

1-2019

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Recommended Citation

E. S. Burt, *Commentary: Translatable and Untranslatable: Discourse Theory and Copyright Law*, 9 U.C. IRVINE L. REV. 335 (2019).
Available at: <https://scholarship.law.uci.edu/ucilr/vol9/iss2/3>

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Translatable and Untranslatable: Discourse Theory and Copyright Law

E.S. Burt*

Annemarie Bridy's fine paper on the copyright infringement of DiModica's Charging Bull by Visbal's Fearless Girl proposes that terms taken from literary theory might be useful for negotiating "the conditions of interaction between existing artistic works and new ones, in order to protect the value and integrity of the former without diminishing production of the latter."¹ This literary critic cannot comment on the practical legal aspects of translating discourse theory into copyright law. So far as I can tell, Bridy is right to find it useful in parsing some issues, and I concur heartily with her conclusion that DiModica has "no traction"² for his case. To date, no case has been filed, so it may be that DiModica understands that, while his bull benefits from publicity in threatening a suit, bringing one would be fruitless.

Some of the issues raised preliminarily in my original response have been dealt with in Bridy's revised paper. Venturing further into literary territory will thus be necessary to develop more fundamental points concerning the underlying question of the translatability of discourse theory into copyright law. Bridy grounds her argument in a claim that there is an overlap between law and literary theory since both are concerned with work-to-work and author-to-author relationships,³ relationships she calls intertextual. Is it true that law and literary theory are concerned with the same problems? Copyright law involves the debts incurred between persons, albeit by means of works.⁴ The limited time when copyright

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1. Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, 9 UC IRVINE L. REV. 293, 298 (2019).

2. *Id.* at 333.

3. *Id.* at 293.

4. I invoke *person* here in a loose sense as subject of rights and duties, in order to distinguish between indebtedness related to exchanges between legal persons, and the indebtedness of one text or tradition to another. It is, however, literally the case according to scholars of the European copyright that the introduction of the term in Kant's *Metaphysics of Morals* to qualify the author's rights ("p ersonliche Recht") over the book marked a critical historical turn. See Immanuel Kant, *Metaphysics*

protects the work, never mind the laws that link it to the life of an author-producer, confirm the point. For the critic, however, intertextuality means textual indebtedness; indeed, as the name suggests, it speaks less to debt than to the simple fact of relationship, between-ness. The relationships themselves rely on an interpreter's discrimination of decisive parallels among an unlimited number in works that draw from a common fund. As the theorist of discourse understands it, the work is not primarily a good but a gift to the public; as such, it bears no price tag, no return can be demanded, and no limit can be imposed on counter-gifts. A work does not cease to give and to welcome counter-gifts because an author dies or a copyright runs out. One can, for instance, argue, as Borges did in 1939, that some identical pages from *Don Quixote* (1605), when "written" by an artist he calls Pierre Mesnard, constitute a new and original work.⁵

Intertextuality, in other words, privileges hybridization rather than singular possession among texts that need not share a temporal horizon. Dialogism is non-convergent with the term dialogue, for similar reasons. In a dialogue, as conditions for understanding, the divergent opinions of speakers emerge contemporaneously and in a same language and place. Dialogism, however, applies to the potential for texts to represent within a single enunciation tongues so divergent as to be mutually exclusive. In Bakhtin's idea, heteroglossic novels represent "the social diversity of speech types," that is, "authorial speech, the speeches of narrators, inserted genres, the speech of characters."⁶ Dialogism operates on that heteroglossia to affect each speech. For Bakhtin, novels contain no monologues. Any supposed instance of speech is always split, dialogized, by competing discourses. Dialogism creates

of Morals, in GESAMMELTE SCHRIFTEN VI 290 (Walter de Gruyter 1968). According to Laurent Pfister, by connecting artistic property to person nineteenth-century French liberal jurists could successfully combat attempts by A.-C. Renouard and P.J. Proudhon to make the rights of authors depend on a contractual notion, in which the service rendered by the author in the gift of the work to the public would serve as the basis for a claim to payment. See AUGUSTIN-CHARLES RENOUARD, TRAITÉ DES DROITS D'AUTEUR, DANS LA LITTÉRATURE, LES SCIENCES ET LES BEAUX-ARTS (1838); PIERRE-JOSEPH PROUDHON, LES MAJORATS LITTÉRAIRES (1863). Such writers as Portalis, Laboulaye, and Pouillet "linked the work and the property right ever more closely to the *person* of the creator, thereby paving the way for the recognition of the moral right." Laurent Pfister, *La Propriété Littéraire est-elle une Propriété? Controverses sur la Nature du Droit d'Auteur au XIXe Siècle*, 205 REVUE INTERNATIONALE DU DROIT D'AUTEUR 116, 152 (2005). Stef van Gompel traces a similar tendency across nineteenth-century Europe. Stef van Gompel, *Les Formalités Sont Mortes, Vive les Formalités! Copyright Formalities and the Reasons for Their Decline in Nineteenth Century Europe*, in PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 157 (Ronan Deazley et al. eds., 2010); see also DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT (1992) (arguing for more complexity to the notion of personhood and therefore of copyright than is recognized when one simply opposes the European conception of author-based rights to the American, commodity-based conception, as if there could be no other kinds).

5. Jorge Luis Borges, *Pierre Ménard, Autor del Quixote*, in SUR 56 (1939), reprinted in FICCIONES (Sur ed., 1944).

6. M.M. BAKHTIN, THE DIALOGIC IMAGINATION: FOUR ESSAYS 263 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., University of Texas Press 1981).

interrelationships, even as it marks a theme's "dispersion into the rivulets and droplets of social heteroglossia."⁷

Note the insistence on dispersal. Dialogism does not respect the for-and-against of dialogue with its dialectical tendency toward synthesis. Bakhtin says that it embodies "the centrifugal forces in the life of language."⁸ This conception militates against DiModica's claim that his bull means optimism, as Bridy says. But it is also evident that the work's scattering will not translate easily into copyright law since heteroglossia can be at odds with the very possibility of regulation.

That scattering has implications for Bridy's use of the terms hypotext and hypertext. The terms come from Genette's rhetorical analysis of narrative and also relate to the text as gift to the public, rather than to authorial ownership.⁹ For Bridy, *Charging Bull* is the hypotext and *Fearless Girl* the hypertext. But I would start by asking about the hypotext on which DiModica has propped his hopeful message of a Wall Street charge. In this case, the question is illuminating. Among the many bulls that his work conjures up, some mentioned by Bridy,¹⁰ one is particularly apt: the famous Minoan fresco of the bull leapers at the Palace of Knossos. The fresco, from 1450 BCE, features a side view of a charging bull and three androgynous human figures grouped around it. The frontal and posterior figures have been tentatively identified as female and the third one, depicted in a graceful handstand on top of the bull, as male. Some maintain that the fresco represents actual practice whereas others, contesting the gender attributions, contend that the tableau is not realistic: the bull would not have obligingly lowered its horns to enable the human figure in front to leap them but would have set its head sideways to gore its target with one horn; the figure on top could never have leapt onto a speeding bull, but would have tumbled out of control; finally, the last figure could not have landed facing the bull's posterior. They maintain that, all attempts to reproduce the feats having ended in injury or death, the three figures are conventional and bear allegorical meanings in a celestial drama involving Orion, Taurus, Perseus, and Andromeda. There is agreement among scholars that the three figures represent the perilous control exerted by humankind over its animal nature.¹¹

Consider what happens if the Knossos image is read as hypotext for *Charging Bull*. For his meaning of an endlessly resurgent market, DiModica exaggerated the image of force while minimizing worries about human risk and responsibility. He has thus erased two of the Minoan figures—specifically, those at front and on top concerned with the fragile dominance of the human over animal impulses. Meanwhile, he has made *Charging Bull*'s hind end inviting for viewers. *Charging*

7. *Id.*

8. *Id.* at 273.

9. GÉRARD GENETTE, *PALIMPSESTES: LA LITTÉRATURE AU SECOND DEGRÉ* 11 (1982).

10. Bridy, *supra* note 1, at 311.

11. Jebulon, *File: Bull Leaping Minoan Fresco Archmus Heraklion*, WIKIMEDIA COMMONS (Feb. 23, 2015, 11:43 AM), https://commons.wikimedia.org/wiki/File:Bull_leaping_minoan_fresco_archmus_Heraklion.jpg [<https://perma.cc/6Z67-6YEA>].

Bull's tail is upswept, exposing outside testicles to the hands of tourists who have rubbed them until they gleam. On the internet, one finds photos of some of these visitors venerating the fertility symbol of the bull from the posterior position.

What of the two figures from the *Bull Leapers* that were left out? A poster for the Occupy Wallstreet movement has restored one. It features a ballet dancer perched *en attitude* atop Charging Bull, exactly where the figure of Knossos performs a handstand. Her graceful balancing act comments on what it means to “occupy” Wall Street, even as it demonstrates artful control over the wildly surging bull. Kristen Visbal's Fearless Girl restores the final figure, the human risked as target and ready to leap onto the bull. The two artists who have provided the figures in the second-level works thus remind us of forgotten parts of the image on which DiModica's bull is propped.¹²

It would take a very elastic concept of dialogue to address this intertextual relation between a fresco created by a Minoan artist over 3500 years ago, and the three works of contemporary Americans. The “dialogue” would be closer to a séance, exorcism, or talking cure, since it would take up a repressed content in works of both living and dead artists. No payment can reach the Minoan. And yet the contemporary works—the surging fertility symbol of DiModica, the potential victim that reminds of danger, and the occupant of the bull that reminds of human control—depend on that hypotext. The ability of the derivative American works to remember or repress parts of the fresco constitutes an important basis of their artistic claim, and thus the rationale for providing works with copyright in the first place. DiModica's contention that Charging Bull is the equivalent of a hypotext and the other two works derivative makes sense only if one excises from consideration the Knossos fresco. From this critic's point of view, without the two supposedly derivative works Charging Bull is incomplete.

In short, there is a tendency with the intertextual relationships and dialogism of discourse theory to transgress limits that the marketplace of ideas respects. The hypotext/hypertext relationship cares nothing for the line, so important to persons, between life and death, or for the elapse of millennia; it allows pillaging works produced in other languages or materials freely. The problem with making legal use of discourse theory is less that its terms do not align with U.S. law, but that—as a result of the unboundedness of the texts to which they refer—they do not align well with positive law at all.

One can approach the problem from another angle, however. A point that Bridy takes up briefly in the revised version of her paper concerns what Genette calls the paratext, that is, part of a text that is “next to, juxtaposed to” the text. The paratextual elements are many for Genette. They include: “titles, subtitles, intertitles,

12. For an image of the Occupy Wallstreet poster, see *What Is Our One Demand?*, WIKIMEDIA, <https://upload.wikimedia.org/wikipedia/en/5/57/Wall-Street-1.jpg> [https://perma.cc/MCQ5-B9US] (last visited Jan. 8, 2019). For an image of Fearless Girl confronting Charging Bull, see Bridy, *supra* note 1, at 295.

prefaces, afterwords, forewords; marginal notes, footnotes and endnotes, epigraphs, illustrations, insertions, jackets, jacket bands . . . blurbs and . . . commentaries.”¹³ In *Truth in Painting*, Derrida, who had written on the marginal and supplemental in texts, translated the problem to visual works by way of the parergon.¹⁴ The parergon frames the work (*ergon*) off from the surrounding space and lies next to (*para*), rather than forming part of, the work proper. Examples are the ornament, frame, title, and pedestal. Work and context are linked to and fenced off from one another by parergonal elements. The paratext results from its author’s negotiations with the limiting context and the legal texts that regulate it, including publisher’s policies. The artist has to decide how best to make use of the limits imposed by the parergonal frames. She has to confront what is at once a boundary to the work, and a chance to contend with the work’s tendency to overrun attempts to limit it. The parergon is the place where the work defines its relation to its context, and in so doing makes itself a place in the sun.

Features of the paratext or, more precisely, the parergon raise pointed questions with respect to DiModica’s and Visbal’s statues. The features of a sculpture that are parergonal would include: the pedestal, the means of anchoring the sculpture to its spot, plaques and elements of the site whereon the sculpture is erected. As Bridy points out, DiModica’s claims do not concern the work itself, Charging Bull as image over which he holds copyright.¹⁵ The bone of contention is the site, and more especially the sightline that DiModica sees his bull’s charge as defining.

Now it strikes me that DiModica has done little to protect his work with parergonal elements. He gets it that the work’s meaning system can overrun limits and, he is something of a master at getting publicity out of that feature. What he does not seem to have done, however, is to take many pragmatic decisions to fence in his bull. After casting the statue, DiModica made a midnight drop of his gift under a Christmas tree on the New York Stock Exchange plaza, without benefit of a permit.¹⁶ His work was effectively presented to the city as guerilla art, in an act that exposed it to being treated as three-and-a-half tons of scrap metal. After a bit of to and fro, a site was found at the point of Bowling Green Park. And there it has remained in its “temporary installation,” benefiting from a tacit permission that seems to have been accorded it as a result of its popularity. No one seems able to meet DiModica’s criteria for a buyer: he wants one willing to purchase the statue for \$5,000,000 who will give it to the city so it can remain in place.¹⁷ In the

13. GENETTE, *supra* note 9, at 9.

14. JACQUES DERRIDA, *LA VÉRITÉ EN PEINTURE* 15–16 (1978).

15. Bridy, *supra* note 1, at 322.

16. See Jeremy Olshan, *Wall Street’s Famed Bronze Bull Arrived 25 Years Ago (Without Permission)*, MARKETWATCH (Dec. 15, 2014), <http://www.marketwatch.com/story/wall-streets-famed-cast-bronze-bull-turns-25-2014-12-15> [https://perma.cc/8PRC-9B2L].

17. Bruce Lambert reports that the bull cost him \$320,000. Bruce Lambert, *Neighborhood Report: Lower Manhattan; A Campaign to Save a Bull*, N.Y. TIMES, Oct. 3, 1993, <https://www.nytimes.com/1993/10/03/nyregion/neighborhood-report-lower-manhattan-a>

meantime, the artist has calculated with the work's popularity, and taken little care to protect either work or public by parergonal elements.

A further customary parergonal element is absent. Charging Bull stands at ground level, without any pedestal. What is the effect of that decision? A comment from Victor Hugo on some upright statues that had been taken off their pedestals after Napoleon's 1814 fall provides a hint. Here's Hugo:

The disoriented air of a statue left down on the ground without a pedestal. Two attitudes. Upright in heaven, lying flat on the ground . . . A statue on foot astonishes the mind and bothers the eye. One forgets that it is of plaster or bronze and that bronze walks no more than plaster, and one is tempted to say to this poor personage with a human face, so ungainly and unhappy in its affected pose: "All right! Go then! Go. Walk. Be off! Exert yourself! The earth is under your feet . . . Who is preventing you?" At least a pedestal explains immobility. For statues, as for men, a pedestal is a little, narrow and honorable space with four precipices around it.¹⁸

For Hugo, alert to the raising and toppling of monuments as reflective of France's nineteenth-century political upheaval, the pedestal is a means to hem in the work's threatening tendency to overrun all boundaries. Especially interesting is his statement that "a pedestal explains [the statue's] immobility." To explain is to express the reason for something. Perhaps Hugo means that the artist places the statue on the pedestal to immobilize it for the viewer, so it cannot be imagined to walk. It is a pragmatic decision to shield the public from the statue's walking, by which Hugo understands an ideology on the march.

There may be a second meaning consonant with a notion that revolution occurs from the ground up. If a mute pedestal *explains* anything, it can only be insofar as explain means develop or unfold. A tension in the work is directed downward into the base to affect the ground. The limiting pedestal would then mediate and carry over the hermeneutic problems of the work into the context.

DiModica's bull has no base. At best its exaggerated hooves, which serve to stabilize the heavy statue, are semi-pedestals. The artist may wish that the result of not limiting the statue's space would be that his Wall Street symbol lays claim to a sightline. But that hope does not give the protection he has failed to provide. Besides, the New York City Parks Commissioners have provided the missing pedestal for him. The crumbled street corner was repaired prior to installation: Charging Bull now has a cobblestone base delimiting park from street and providing Charging Bull three of Hugo's precipices to check its surge. Were it to lunge past the edge, it would topple. It is quite possible that a savvy artist would want to negotiate from the city a perimeter for a statue greater than the pedestal on

campaign-to-save-a-bull.html [https://perma.cc/4F7S-TMBL]. David W. Dunlap states the artist's asking price was \$5,000,000. David W. Dunlap, *The Bronze Bull Is for Sale, but There Are a Few Conditions*, N.Y. TIMES, Dec. 21, 2004, https://www.nytimes.com/2004/12/21/nyregion/the-bronze-bull-is-for-sale-but-there-are-a-few-conditions.html [https://perma.cc/8QC3-744N].

18. VICTOR HUGO, *CHOSÉS VUES*, 1830-1846, at 213-14 (Hubert Juin ed., 1972).

which it perches, but the pedestal establishes that the context has a right to limit its reach. When, as is the case of Charging Bull, the city has done what the artist failed to do in giving a temporary home to Charging Bull, it is difficult to see what ground the artist's wish would have to stand on.

As for Fearless Girl, Visbal or her corporate sponsor has taken care to supply the statue with a distinct pedestal. She stands in the sightline of the bull, but not on the corner that serves as his pedestal. Her position is on an apron of stone that has been added to the original corner, presumably with the necessary permits.¹⁹ The corner tidied up for Charging Bull in 1989 had begun to crumble; it was brought into repair when Fearless Girl was placed on the site. A clear line between Charging Bull's corner and Fearless Girl's skirting shows Visbal's clear intent to leave the bull alone in his cobblestone pasture, while allowing the mind's eye to link the two statues and to add a commentary. She is next to Charging Bull's corner, but in the position of a frank add-on. Yes, Fearless Girl stands in the path of the bull. But one of Hugo's abysses gapes between them, visible as the line where stone meets stone. Fearless Girl has marked off her place: it is that of the supplement, and she capably defends it.

I wouldn't presume to propose the direction copyright law ought to take from this consideration. However, the parergonal elements, where the artist has tried to bring the work-as-gift into conformity with the context and to transact with its legalities, are worth taking into account. The parergon demonstrates an artist's skill at constructing boundaries, even as it is a place where it threatens an overflow. Surely it counts for something that a limit—however problematic—is being posed. Where the artist has protected neither public nor work by parergons, as is the case with Charging Bull, it does not seem to this literary critic that the law ought to help him out.

In short, Bridy has made use of terms in discourse theory—dialogism, the hypotext and hypertext—that do not translate seamlessly into the limited rights of an author that copyright regulates. On the other hand, the parergonal elements of a work, which she also briefly addresses, demonstrate the artist's attention to the entrance of the work into the context, including the legal context. As such, they appear appropriate ground for copyright law to consider in regulating the traffic between authors by means of works.

19. Letter from Norman Siegel, Partner, Siegel Teitelbaum & Evans, LLP, & Steven Hyman, Partner, McLaughlin & Stern, LLP, to Mayor Bill de Blasio, City of N.Y. (Apr. 11, 2017), <https://www.scribd.com/document/344998311/Letter-to-Mayor-DeBlasio-on-Charging-Bull-vs-Fearless-Girl>.

