Jessica Litman argues that the basic reproductive unit of U.S. copyright law, the copy, “no longer serves our needs, and we should jettison it completely” (180). The challenge posed by modern technologies is central to her argument. Computers routinely produce “copies” of program code and data in use. Litman suggests that use—distinguished as commercial or non-commercial—would be a better way of organizing copyright legislation. But use is a complex and nuanced term, especially when applied to one ubiquitous reproductive technology, photography.

Photography can be described as a group of technologies with multiple uses. Reproduction, in the sense of making copies, is only one aspect. For the average snaphooter, a photograph of a relative is not used to “copy” them, but rather to depict a likeness as a trigger for memories. Industrial uses of photography are different. Large-scale integrated circuits are fabricated using photographic technologies. Dark and light areas in a negative detect if a resistant mask should be deposited; the negative presents a mapped description of circuit pathways. Much like the copies found in computer program code, reproduction occurs without recognizable depiction. The photographic functions of reproduction, depiction, and detection are separate (Maynard, Engine and “Talbot’s Technologies”). I agree with Litman’s contention that the term copy has lost its utility, not merely because of digital technology, but because of technology in the broadest sense. Distinguishing between description and depiction differentiates between the “copies” computers use and copies as reproductions. The transitory “copies” of data present in digital technology are sets of instructions describing a tangible or ephemeral object—music, pictures, and words. Like the photographic negatives used to manufacture integrated circuits or circuit boards,
the copied data tells machines how to reproduce objects. It neither depicts, nor reproduces them.

These subtle distinctions are present in U.S. copyright law, but only in regard to architecture. Descriptions of buildings, in the form of plans, can be copyrighted. However, 17 U.S.C. §120(a) provides for a right of depiction:

(a) Pictorial Representations Permitted.—The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.

This right only extends to architecture; no other category in copyright law offers similar exclusions. The statute uses the term “representation” rather than depiction and only concerns pictorial representations. Nonetheless, U.S.C. 17 §120(a) differentiates between representation and reproduction and classifies photography among representative technologies.

Photography’s depictive power is often conflated with the descriptive- ness of its reproductions. Its ability to describe physical objects into two- dimensional projections is unparalleled. Photographs “tell” us things about the subject, but also provide raw material for imagination. A photograph is not a “copy” of its subject. I am sympathetic to Kendall L. Walton’s controversial assertion that depictive photographs are essentially fictions facilitating imagination. “To be a depiction is to have the function of serving as a prop in visual games of make believe” (Walton, Mimesis 296). A depiction does more than “copy” reality. Nonetheless, because of the power of its descriptions, photography is more suspect than painting or sketching. A person sketching a public landmark is less likely to be interrogated than a person with a camera. The right to photograph in public does not exist by statute, except in the case of architecture.

Following a 2005 controversy regarding Anish Kapoor’s sculpture Cloud Gate, this chapter revisits the concept of reproducibility in art. Kapoor’s sculpture captured the imagination of Internet users who warned of a new prohibition of photography taking hold. Though Walter Benjamin’s “The Work of Art in the Age of Mechanical Reproduction” loses some of its prophetic luster in the aftermath of Cloud Gate, most of the mechanisms involved remain relevant. As a monument to capitalism and a “copyrightable” property, the sculpture provides a locus for discussing the right to photograph in public spaces and the use of media, both new and old.
Cloud Gate

Anish Kapoor’s Cloud Gate is a publicly visible sculpture located in Millennium Park, Chicago. The park was proposed in 1996 to occupy a twenty-four-acre site, with a budget of $150 million. Originally slated to open in 2000, the park debuted in mid-2004. Changes in the project necessitated the formation of a nonprofit corporation, Millennium Park Inc., headed by former Sara Lee CEO John Bryan. With corporate support, the budget grew to $475 million, received from public and private contributions.² Cloud Gate was made possible by an $11.5 million-dollar grant from SBC Telecommunications, and was incomplete when the park opened. Composed of 168 stainless steel plates, its welds had not been polished. Although the opening was premature, Kapoor remarked: “At least it’s there on the opening day, if only as a semi-finished object. One gets a sense of what it’s going to be” (Nance 64). Citizens and the media in Chicago designated the structure as “the bean” before it was properly titled. Kapoor was not amused:

I’d just as happily do without a title, actually, except that it suggests a possibility of interpretation. In this case, the work is clearly reflecting what’s around it, picking up the Chicago horizon, the Chicago skyline—bringing it into itself, in a way. And it is a gate—a gate to Chicago, a poetic idea about the city it reflects. To call it something else damages the potential for a different way of thinking about the piece. (Nance 64)

Titles, according to Kapoor, focus our thoughts on what the sculpture might depict. Measuring sixty-six feet long, thirty-three feet tall, and weighing 110 tons, Cloud Gate has a certain gravitas undercut by the diminutive title of “bean.” This early controversy makes it easier to differentiate between a descriptive label such as “the bean” and its depictive one, Cloud Gate. There is nothing aside from respect to prevent false labeling of the sculpture. There is no law against it. Richard Rezac, a sculptor and professor at the Art Institute of Chicago, remarked about the nickname: “I think it’s a trivialization of his efforts, his ideas and his basic intention.” Further, Rezac elaborates on an important aspect of the work: “The fact that it’s reflective, that it functions as a mirror, is the whole essence of the work” (Nance 64). Control over what depictions of Cloud Gate reflect has been a problem for both the sculptor and the City of Chicago.

On January 27, 2005, the blog New (sub)Urbanism reported on an emerging story: professional photographer Warren Wimmer was stopped by a security guard from photographing Cloud Gate. Ben Joravsky’s article “The
Bean Police” in the Chicago Reader was ground zero. Depictions of this event on the Internet caused a stir. BoingBoing picked up the story on February 6, and links multiplied. The City of Chicago vowed to drop its permit fee for professional photographers in Millennium Park on February 17. A follow-up article by Joravsky seemed to settle the issue on February 11. Another article in the Christian Science Monitor on March 30 went largely unnoticed by bloggers (Kleiman). The issues raised in this interface of media, technology, and public space deserve careful unpacking.

Reaction by the media had nothing to do with Cloud Gate as a work of art. “The Bean Police” discovered that professional photography in Millennium Park requires a permit. Wimmer, to avoid purchasing this permit, bribed a security guard. He was also warned not to sell any photographs of Cloud Gate. Joravsky’s research made it clear that the restrictions on photography in public parks applied not only to Cloud Gate, but to all professional photography in any city park. But his selective subtitle read: “The city’s charging some photographers hundreds of dollars to take pictures in Millennium Park,” highlighting Chicago’s newest attraction. Titling the follow-up article “Pork in the Park,” Joravsky declared a narrow field of interest. But the article details two distinct modes of regulation. First, “professional” photography requires a permit in public spaces. Second, photographs could not be sold without explicit permission. There was no mention of casual photography, and the ambiguous “some” of Joravsky’s initial subtitle promotes misreading.

As the story proliferated on the Internet, the depiction of professional regulation was minimized. Instead, the focus was the threat of public space itself being copyrighted. The central commercial/noncommercial distinction was ignored. The City of Chicago attempted to differentiate between amateur and professional by identifying the type of equipment. Security guards were instructed to look for tripods and “professional looking” equipment or tripods. The purpose of both is to make more “exact” copies of a scene. The threat of exact copies of Kapoor’s sculpture might be a divisive point, but public reaction accentuated the power to prohibit, rather than the separation of commercial and noncommercial behaviors. David Bollier expressed this imagined crisis by comparing the chain of events surrounding Cloud Gate to an earlier controversy blogged by Lawrence Lessig—a prohibition on photography in Starbucks Cafés. While the response on the Internet is analogous, the core situations are not. The interior of a Starbucks franchise is arguably a private space regulated through the policies of the franchise or the owner.³ Casinos in Las Vegas regulate public photogra-
phy. The overriding issue is an assumed privacy right for their patrons. Family-oriented casinos encourage photography, while more upscale venues discourage it.

Millennium Park is a public space. Nonetheless, there are statutory rights that control representations of “public” presences—be they buildings, sculptures, or images of people in public places. There is no general statutory right to photograph in public; these rights are derived from common-law precedents. Lessig has argued elsewhere that these precedents accentuate the relationship between freedom from regulation and technological innovation (345). However, the right of the public to represent, reproduce, or transmit iconic presences is shaky. Icons like Cloud Gate reflect cultural values, and regulating the ability of culture to reproduce itself has far-reaching implications beyond technological innovation. Lessig and others have also argued that excessive regulation of cultural products might mean the death of culture. But such regulations grow from copyright’s first mandate—to promote progress in the useful arts. According to Lessig, Starbucks prohibits photography on the grounds that it reproduces their floor plan in a transmissible form, promoting infringement of their copyrights. The casino example is not a matter of copyright at all; photography can be prohibited because it infringes on privacy rights. In matters of public space, multiple rights are involved.

In response to Starbucks’ prohibition, Lessig encouraged his readers to practice civil disobedience—hundreds of readers responded by posting photographs taken in Starbucks. Cory Doctorow of BoingBoing responded in kind to the “crisis” of Cloud Gate by urging readers to take photographs of Cloud Gate and upload them. The response was disappointing. New photographs of the sculpture were impossible; Cloud Gate was draped in a tent in late January to polish its seams. Moreover, amateur photography was never prohibited, and the presence of photographs of the sculpture online was a nonissue. A webcam operated by US Equity has been gradually accumulating a public Internet archive of photos of the sculpture and adjoining restaurant since March 5, 2004. The transformation of Cloud Gate from a work of art into a politicized work of art negotiates the boundaries of both legal and aesthetic discourse.

These boundaries were more specifically addressed by the Christian Science Monitor story “Who Owns Public Art?” Bob Horsch, who had been selling postcards and calendars of the sculpture from his gallery, was warned by city representatives to cease selling these “copies.” Horsch was shocked: “We’ve been representing Chicago for 32 years. We’ve put up with the dirt
for six years and now we can’t take a picture of what’s across the street?” (Kleiman 15). What emerges from this mainstream article is a more accurate depiction. The prohibition the City of Chicago seeks to enforce is the commercial exploitation of its properties through “copies.” The copyrights of the objects in Millennium Park have been transferred to the City of Chicago, which claims an exclusive right to commercial exploitation. Photography by the general public, considered to fall within the realm of “fair use,” is exempt. What is at stake for Horsch is the ability to exploit public landmarks for financial gain.

The complexity of the situation is obscured by fear of the prohibition of photography in public spaces. Can objects be photographed freely in public space? The answer is generally yes. Can these photographs be reproduced openly for profit? The answer to that question is frequently no. Walter Benjamin observed:

> The increasing proletarianization of modern man and the increasing formation of masses are two sides of the same process. Fascism attempts to organize the newly proletarianized masses while leaving intact the property relations which they strive to abolish. It sees its salvation in granting expression to the masses—but on no account granting them rights. (120–21)

*Cloud Gate* deserves deeper contemplation as an object that challenges the “copy” as a measure of value. A work of art escapes being classed as a useful article—unlike buildings, the prohibition of salable photographic reproductions of public sculpture rests on solid ground. Expression of the sculpture’s presence in the form of casual snapshots is granted, but a viewer has no right to profit.

### Reproducibility

Are copies of *Cloud Gate* even possible? Kapoor’s sculpture seems to embody Benjamin’s concept of the irreproducible aura. “The Work of Art in the Age of Mechanical Reproduction,” first available in English translation in the 1968 compilation *Illuminations*, has enjoyed critical success as a reflection on the importance of art in dangerous political times. Recent translations suggest that the original title is incorrect. An alternate title, “The Work of Art in the Age of Its Technological Reproducibility,” is a better fit. Rather than the immutable “work of art” thrust into an age of reproduction, the possessive pronoun more accurately reflects the presence of art
in an age where it is not only subject to reproduction, but designed for reproducibility. The benchmark “new” art medium for Benjamin was film; the classic “old” medium was sculpture. Benjamin predicted that sculpture would inevitably decline in the age of composite arts like film, because they forcefully renounce all concept of eternal value in favor of the potential for endless improvement. The effect of “eternal value” is aura, “a strange tissue of space and time: the apparition of a distance, however near it may be” (105). The social reason for aura’s decay is “the desire of the masses to ‘get closer’ to things spatially and humanly, and their equally passionate concern for overcoming each thing’s uniqueness by assimilating it as a reproduction” (105). When Millennium Park opened, no officially sanctioned reproductions were available. Bob Horsch capitalized on the desire to possess reproductions by providing calendars, refrigerator magnets, and posters.\(^5\) Sales were only moderate, perhaps because Cloud Gate proved uniquely resistant to assimilation.

Cloud Gate distorts the skyline of Chicago, rendering it strange and distant while reflecting the city and its spectators. The initial public response to the sculpture was a rush to touch it and to confront their reflections in it. The “strange tissue of space and time” that Benjamin connects with the aura of a unique work of art is an essential, if not literal, aspect of Kapoor’s work. As Blair Kamin described it, “The sculpture grabs you with its funhouse distortion game, then holds you, mystifies you, and eventually delights you with its sophisticated play of opposites” (10). Its monumental presence is deeply symbolic. Kapoor sees his work as an intersection between sculpture and architecture:

My inspiration as an artist from as early as I can remember has been symbolic architecture. Perhaps some of the most deeply, philosophically coherent objects of all time are buildings. . . . Whether it’s the Jantar Mantar in India, or early mosques like the one at Samara, Iraq, or the pyramids—there are two things that come together. One is the ritual procession that those structures seem to describe, evoke and even prescribe. And the other is that they define themselves with a certain self-evident gestalt. What they seem to say is that if you look at the object from here, or if you look at the object from there, it’s the same object. (Ellias 1)

Cloud Gate invites a ritual procession, while granting spectators a unique view of themselves reflected inside the work. Kapoor’s work illuminates,
retrospectively, the blindness and insight in “The Work of Art in the Age of Its Technological Reproducibility.” Although Benjamin failed to grant continuing relevance to sculptures, he acknowledged the importance of architecture as the oldest and most fundamental of the arts: “Its history is longer than that of any other art, and its effect must be recognized in any attempt to account for the relationship of the masses to a work of art” (120). Monuments rest in an uneasy space between sculpture and architecture.

Nonetheless, Benjamin’s essay gives the preeminent position to film. Distribution of film is enforced, because without such distribution the costs of production would be prohibitive. The countervailing impulses of private enterprise and public consumption require careful negotiations. Film came of age during depressions affecting the global economy. Benjamin observes:

The same disorders which lead, in the world at large, to an attempt to maintain existing property relations by brute force induced film capital, under the threats of crisis, to speed up the development of sound films. The introduction brought temporary relief, not only because sound film attracted the masses back into the cinema but also because it attracted new capital from the electricity industry with that of film. Thus, considered from the outside, sound film promoted national interests; but seen from the inside, it helped internationalize film production even more than before. (123)

The historic situation facing film reflects the recurrent paradox of public art. Public art requires the acquisition of capital, either through appeal to profit or the support of a nation/state. Cloud Gate was funded by a grant from a telecommunications company, but the line between nation/state and corporate support is thin. The city seeks to recover the cost of continued maintenance of the park through use and parking fees. On one level concerns are local to the city/state—maintenance of their property. But the dramatic result created through an international collaboration with an Indian sculptor forces us to reevaluate our perception of public art.

It is not surprising that those who funded the project have an interest in maintaining conventional property relations to recover their investment. It is also not surprising that taxpayers feel a sense of “ownership” of public works. Unlike a film, a public sculpture has a tangible presence. It has value not only in its exhibition, but also in its possession. The question of who owns Cloud Gate—the people of Chicago, the development corporation, or the sculptor who created it—is complex. The federal government denies
copyright protection to works created by government employees, but copy-
right protection is granted to works created on contract, that is, “works for
hire.” States vary in their position on works for hire, so although a public
nonprofit development corporation contracted it, it is not automatically
“public property.” The power to grant copyright to public works is divided
state by state. The rights associated with Millennium Park are hopelessly
fractured among multiple contractors with exploitation rights, state and
city governments, as well as the creative rights of the artists themselves.

Benjamin’s benchmark of democratic art, film, highlights a shift from
cult value, the value of ritual possession, to that of exhibition value. Gener-
ally speaking, the City of Chicago proposes to pay for construction and
upkeep of the park through fees, including permits for professional pho-
tography, parking fees, and event fees. These fees rely on a cultish attrac-
tion to the site. The photographer’s use fees that triggered the Cloud Gate
controversy perhaps reflect its cult value, but more importantly they signal
utility. Useful articles cannot be protected under U.S. copyright.

As a work of art that weighs 110 tons produced at a cost of $11.5 million,
Cloud Gate is not easily copied. But exhibition rights—the right to repro-
duce reproductions—are separate. Sculpture, though it is one of the oldest
reproducible art forms, cannot be reproduced without permission of the
creators or their assigns under U.S. copyright law. However, because of its
relationship to architectural monuments and its visibility in public space,
the status of Cloud Gate is complex.

Rights and Responsibilities

Photographing in public spaces always balances public and private rights
and responsibilities. Subject matter is generally the litmus test for repro-
ducibility. For example, individuals are assumed to have rights of privacy
that supersede rights of publicity. The level of protection afforded individ-
uals differs with their status as public or private figures. Because celebrities
are deemed newsworthy, their rights diminish. A general right to photo-
graph people in public spaces is assumed, but there is no right to exploit
their images commercially. However, newsworthy images can be exploited
as fair use. Significantly, this assumed fair use includes the right to repro-
duce and sell photographs with newsworthy content for profit. Due to the
reflective nature of Cloud Gate, if the skyline of Chicago is identified as
newsworthy, photographs of the sculpture (which automatically reproduce
the skyline) might be distributed under fair use. Entrepreneurs like Horsch
would merely be distributing newsworthy content.
However, the case most applicable to *Cloud Gate* is *Hart v. Sampley* (1992). It centers on Fredrick E. Hart’s sculpture *The Three Servicemen*, part of the Vietnam Veterans Memorial in Washington D.C. The defendants sold T-shirts and photographs of the sculpture without authorization. In court they argued that the sculpture constituted a *useful article* “that cannot be separated from the functional purpose of honoring Vietnam Veterans.” Under this lens, all monumental works of art would be exempt. The court did not agree. Their reasoning was sound—if *use* were defined in this manner, most works of art might be termed exempt. The next argument was that the sculpture was located “in an ordinarily visible and public place,” referencing 17 U.S. Code, Section 120(a), which exempts pictorial representation of architectural works. This was rejected on technical grounds, not because *The Three Serviceman* is not a work of architecture, but because of timing. The sculpture was unveiled on November 9, 1984, and Section 120(a) did not take effect until December 1, 1990. The defendants were prohibited from reproducing the sculpture for profit.

The invocation of Section 120(a) is suggestive—consideration of monumental works as architecture rather than sculpture seems consistent with their public use. Because it was created after 1991, a suit regarding the sale of photographs of *Cloud Gate* would clarify the rights and responsibilities regarding public monuments. As Melissa L. Mathis suggests:

> While the utilitarian nature of architectural structures was the historical justification for a denial of copyright protection, this rationale does not apply to nonfunctional monumental works. Nonetheless, monuments are perhaps our most cherished works of public art. There is a unique reciprocity in such works that is absent from the other fine arts: they exist for the public and by the public. This relationship is one that must be recognized by our copyright law. It is also, however, one that must be understood by the authors of such works. (628)

The status of professional (for profit) photographs of *Cloud Gate* can be established as fair use, but there are alternatives.

Reproductions of copyrighted works can also be treated as “derivative works.” A pair of recent cases suggests dubious stature for photographs. In *Ets-Hokin v. Sky Spirits, Inc*, 225 F.3d 1068 (9th Cir. 2000), the court held that a commercial photograph created for an advertisement was not derivative of its subject. However, in this case, the subject—a vodka bottle—was not a copyrightable work. In a later case involving the photography of ornamental picture frames for a catalogue, *SHL Imaging, Inc, v. Artisan*
While the *Ets-Hokin* court correctly noted that a derivative work must be based on a “preexisting work,” and that the term “work” refers to a “work of authorship” as set forth in 17 U.S.C. §102(a), it failed to appreciate that any derivative work must recast, transform or adopt [*sic*] the authorship contained in the preexisting work. A photograph of Jeff Koon’s “Puppy” sculpture in Manhattan’s Rockefeller Center, merely depicts that sculpture; it does not recast, transform, or adapt Koons’ sculptural authorship. In short, the authorship of the photographic work is entirely different and separate from the authorship of the sculpture. (Cohen 114)

In the language chosen by the court, a photograph *merely depicts* rather than copies preexisting work. Approached as the allocation of authorial rights, this ruling suggests that photographing a sculpture embedded in public surroundings creates a new work. Photographs are neither “copies” nor derivative works.

What *use* do photographs of public monuments serve? For Bob Horsch, they provide a substantial part of his income. Nevertheless, while his photographs of Wrigley Field and other Chicago landmarks sold briskly, photographs of Cloud Gate had to be marked down. A few moments observing in Millennium Park provide an answer. Visitors prefer to photograph their own reflections, to image and imagine themselves in Cloud Gate.

**Notes**

1. Architecture, classed as a useful article, has received limited protection under U.S. copyright law. Protection for architectural plans was only added with the 1976 Copyright Act, and §120 was added in 1990 to increase U.S. compliance with the Berne Convention.
2. For discussion of the background, see Hubbard; Jones; and Kamin.
3. Curiously, however, Starbucks would be considered a *public* space if copyrighted music or videotapes were played. When determining the criteria for public performance §101(1) declares that “any place where a substantial number of persons outside a normal circle of family and its social acquaintances” might hear is “public.”
6. A 2004 case regarding photographs of Barbra Streisand’s home on the California coast is instructive. Though 17 U.S.C. §120 grants the right to photograph architecture visible from public locations, Streisand’s suit against photographer Kenneth...
Adelman argued that his aerial photographs from public airspace were an invasion of privacy. The suit was summarily dismissed on the grounds that the photographs, freely sold on the Internet, were *newsworthy* and therefore fair use. The news interest was not in Streisand’s house, but the coastline underneath it. Full court transcripts and press coverage are available at California Coastal Records Project, http://www.californiacoastline.org/streisand/lawsuit.html.

**Works Cited**


