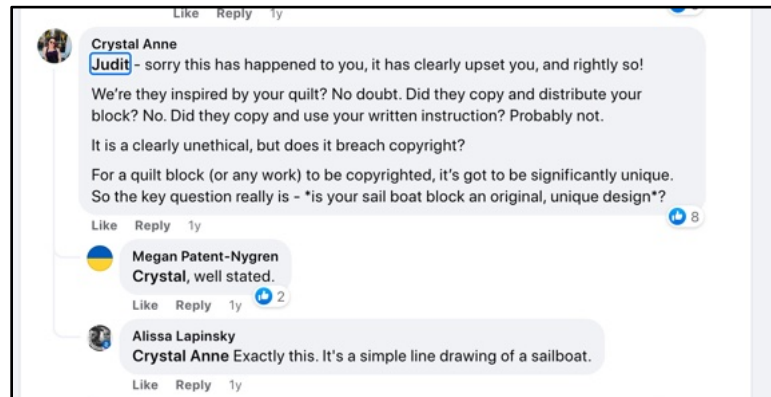
The quilt world is made up of quilting blocks—standard blocks that everyone uses and agrees is in the public domain. The question here is when is something common, and when is it protectable. Here’s what Denise Jackson Looney wrote:⁹²



Here is another response by Crystal Anne:⁹³

⁹² Denise Jackson Looney, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt/>.

⁹³ Crystal Anne, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt/>.



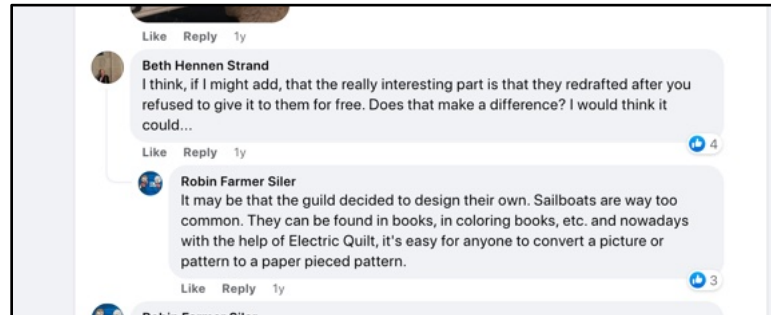
And more weighed in.⁹⁴



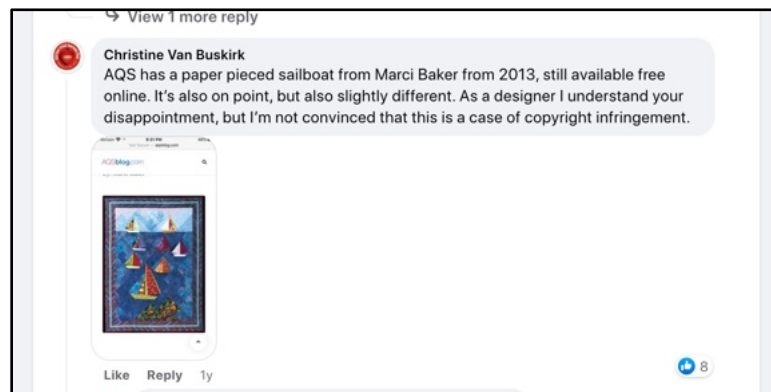
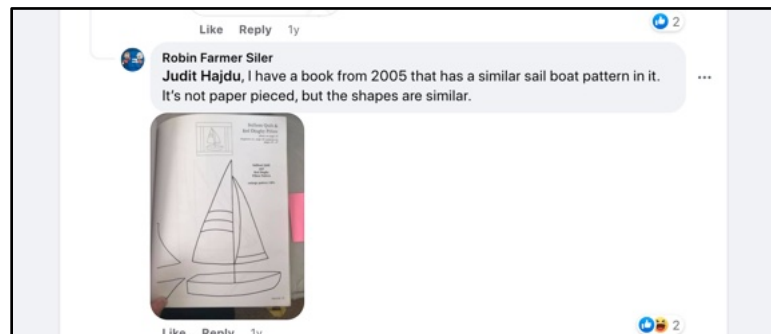
I was a proud mama with these conversations. They understand how copyright law works. But we've been discussing this for a number of years, including Copyright Camp, podcasts about copyright and quilting, and discussions like this everyday. They understand how copyright works.⁹⁵

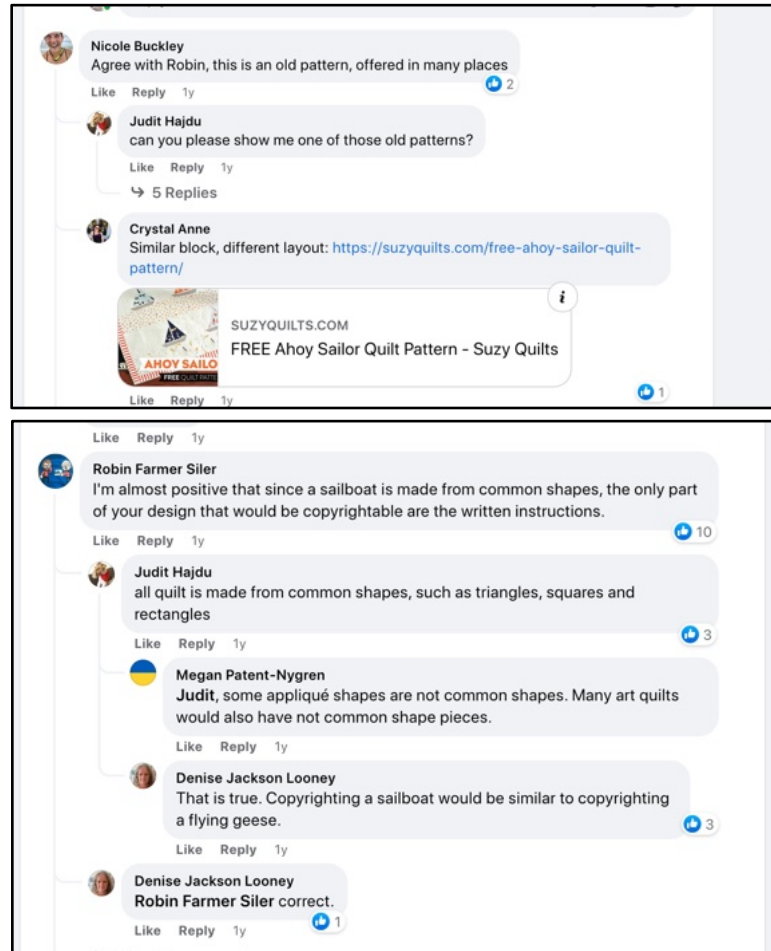
⁹⁴ Robin Farmer Siler, *Just Wanna Quilt*, FACEBOOK (Oct. 22, 2020), <https://www.facebook.com/groups/justwannaquilt>.

⁹⁵ *Id.*



And then the conversation turned to seeing if they could find similar patterns of sail boats. They were doing their homework. Will the CCB? Who will do this part of the work? Would they assume the sailboat pattern was actually the claimants? Will it be another silhouette fairy case?





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There are no third party experts at hand as part of the CCB system, unless you count the legal team evaluating the initial claims coming in.⁹⁷ How will they know when a sailboat is protectable and not? They need their own quilting army, don't they? How do we communicate this level of conversation to claimants? I think this sailboat example is fairly simple. But we have already seen the *Boisson* court get it wrong with quilts.⁹⁸ How will they know that a more complicated pattern, like a Mariner's Compass or Double Wedding ring is something everyone knows and uses?

⁹⁶ *Id.*

⁹⁷ *About the Copyright Claims Board*, in CCB HANDBOOK 1, 8 (2024).

⁹⁸ *Boisson v. Banian, Ltd.*, 273 F.3d 262 (2d Cir. 2001).

F. Damages

One other key element. The message the CCB is sending is “Don’t think this is a cash cow.” The damages can be up to \$15,000, but so far have been closer to \$3,000. The average damages award has been around \$2,000. The damages are based on data about licensing, whether the registration was timely (whereafter statutory damages could be applied), and the differences between actual damages and statutory damages. The message being sent is that filing with the CCB is not an automatic windfall of \$15,000. And, it costs money to file—at least \$100-200 (the claim itself and registration if not already registered), plus the cost of service of process. Will this act as a deterrent? I imagine it will for my quilters. But that also may help us understand the stakes, and also the small margins of profit. They just can’t afford to take the chance, even at this level. And maybe that’s okay.

III. ENTER ANDY WARHOL

As part of the conversation with the quilters, we often hit on the question of fair use. There’s a lot of talk about fair use, and how to use fair use within their work. This used to be a complicated conversation. But I think in some way, *Andy Warhol* simplifies it; at least for the makers that I know. Taking a photograph and using it in the same manner as the original will not be fair use. What about use as reference photographs? You have to be careful. Bisa Butler was careful, using only public domain images. *Andy Warhol* makes that ever more present. The other aspects of fair use still apply, of course, and that’s important for so many makers.⁹⁹ *Andy Warhol* provides greater teeth for using a photograph without permission. We have seen cases after *Andy Warhol*. So, what is a quilter (or other artist) to do? Be aware of one’s use of others’ photographs—for reference, of the building. So, it will be interesting to see if the CCB get these post-*Warhol* cases, and how that impacts use of source images. Will there be a licensing fee found, three times the original licensing fee?

IV. CONCLUSION: COMMUNICATING COPYRIGHT TO MAKERS

This is not an essay about quilting, and yet it is about quilting. I am in my studio, quilting. I want to make my own fairy silhouettes. I want to play with a public domain boat. Creativity starts with ideas, but also with objects—photographs, shapes, others’ works. The law can help us understand the boundaries sometimes—think Compendium III and case law. There is a nuance here. But also not. And we learn that from *Andy Warhol*.¹⁰⁰ Don’t compete with

⁹⁹ Sid Gard and I are doing just that with our forthcoming book, *JUST WANNA COPYRIGHT FOR MAKERS*, (C&T Publishers, expected December 2024). This is the second in the series, the first *JUST WANNA TRADEMARK FOR MAKERS*, (C&T Publishers, 2023), and a contracts book in the same series due out in 2025.

¹⁰⁰ *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 (2023).

the original for the same reason in the same market. Just not cool. The photographers at the CCB feel that way.

My hope for the CCB is that the decisions and process help us as makers sort out just what copyright is and isn't. Can it be a non-precedent setting guidance? And what additional resources would be needed to help make the boundaries of copyright clearer to the general public who are engaged in making, borrowing, and stealing creative works? Maybe I'm pinning too much on the CCB, but a quilter can dream.

December 2023. I'm in Chicago again, and this time at the Museum of Contemporary Art, to see the art quilts of Faith Ringgold. These predate Bisa Butler's quilts by decades. They are paintings on fabric, often framed by quilt blocks. They are art. They are famous. They are so copyrighted. I stand in awe. They incorporate images, phrases and writings, and even other renditions of other (famous) paintings. Turns out there are quite a few lawsuits involving quilts. But that is for another day. Right now, I am in awe of seeing up close these masterpieces I've only seen in books. And she is incorporating images of people, famous old paintings, words, and so much more. And it makes me think of where we began, with the Bisa Butler show at the Art Institute.

Bisa Butler's amazing quilts seem like a long way away now—in this paper and in viewing them, and of course, in my nightly attempts at quilting. But she starts with a concept, technique, and images, and in this case, known public domain images. She builds art from fabric. There is no doubt that her work is a derivative of the original photographs. And they are beautiful. She was aware of copyright—she chose specifically public domain photographs. She understood copyright in her practice. But I am left, at the end of the day, with the question of how you explain all of these nuances to makers, to artists, to creators. What if she wanted to use images of copyrightable characters, of the Batmobile? What then? Would *Andy Warhol* legally preclude that? Would anyone care? No idea. And if a quilter takes the image of a famous character, person, or the Batmobile and makes that image into a quilt, will it matter? Likely not. Unless of course, it is one of the photographers that file claims at the CCB, or the quilter's quilt becomes commercially problematic. But again, that is for another day.¹⁰¹

Teaching artists how to understand their work in relationship to others is key. What are the rules of creation? How do they understand what the law allows and what it does not? In one of my first interviews for the *Just Wanna Quilt* project, a husband/wife quilting team (that made their income from their creative work) explained to me that they saw infringing activities on a spectrum: an economic spectrum, not degree of similarity.¹⁰² They presumed that part. On one end was the innocent infringer, who didn't realize their errors. On the other was someone

¹⁰¹ Again, this is the subject of Sid Gard and Elizabeth Townsend Gard's piece for *University of Houston Law Review on Borrowed Fame*, forthcoming 2024.

¹⁰² *Id.*

that had usurped a licensing deal with a major company, losing income. You measure both the substantial similarity and the economic loss. But the couple also didn't really spend time doing the work themselves on what they might be infringing, where they got their ideas, and whose feelings they might be hurting. I saw this a lot; I still do. Idea/Expression, infringement, potential economic loss, and hurt feelings are all tied together; however, they are also a two (or multiple) lane highway where oftentimes creators are just looking at who might have harmed them, and not where their ideas or expression originated.

So, what about the CCB? Will it help us understand the boundaries of creating? Not quite yet. The Board is upholding our principles on first sale and fair use. And we see that professional photographers can now impose a three times license fee for unauthorized use of their photographs on commercial websites. But we are still too early to know if makers and others will use it to sort out boundary issues.

So, time to head back to the quilt studio and ponder some more. Perhaps I'll try my hand using the techniques described in a video by Bisa Butler.¹⁰³ Or perhaps I'll make travel plans to see another quilt exhibit. I hear there's a really cool Stitchpunk Quilt exhibit at the New England Quilt Museum.¹⁰⁴ That might pose interesting copyright questions. I think I might make a version of a pixelated chicken from the video game *Stardew Valley*. (An original pixelated character that someone made a cross-stitch pattern of and is selling it on Etsy (I bought it) and now I'm making into a quilt.) Oh, there is so much more to explore in the quilting studio related to copyright.

¹⁰³ Bisa Butler, *Process*, Scholastic, <https://www.youtube.com/watch?v=rqalw7jUlqk>.

¹⁰⁴ StitchPunk, New England Quilt Museum, <https://www.neqm.org/stichpunk-details>.