DePaul Journal of Art, Technology & Intellectual Property Law

Volume 5
Issue 1 *Winter 1994/Spring 1995*

Article 5

Copyright Problems in Post-Modern Art

Lori Petruzzelli

COPYRIGHT PROBLEMS IN POST-MODERN ART

Lori Petruzzelli[*]

I. INTRODUCTION

Copyright law establishes a framework to protect artistic creation by providing a system of economic incentives. By granting an artist property rights in her work, the Copyright Act fosters the production of a wide array of creative works from many different genres.[1] To this end, the Copyright Act does not define art, rather it draws lines and sets forth flexible categories of works which are eligible for protection. There are no qualitative tests, simply a low threshold of originality and a requirement that the work be an expression, not an idea.[2] Even with this broad framework and flexible approach, the Copyright Act fails to extend protection to many movements within post-modern art.

Post-modernism rebels against the traditional norms of originality, ownership, and expression that define copyright protection. The post-modern artist challenges notions of originality by lifting images from pre-existing works to present novel ideas about society, politics, and consumerism. Ownership is questioned by appropriation artists who take the work of another and claim it as their own. Artistic expression, once the essence of art, is now subservient to the artistic idea.[3] "[Post-modernism's] . . . ambitions are not the ambitions of art, but those of politics or psychology or pornography or something else."[4]

Some commentators believe the Copyright Act should adapt to cover forms of art that did not exist or were in their inception at the time the Act was written. Others argue that the Copyright Act discriminates against modern artists because it draws lines using traditional notions of creation and originality. These people argue that the Act must be changed or post-modernism and its wealth of socially rewarding commentary will suffer.

This paper argues that the Copyright Act should not be changed to accommodate the specific problems posed by post-modern art. To do otherwise would lead to an amorphous, unworkable scheme where potentially everything could be

---

* B.A. 1992, Fairfield University (Politics and Art History); J.D. 1995, Marshall-Wythe School of Law, College of William & Mary. The author would like to thank Professor I. Trotter Hardy for his guidance and assistance. This work is dedicated to the memory of Rev. Christopher J. Mooney, S.J. -- jurist, teacher, friend.

1. E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1477 (1993).

2. Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 179 (1990).

3. Lynne A. Greenberg, *The Art of Appropriation: Puppies Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 1 (1992).

4. JAMES GARDNER, CULTURE OR TRASH? A PROVOCATIVE VIEW OF CONTEMPORARY PAINTING, SCULPTURE, AND OTHER COSTLY COMMODITIES vii (1993).

protected art. Artistic ideas would take precedence over artistic expression, and the wealth of creative expression that has defined our culture would suffer. Artists would be able to have a monopoly on ideas that would forestall entire avenues of creative expression, such as certain colors or geometric shapes. The Copyright Act was written to minimize subjective evaluations, but to accommodate post-modern art, judges would have to interject their own aesthetic sensibilities in determining whether an artist's idea was original.

This paper will discuss the tension between post-modern art and the Copyright Act by discussing several cornerstones of copyright law and how they apply to various movements within post-modern art. The low threshold of originality will be discussed in the context of how the Act attempts to minimize bias against modern art.

I will discuss how the current Copyright Act is workable, despite its exclusion of much of post-modern art, by first examining the incentive structure of the Copyright Act and how it is aimed at fostering artistic expression, not ideas. This paper will then discuss copyright problems unique to conceptual art, such as the tension between the idea/expression dichotomy and the movement's premium on art as idea. Conceptual art should not receive copyright protection because the emphasis in this movement is on new ideas, not new expression. Two artists creating strikingly similar works are not really in competition with each other if their ideas are distinct. There is little concern if a conceptual artist copies another's expression, so long as the underlying idea is distinct. These artists do not need the types of incentives that the Copyright Act offers to foster continued creation.

Next, I will examine the problems posed by Appropriation art, a movement which incorporates the images of others into pre-existing works to comment on society.[5] Appropriation art is, in essence, infringement for a reason. Artists take the copyrighted work of another and place it in a new context. This is a form of art that results in some legitimate social commentary. Yet, it fails to produce legitimate original expression, which is what the Copyright Act fosters. Proposals to change the Copyright Act to accommodate this type of work lead to a myriad of problems. Allowing a fair use defense to Appropriation art on a larger scale would lead to abuse by infringers claiming artistic intent. Post-modern artists would be infringing the works of others with abandon. What was once considered infringement would be considered protected expression.

Post-modernism does pose distinct copyright problems, but this type of art is simply not suited for protection. If the Act were overhauled to accommodate post-modernism's unique problems, the essence of copyright protection, the fostering of original expression, would be seriously undermined and our national culture would suffer.

5. Ames, *supra* note 1, at 1481.

II. THE COPYRIGHT ACT OF 1976

A. COPYRIGHT INCENTIVES: AN OVERVIEW

The overriding purpose of copyright law in the United States is to encourage the widest possible dissemination of artistic works to the public. The Copyright Act is based on the presumption that authors will not invest their time and money in creating original works unless they are granted certain property rights. The types of property rights implicated by this presumption are the author's right to control the distribution of her work in the marketplace and the right to profit from the use of her work in the marketplace.[6]

To this end, the framers of the Constitution provided that Congress should have the power to enact a statute to grant such property rights and economic incentives to authors.[7] The Constitution provides for the enactment of a copyright statute "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] Pursuant to this constitutional mandate, the Copyright Act was enacted.[9] Copyright protection is extended to "original works of authorship fixed in any tangible medium of expression."[10]

The Copyright Act provides artists and authors with economic incentives to create unique and original works which contribute to our cultural heritage.[11] Economic incentives guarantee a fair return for an author's effort in order to increase the amount of creative work available to the public.[12] An artist should not lose the economic return she could reasonably expect to get from her work due to someone illegally copying her work and selling it, thus supplanting the original artist's market.[13]

Copyright law also recognizes that authors need to draw on the works of others for inspiration. In order for our national culture to thrive, authors must be permitted to create works which draw from their predecessors. The need of authors to draw from the work of others must be balanced with the need to grant economic incentives for original works.[14]

The Copyright Act strikes a balance by focusing on protecting the copyright

---

6. 1 PAUL GOLDSTEIN, COPYRIGHT § 1.1 (1989).

7. *Id.*

8. U.S. CONST. art. I, § 8, cl. 8. Note that "Science" refers to the work of authors, which is the subject of copyright protection, while "useful Arts" refers to the work of inventors, which is the subject of patent protection.

9. The 1976 Copyright Act as amended is the present statute which provides copyright protection. 17 U.S.C. §§ 102-810 (1988).

10. 17 U.S.C. § 102 (1988).

11. Greenberg, *supra* note 3, at 16. The Copyright Act also promotes the dissemination of knowledge by requiring that the owner of a copyright or of the exclusive right to publication of a work published in the United States deposit two copies of the work for the Library of Congress. 17 U.S.C. § 407 (1988).

12. Ames, *supra* note 1, at 1486-1487.

13. *Id.* at 1515.

14. GOLDSTEIN, *supra* note 6, at § 1.1.

holder's economic incentives for continued creation, rather than on protecting the rights in a work from any "hint of infringement."[15] To this end, the Copyright Act employs a liberal fair use standard[16] that allows copying when the harm to the market is insubstantial and outweighed by a strong public interest in fostering works that criticize and question societal norms through commenting on the copyrighted work of another.[17]

B. COPYRIGHT INCENTIVES AND POST-MODERN ART

Despite the Copyright Act's long history and success at providing incentives for artists and authors to create a near infinite number of creative works, these same incentives that fostered creation in other media and movements run counter to the underpinnings of the post-modern art movement. Copyright law has a moral aspect that contradicts appropriation art:[18] that a person should not take another's work for their own financial gain.[19] This aspect of copyright law is in conflict with the practice of post-modern artists who freely comment on copyrighted images from the mass media that are controlled by broadcasters, publishers, and motion picture conglomerates. Incentives for post-modern artists are more political in nature than economic. The post-modern artist creates works to challenge these powerful groups which might otherwise have monopoly control over the communication of the very images that create our popular culture.[20] Because many post-modern artists appropriate the copyrighted works of others to comment on society, much of post-modern art is not copyrightable.

Likewise, conceptual artists challenge the same powerful groups as the appropriation artists by redefining what is art and what are socially valuable ideas. The conceptual artist does this by creating works that are original in idea, but not expression.[21] Such works do not get copyright protection because protection is only extended to works that are original in execution, rather than original in idea.[22] Yet, post-modern art continues to thrive, even though it does not benefit from the incentives of the Copyright Act. If post-modern art continues to thrive without economic incentives, extending copyright protection to post-modern art may not be necessary.

---

15. Ames, *supra* note 1, at 1477.

16. *See infra* note 164.

17. Ames, *supra* note 1, at 1477.

18. Appropriation art is a movement within post-modernism that lifts images from the mass media, sometimes in their entirety, to comment not only on the image itself, but on the consumerism of a mass media society. *Id.* at 1487; *see also infra* notes 149-152 and accompanying text.

19. Timothy Cone, *Fair Use? Rogers v. Koons,* ARTS MAG., December 1991, at 25, 26.

20. *Id.*

21. Roberta Smith, *Conceptual Art, in* CONCEPTS OF MODERN ART, 256, 260 (Nikos Stangos ed. 1981).

22. 17 U.S.C. § 102(a) (1988).

III. ORIGINALITY REQUIREMENT

A. PROTECTION OF ORIGINAL EXPRESSION, NOT IDEAS

Post-modernism not only runs counter to the incentive structure of the Copyright Act, but to its minimum requirements that a work be original in expression. Within post-modern art is the conceptual art movement which challenges notions of creativity by embracing the idea as art, rather than the execution.[23] This entire movement challenges the underpinnings of copyright law: the notions of originality and expression versus idea. The notion that art does not need to have any form at all so long as the artist has a mental conception is a total rejection of copyright's notion that a line can be drawn between idea and expression.[24]

"Idea" refers to a work's animating concept, such as a story of two star-crossed lovers, while "expression" refers to the ultimate, literal expression, such as the play that tells the story of the two lovers.[25] Courts will look at a creation and separate the idea, the unprotected part of a work, from its expression, the protected part of the work.[26] This separation represents an important policy decision of what parts of a work authors should be allowed to monopolize and what parts belong in the public domain, so others are free to build on them.[27]

B. FEIST FORMULATION OF ORIGINALITY

Copyright's formulation of originality lies at the heart of the Act as does the separation of idea from expression. Examining the basis for originality demonstrates how the Act goes about classifying what types of works are worthy of protection. This formulation is purposefully broad so that aesthetic judgments are kept to an absolute minimum. Even with this broad definition, many works of post-modern art which stress original ideas rather than original expression fail to qualify for copyright protection.

"The *sine qua non* of copyright is originality."[28] The leading case on copyright's originality standard is *Feist Publications, Inc. v. Rural Telephone Service Co.*[29] The court in *Feist* articulated the standard for originality, not explicitly, but by default.[30] This reluctancy to define originality without any exactitude reflects the ambiguity and subjective nature of that concept.

The threshold for originality is that the work must be the original of the author, as opposed to being work appropriated from another. The artist's personal

---

23. *See* Smith, *supra* note 21, at 257.

24. *Id.*

25. GOLDSTEIN, *supra* note 6, at § 2.3.1.

26. *See* Baker v. Selden, 101 U.S. 99 (1879) (holding that the copyright of an accounting book extended only to the words describing the method, and not the method itself).

27. GOLDSTEIN, *supra* note 6, at § 2.3.

28. Feist Publications, Inc. v. Rural Telephone Service Co., 111 S. Ct. 1282, 1287 (1992) (holding that arrangement of listings in white pages was not original expression).

29. *Id.*

30. Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 823 (1993).

contribution to the work is what is considered to be original.[31] This poses a problem for appropriation artists who lift the images of others, sometimes in their entirety, and incorporate them into their work. In addition to this requirement of independent creation, the court in *Feist* also noted that the work must embody some minimal degree of creativity. All that is needed is "some creative spark, no matter how crude, humble or obvious."[32] By keeping the threshold so low, the Copyright Act minimizes the danger of the judiciary interjecting their own notions of what is or is not art.[33] As long as the work in question meets the low requisite level of creativity, the work gets copyright protection, regardless of how slight the creative spark might be that illuminates the entire piece. Nonetheless, in *Feist*, the arrangement of listings in Rural's white pages failed to meet even this minimum standard.[34] The court found that the arrangement of these listings "could not be more obvious and lacks the modicum of creativity necessary to transform mere selection into copyrightable expression."[35] The court went on to state that such an arrangement was an "age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course."[36] Such an arrangement would, therefore, be denied copyright protection. Thus, as a pre-requisite for copyright protection, originality has a very low threshold that extends protection to a wide variety of creative expression, regardless of the subjective value of the work. Nevertheless, some works of post-modern art do not even have this requisite level of creativity because they focus on original ideas, rather than original expression. Other works fail to receive protection because they are not the independent creation of the artist, but rather are the appropriated work of someone else.

C. NOVELTY VERSUS ORIGINALITY

In order to make copyright protection available to the widest number of works possible, copyright law uses a standard for originality that is distinct from the novelty requirement in patents.[37] The introduction of new techniques and styles to the world of art is truly creative in that it is novel. Although a novel work of art would also be considered original under the Copyright Act, a work need not be novel to still receive copyright protection.[38] Like the author's combination of

31. *Feist*, 111 S. Ct. at 1287.

32. *Id.*

33. Cohen, *supra* note 2, at 230.

34. *Feist*, 111 S. Ct. 1282.

35. *Id.* at 1285.

36. *Id.* Many works of post-modern art, especially minimalist works, fit this description. Think of Malevich's *White on White*. Although the concept of embracing the canvas as simply a picture plane, rather than a window onto the world was creative in concept, the end product of a white square on a white canvas was commonplace. Under *Feist's* analysis, the simplistic execution of painting a white square can easily be viewed as so rooted in tradition as to lack the requisite creative spark.

37. GOLDSTEIN, *supra* note 6, at § 2.2.1.1 (1989).

38. Probably Judge Learned Hand's example of an author independently writing a poem that turns out to be line for line identical to Keats's *Ode on a Grecian Urn* is the best example of the distinction between novelty and originality for copyright purposes. As long as the second author can

pre-existing words and letters to create a literary work, so does the artist transform *pre-existing* elements of color, shape, tone, and dimension to create a new work.[39] In this way, if a successor of Rembrandt were to incorporate his novel variations of light and color into a painting of his own independent creation, the successor's painting would have the requisite degree of originality, even though the techniques and style utilized were not unique to the successor artist.

Congress chose the lower standard of originality for the Copyright Act, as opposed to novelty, in order to provide protection and incentives to the broadest class of works possible. It did this by not confining the standard for originality to anything but the lowest requisite threshold. In this way, the Copyright Act tries to protect as many different genres of art as it possibly can while still making protection meaningful by not extending protection to absolutely everything.[40]

IV. TENSION BETWEEN COPYRIGHT LAW AND CONCEPTUAL ART

A. *LACK OF ORIGINAL EXPRESSION*

Fulfilling the requirement of originality for copyright protection is difficult for the conceptual artist because creativity for them lies in the idea, not in the expression.[41] In conceptual art, language and ideas are the true essence of art, not the visual or sensory experience.[42] Artist Douglas Huebler summarized the spirit of the movement when he stated that all art activity is a process of conceptual documentation, and it is ideas that remain once the creative process has ended.[43]

The Dada movement was the precursor to contemporary conceptual art.[44] According to Marcel Duchamp, the artist who is considered the founder of the Dada movement, art had more to do with the artist's intentions than with any creative act or aesthetic expression. To Duchamp, art was idea.[45] As such, the materials of the conceptual artist are as infinite as the amount of ideas and interpretations.[46]

The work of German artist Hans Haacke is a prime example of art as idea, not expression. Haacke's work, entitled *Manet Project*, consists of panels that list

---

prove that he had not copied Keats's poem, meaning that the second poem was the independent creation of the second author, the poem would meet the originality requirement. Nevertheless, the second author would have a most difficult time proving that the similarities were due to some freak coincidence. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936).

39. VerSteeg, *supra* note 30, at 816.

40. "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1988).

41. Greenberg, *supra* note 3, at 14.

42. Smith, *supra* note 23, at 260.

43. Robert C. Morgan, *Word, Document, Installation: Recent Developments in Conceptual Art*, ARTS MAG., May 1991, at 65, 69.

44. *See infra* notes 85-88, 122-123 and accompanying text.

45. Smith, *supra* note 21, at 257.

46. Robert C. Morgan, *Idea, Concept, System*, ARTS MAG., September 1989, at 61, 62.

the names of all the people who bought and sold Manet's *Bunch of Asparagus* from 1880 until the Wallraf-Richartz Museum in Cologne acquired that painting. His work's importance rests not in the visual effect or aesthetic qualities of the letters on the panels, but in questioning the association of business transactions with the art world.[47]

Art as idea is also a powerful tool of political conceptual art. Jenny Holzer is a conceptual artist known for her "Truisms" or aphorisms of powerful words. In 1982, Holzer flashed messages on the electronic board in Times Square that read, "Property Created Crime" and "Torture is Barbaric."[48] Her work has also been exhibited in the Guggenheim in the form of provocative messages communicated in light.[49] Like Haacke, the importance of Holzer's work lies in the message she is communicating, and not in the visual effects of colored light.

An artist's lack of creative intent in producing a work can not nullify the originality of a work.[50] However, an artist's creative intent alone does not make a work original because copyrightability turns on the originality of the artistic expression, not on the originality of the artistic idea.[51]

Nevertheless, some conceptual works such as minimalist works, are *only* creative in their conception, rather than in their execution. Minimalists believe that art is a vehicle for imposing order on things, rather than a mode of self-expression.[52] A minimalist work such as Malevich's *White on White* is a prime example of the tension between a creative concept and a commonplace execution.[53] Malevich expressed the creative idea of absolute artistic purity by painting the simplest thing one could possibly paint: a monochromatic white canvas.[54] Yet, this painted white canvas was not much different in appearance than the white canvas artists begin with before applying any paint.

The nature of abstract art simply does not lend itself to a wealth of creative expression. Some critics believe that we may soon reach a point where very few variations on abstraction will have remained unclaimed. Art critic James Gardner writes that it is now a miracle when a contemporary artist makes a truly original abstraction.[55] Likewise, Thomas Lawson writes that the "deliberate sparseness" of minimalism and abstraction have become "worn through overuse."[56]

In the Whitney Biennial, for example, post-modern artists, like Dawn Fryling, appropriated elements in their art that have been used many times before. Fryling used the tradition of light shows and theatrical sets from the work of Robert Mangold and Allan McCollum in her room of empty picture frames and halide

47. ROBERT PELFREY & MARY HALL-PELFREY, ART AND MASS MEDIA 323 (1985).
48. GARDNER, *supra* note 4, at 165.
49. *Id.*
50. VerSteeg, *supra* note 30, at 845.
51. *See id.*
52. Suzi Gablik, *Minimalism, in* CONCEPTS OF MODERN ART 244, 245 (Nikos Stangos ed. 1981).
53. *See* discussion, *supra* note 36.
54. PELFREY, *supra* note 47, at 239.
55. GARDNER, *supra* note 4, at 131.
56. Thomas Lawson, *Last Exit: Painting, in* AFTER MODERNISM: RETHINKING REPRESENTATION 153, 154 (Brian Wallis ed. 1984).

lights.[57] Another example of what critics consider to be the death throes of creative conceptual art can be observed in Christian Marclay's *Tape Fall*. The *Tape Fall* consisted of a tape reel in a stairway, spewing tape off one reel into a pile of discarded tape, while the sound of waves echoed in the background. Thomas McEvilley, in his review of Marclay's work in the WHITNEY BIENNIAL, noted that a "troubling similar" piece was done by William Anastasi in 1965.[58] Marclay may not have known about the previous work, but "the conceptual vocabulary, like painting before it, is getting cramped and going around in circles a bit."[59]

As such, the problem of this type of art meeting copyright's originality requirement may be rooted in the nature of the movement and not in the shortcomings of the law. The copyright law should not have to accommodate art movements that are premised on notions that run counter to traditional views of art. If the copyright law were to accommodate each new movement, virtually everything would receive protection, idea and expression, and it would lead to the death of copyright protection and the incentive system as we know it.

For example, to accommodate minimalist Art, copyright protection would have to be extended to works that are so simplistic that the idea merges with the expression. This could lead to one artist holding a monopoly on the color blue, if the work in question consisted of nothing more than a blue panel.

Because copyright protection is currently only extended to works of original expression, copyright protection would have to be extended to original ideas, as well as expression, to accommodate conceptual art. Under such a system everything could be potentially copyrightable art, as long as the conception were original. This could lead to some ridiculous results. Consider the work of performance artist Chris Burden. In Burden's work *Garçon!* the artist did nothing more than serve coffee to hundreds of gallery patrons. The cream pitcher he used was later encased in glass and sold for $24,000 as a work of art.[60] If copyright protection were extended to original ideas, others would be forestalled from serving coffee if they exhibited a motivation similar to Burden's. Producers of cream pitchers may be threatened with an infringement action if a pitcher of theirs was used for a similar purpose. There would also be the administrative problem of registering ideas and proving that what someone claims to be their idea is a bona fide conception and not a ploy to escape infringement.

B. TENSION BETWEEN THE IDEA/EXPRESSION DICHOTOMY AND CONCEPTUAL CREATIVITY

Professor Amy Cohen of Western New England College of Law believes that the copyright law should change to accommodate non-traditional art movements.

---

57. Thomas McEvilley, *Two Big Shows: Post-Modernism and Its Discontents*, ARTFORUM, Summer 1991, at 98, 100.

58. *Id.*

59. *Id.*

60. GARDNER, *supra* note 4, at 3.

Cohen writes that if value is placed on the creative process in conceptual art, then copyright's focus on the end product seems misplaced.[61]

> To the extent that copyright law rests on the view that the government should prohibit copying of expression in order to protect the original artist but allow the copying of ideas in order to encourage the creation of new works, it may be missing the point. There may be no way for the new artist to extract the 'idea' without the 'expression' of it, and moreover, there may be no point in making that artist attempt to do so because that artist's creation of his or her work may be considered valuable as a reflection of that artist and that artist's definition of what is art.[62]

What Professor Cohen is doing is recognizing the tension between the idea/expression dichotomy and notions of creativity in contemporary art.[63] Because there may be no way to extract the idea from the expression in many contemporary art forms, whole movements will be denied copyright protection.[64] Some may argue that this lack of copyright protection has led to the lack of creativity in minimalist and conceptual art.[65] Yet, this position is questionable. The essence of minimalist art is the conception behind the work. It is not in the nature of the work to strive for different forms of expression, rather artists strive for original conceptions behind similar works. While the work of Mark Rothko and Barnett Newman appear similar in their handling of sheets of color, what sets them apart from each other is their thought and emotion.[66] The artist's thought and emotion behind a minimalist work is what makes that work distinctive, setting it apart from other similar works. The economic incentives for minimalist art are different than the incentives associated with other genres. The market for a Rothko painting is defined by the artist's personality, not by the aesthetic qualities of his work. One wants a Rothko not because there is no other blue rectangle quite like it, but because his personality was behind the creation. His blue rectangle supposedly conveys his outlook on art to the viewer in a way that no other blue rectangle can. Although the Copyright Act provides incentives for works that would not otherwise be made, conceptual artists continue to create and sell their work without copyright protection and its economic incentives.

C. MINIMALIST ART AND THE MERGER DOCTRINE

Roman Opalka's work is an interesting example of Minimalist art which is original in idea but not in expression. His life's work is painting sequences of numbers on black canvas with white paint. He reduces the tone of the black background by one percent and estimates by the time he is seventy, his works

---

61. Cohen, *supra* note 2, at 231.

62. *Id.*

63. *See id.* at 208.

64. *See id.* at 231.

65. *See supra* notes 57-59 and accompanying text.

66. CARLA GOTTLIEB, BEYOND MODERN ART 80-81 (1976). Rothko painted monochromatic canvases for clarity, the elimination of obstacles between the painter and the idea, while Barnett painted his monochromatic canvases as a personal approach to mysticism and religion.

will be white on white.[67] Opalka's idea is original, but his end product of an all white canvas will be the same in expression as Malevich's *WHITE ON WHITE.*

Even if Malevich never painted *WHITE ON WHITE,* Opalka's work would not receive copyright protection because an all white canvas embodies the merger doctrine. Where a work's underlying expression can only be expressed in one way, a court will withhold copyright protection even if there is some original expression.[68] Using the example of Malevich's *WHITE ON WHITE*, there is no other way to express the idea of a white square than to paint a white square. To grant copyright protection to the white square would confer a monopoly of the white square on one artist. This result would be disastrous to creativity in general. Any work containing a white square could potentially be infringing, from a folk art quilt with white patches to a representational painting depicting a white window.

The general rule is that if there is more than one way to express something, a court will grant copyright protection even if the expression is closely circumscribed by the idea.[69] In the case of the white square, although one can vary the medium, there is essentially no other way to express a white square. Even if the monopoly was confined to the original medium of paint on canvas, the creative avenues of one entire medium would be stifled. This may encourage artists to abandon a medium once the basic creative ingredients of shapes, colors, and dimensions are claimed by other artists. This would undermine the incentive structure of the Copyright Act, and would stifle the creation of new works of art.

D. UNINTENTIONAL BIAS AGAINST MINIMALIST ART

In separating what is idea from what is expression, courts will examine the work that has been copied. The court will consider if the nature of the subject matter dictates the way the artist renders the subject. When a court determines how much of the expression is dictated by the design, assessments of the fact finder's conception of aesthetics is sometimes influential.[70] It is easiest for the fact finder to separate expression from idea when the first work is rich in details (not dictated by the basic idea) and the second work has not copied these details.[71] This scheme is biased against minimalist art, which is usually devoid of all detail. However, this result does not spring from intentional bias in the Copyright Act against minimalist art. One must consider the nature of minimalist art and how its emphasis on ideas rather than expression would not be advanced through copyright protection, which provides incentives for new forms of expression. At the worst, copyright protection would forestall all artists from using the simple forms of abstraction such as geometric shapes and primary colors. This

67. Robert C. Morgan, *Idea, Concept, System,* ARTS MAG., September 1989, at 61, 65.
68. GOLDSTEIN, *supra* note 6, at § 2.3.2.
69. *Id.*
70. Cohen, *supra* note 2, at 212.
71. *Id.* at 219.

would deny artists the use of the very building blocks of their profession.[72]

V. DERIVATIVE WORKS' FORMULATION OF ORIGINALITY

A. INFRINGEMENT BY POST-MODERN DERIVATIVE WORKS

Much of post-modern art consists of what in copyright terminology is called derivative works. A derivative work is "a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction . . . or any other form in which a work may be recast, transformed or adapted . . . ."[73]

When an artist makes a derivative work, he borrows from, transforms, or appropriates a pre-existing work in order to make his creation. However, the copyright owner has the exclusive right to prepare such derivative works.[74] Post-modern artists frequently infringe copyrights when they use their work to comment on contemporary images that have not yet fallen into the public domain or when they fail to pay licensing fees. Such works infringe the underlying work, regardless of the degree of transformation or creativity the derivative artist has breathed into the secondary work.[75] No matter how creative the post-modern artist's transformation of the underlying work may be, he must not trammel on the property rights that the original artist has in her work. If the post-modern artist were allowed to create derivative works without the permission of the copyright holder, it would completely undermine the incentive structure of the Copyright Act. Thus, when post-modern artists who appropriate from others in creating derivative works are found guilty of infringement, it is not because of a judicial bias against modern art, but because of the basic principles of copyright law, that one may not steal the copyrighted work of another for their own benefit.[76]

B. DISTINGUISHABLE VARIATION TEST

Even if a post-modern artist borrows from the public domain, transforms a work which she has the copyright to, or pays a licensing fee, if the derivative artist wishes to receive copyright protection, the work must still meet copyright's originality requirement. Originality in a derivative work requires that the author contribute "something more than a 'merely trivial' variation, something recognizably 'his own.' No matter how poor artistically the 'author's' addition, it is enough if it be his own."[77] Thus, two requirements for originality must be met if the derivative work is to receive copyright protection: the derivative work must

---

72. *See* GOLDSTEIN, *supra* note 6, at § 2.3.2.

73. 17 U.S.C. § 101 (1988).

74. 17 U.S.C. § 106(3) (1988).

75. Jeff Koons's *String of Puppies* is probably the most infamous derivative work of late. *See infra* notes 161-177 and accompanying test.

76. *See* Cone, *supra* note 19, at 26.

77. Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir. 1951).

borrow the original expression from an underlying work and the new work must be a transformation of the underlying work, not simply a copy. Courts apply the same standard of originality to derivative works as they do to copyright subject matter in general. Nevertheless, courts tend to merge the two requirements for originality into the single standard that a derivative work must contain "distinguishable, nontrivial variation from the underlying work."[78] In *Alfred Bell*, for example, the artist transformed works in the public domain by old masters into mezzotint engravings. The etched reproductions differed from the original oil paintings because the engraver used lines and dots to create light and shade. This is distinguishable from the use of brush strokes and color by the old master to produce light and shade in the original work.[79] The court held that these reproductions were enough of a deviation from the underlying work to meet the originality standard.[80]

As with non-derivative works, the distinguishable variation of a derivative work need not be intentional.[81] As Judge Frank stated in *Alfred Bell*, "[a] copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his own and copyright it."[82]

Nevertheless, some derivative works by post-modern artists do not fulfill the distinguishable variation requirement. If someone were to copy the work of these artists, the post-modern artist would have no recourse under the Copyright Act since the derivative work fails to fulfill the low threshold of originality that is required for copyright protection. For example, the distinguishable variation standard for derivative works operates to exclude the whole movement of Super Realism from copyright protection. Super Realism appropriates images from photographs and replicates them exactly in paint or a similar medium.[83] The whole point of Super Realism is that there is no deviation from the original, underlying work.[84] If the work of this movement is not protected, one must ask if there will be any incentives to create this type of art. Is this type of art not protected because it is not the type of expression that Congress believes will benefit the public? The answer is that this type of art does not produce anything new to our culture by way of expression. Some may argue that the originality standard for derivative works must be reformulated so as to not arbitrarily discriminate against post-modern art. Nevertheless, the Copyright Act does not

78. GOLDSTEIN, *supra* note 6, at § 2.16.2.

79. *See Alfred Bell*, 191 F.2d at 104-105, n.22.

80. *Alfred Bell*, 191 F.2d 99.

81. *Id.*

82. *Id.* at 105.

83. Greenberg, *supra* note 3, at 13. An example of a Super Realism, also called Photo Realism, is the work of Chuck Close. Close makes paintings of his friends' faces from photographs using an elaborate grid system to guarantee photographic exactitude. Close breaks down his strokes into minute dots within the grid system so there is no signature style, only the photographic image. PELFREY, *supra* note 47, at 292.

84. Greenberg, *supra* note 3, at 13.

arbitrarily discriminate against post-modern derivative works. The low threshold requirement of originality excludes some movements within post-modernism, but not all movements. Some movements within post-modernism do produce works containing some low level of original expression. These works do receive copyright protection because they contain original expression. Congress believes that the dissemination of such works containing some level of original expression will be beneficial to the public in that they add to our cultural vocabulary.

C. *Rationale of Distinguishable Variation Standard*

To demonstrate how the distinguishable variation standard of originality does not operate to arbitrarily discriminate against post-modern art, it may be helpful to consider what a court would do if Marcel Duchamp tried to register his copy of *Mona Lisa* with a mustache and beard, entitled *L.H.O.O.Q.*[85] The judge would first separate the underlying work from the work in question. The conceptual components would be isolated.[86] Leonardo da Vinci's *Mona Lisa* would be separated from what Duchamp added to the work (the mustache, beard, and initials). The judge would then consider the number of variations in the work, keeping in mind that the variations in a work should be considered trivial only when they are very small in number.[87] The addition of the penciled in mustache, beard, and the letters L.H.O.O.Q. are simply not be enough of a variation to overcome the "merely trivial"[88] threshold of *Alfred Bell.* Alternatively, when Andy Warhol silkscreened Leonardo's *Mona Lisa* onto a stretched canvas and painted the silkscreen in his signature primary colors, Warhol's variations would be considered enough to give him a copyright in the derivative work.

Duchamp's work simply does not have enough original components to be worthy of protection. The court uses an objective originality standard. Their decision not to extend protection to Duchamp's work has nothing to do with the subject matter: the recontextualization of an icon of art history into a mockery of art. Andy Warhol's work does basically the same thing as Duchamp's. Warhol challenges the meaning of the *Mona Lisa* in the art history continuum by mass producing the image in the bright colors of Madison Avenue advertising agencies. Yet, unlike Duchamp, Warhol conveys his message by making enough variations from the original work, that his work actually adds something new to our visual vocabulary. The purpose of the Copyright Act is to encourage the production of original works. Duchamp's work simply does not contain enough deviations from the original so as to classify it as an original derivative work. Thus, derivative post-modern works of art are given the same consideration as works from other movements— an objective examination of the distinguishable

85. L.H.O.O.Q. reads phonetically in French: "She's got hot pants" or "Her arse is itching." Marcel Duchamp, *L.H.O.O.Q.* 1919. Corrected Readymade, print and pencil. 7 1/2" x 5". Private Collection, Paris. GOTTLIEB, *supra* note 66, at 103.

86. VerSteeg, *supra* note 30, at 848.

87. *Id.* at 854.

88. *Alfred Bell*, 191 F. 2d at 103.

variations from the original.

VI. DEFINING ART

A. AVANT-GARDE REFORMULATION OF ART

One must examine the non-traditional way in which post-modernism defines art in order to understand how unworkable the Copyright Act would be if it were overhauled to accommodate post-modern art. Some may argue that the copyright requirement of originality suppresses the avant-garde by denying protection to those works which push the envelope of what is considered art.[89] Yet, the whole point of post-modernism is to question the meaning of art. Post-modernists do not need the economic incentives of the Copyright Act to inspire works that question the traditional definitions of art. All they need as inspiration is a traditional definition to defy. The Copyright Act provides such a traditional definition in that it extends protection to works which are traditionally regarded as art. If a work is original in its execution and is in a fixed tangible medium, it will receive copyright protection.[90] If works from movements such as Super Realism fell under the protection of the Copyright Act, it would be because those works had the requisite amount of creativity or originality. If copyright protection were extended to such a work, it would mean that the work fell within the traditional definitions of art. Thus, if a post-modern work receives copyright protection, the artist has failed in his attempt to redefine and challenge the traditional definitions of art. His work has failed to fulfill the mission of post-modernism: to redefine art. Works that push the envelope of originality must fall outside the scope of copyright protection because the Copyright Act provides the standard for originality against which the post-modern artist rebels.

Indeed, a major goal of post-modern art is to obscure "the boundaries and logic of inherited artistic ideas and materials, including the inheritance of Modernism."[91] Post-modern art challenges the traditional definitions of art by embracing new media, escaping the confines of the canvas and the gallery, which were still trappings of the Modernism of Picasso and Miro. To this end, post-modern art departs from painting as the pre-eminent vehicle of artistic expression.[92] Today, art can be anything. The artist, Christo, for example, wrapped two and a half miles of Australian coastline in fabric. Christo considers the act of uniting zoning boards, landowners, the press, the ocean, and land as much a part of his art as was the coastline, enveloped in yards of fabric.[93] In this way, Christo tried to escape the confines of traditional art, where the gallery is the center of gravity.

Christo's work is also an attempt at escaping the "rectangle." The rectangle refers to the physical picture plane of a painting. Renaissance master Leon

89. Greenberg, *supra* note 3, at 7.
90. 17 U.S.C. § 102(a) (1988).
91. PELFREY, *supra* note 47, at 318.
92. *Id.*
93. *Id.* at 332.

Battista Alberti was the first artist to articulate this idea by explaining that the rectangle surface of the painting serves as an open window through which the painted subject is viewed.[94] Christo escapes the rectangle of the canvas, the rectangle of the gallery space, and the rectangle of the window to the world. Instead of a viewing a subject through a window, Christo takes the viewer outdoors, to the subject itself. If the copyright law evolved to extend copyright protection to this art event, it would mean that the definition of traditional art would be extended to embrace the art event. The art event would be part of what is established art and would no longer be considered avant garde. The art event would no longer be a form of artistic rebellion. The post-modern artist would be forced to rebel against this definitional assimilation into the Copyright Act in the same way he has struggled against the confines of the rectangle. The post-modern artist would then attempt to blur the lines of what is a copyrighted art event in order to fulfill the post-modernist goal of confounding inherited ideas of what defines traditional artistic expression. Post-modern art resists embracing a definition of art, while copyright laws imposes a definition of art. These two conflicting goals can not readily co-exist.

B. Tension Between Classical and Romantic View of Art

As post-modern artists redefine art in ways that run counter to copyright's definition of art, so do they also redefine the way in which art should be evaluated. The post-modern view of artistic judgment runs counter to the underpinnings of the Copyright Act. Post-modernists think art should be subjectively evaluated. Yet, the Copyright Act is based on objective evaluation so as to minimize bias against new art forms that may result from the subjective approach. In this way, the Copyright Act actually protects modern art forms from intentional bias.

The definition of art has evolved over the years from the early 19th and late 18th century Classical view of art, which is based on accuracy and imitation, to the Romantic view, based on art as a form of self-expression reflecting the spirit of the artist, which developed in the 19th century and extends into contemporary times.[95] These different conceptions of art pose distinct problems in the area of post-modern art. Post-modern art, unlike classical art, has collapsed the boundaries between high and low art and between different genres.[96] Post-modern art rejects the classical definition of art and the view that art can be evaluated objectively.[97]

In *Bleistein v. Donaldson Lithographing Co.*,[98] Justice Holmes articulated the

94. Joseph Masheck, Modernities: Art-Matters in the Present 16 (1993).

95. *Id.* at 184-186.

96. Consider the work of Keith Haring which once adorned the walls of subway stations in New York City. His graffiti moved from the streets and playgrounds of New York to the walls of private galleries in SoHo.

97. Cohen, *supra* note 2, at 193.

98. 188 U.S. 239 (1903).

opposing view, that there should be an objective basis for evaluating art.

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme, some works of genius would be sure to miss appreciation. Their novelty would make them repulsive until the public had learned the new language in which their author spoke . . . .At the other end, copyright would be denied to pictures that appealed to a public less educated than the judge.[99]

As Justice Holmes warned against art being subjectively evaluated, art critics such as John Dewey urge us to value art for the creative experience behind it and for what the work conveys to us about that experience. Dewey admonishes the viewer not to judge art based on its conformity to objective criteria but rather judge it on purely subjective grounds.[100]

The post-modern conception of how art should be judged is directly at odds with how art is evaluated under the copyright law. If post-modern art were judged in the manner art critics urge, it would lead to the type of judicial pronouncements and aesthetic discrimination that Justice Holmes believed had no place in copyright consideration.

Under the subjective approach to evaluating art, an individual's cultural background and identity would be instrumental in determining what is valuable art, deserving protection.[101] Thus, a representational work of traditional fine art may receive greater protection than a non-representational work, depicting controversial subject matter. A judge may view the controversial subject matter as not contributing anything valuable to our cultural artistic experience. Under this system of evaluation, even a work which fulfills the objective criteria of originality may fail to receive protection if the work does not communicate the experience of creation in a way that appeals to the finder of fact. The subjective evaluation of art would, therefore, lead to unfairness and judicial bias against certain types of art, especially post-modern art.

C. *Copyright Act's Minimal Assessment of Artistic Merit*

The Copyright Act does not deny protection to certain post-modern works because of an inherent bias against post-modernism. Post-modern works are not denied protection because they sometimes lack beauty or skill. The Copyright Act is structured so that protection is granted with minimal assessment of artistic value. This is distinguishable from the way Congress considers art in other contexts. By comparing the neutral requirements of the Copyright Act with the subjective evaluations required in other areas of the law, one can see how the Act strives to be unbiased in its artistic valuations. When bias results under this system it is not from the way the Act is structured, but from the way the judiciary

99. *Id.* at 251.
100. Cohen, *supra* note 2, at 191.
101. *Id.* at 192.

interprets the Act.

Because it would be unwise for judges to interject their own personal tastes into the decision-making process, Congress has tried to structure copyright law so that the role of assessing artistic value will be minimal.[102] Copyright protection without regard to artistic value is reflected in three aspects of current copyright law: the liberal definition of works eligible for protection, lack of any substantive evaluation of the merits of a work, and provisions for statutory damages even if a work has no proven economic value.[103]

Copyright law does not define art as do many other areas of the law.[104] Copyright law has been structured to avoid the types of aesthetic value judgments that were present in the National Endowment for the Arts (NEA) funding controversy over the homo-erotic photographs of Robert Mapplethorpe and *Piss Christ*, a photograph of a crucifix in a glass of urine by Andres Serrano.[105] Through an amendment by Senator Jesse Helms of North Carolina, the government determines what is socially valuable art. The NEA denies funding to works "considered obscene, including but not limited to, depictions of sadomasochism, homo-eroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."[106] Unlike the Copyright Act, the NEA requires a subjective evaluation of what is worthy of protection. The Copyright Act does not focus on the content of the work, but rather the form. The same works which are denied NEA funding could still be copyrightable as long as they fulfill the requirement of an "original work of authorship in any fixed tangible medium of expression."[107]

Copyright law is also distinguishable from customs law which once defined art by the professional status of the creator.[108] In addition, copyright law does

---

102. 17 U.S.C. § 102 (1988). The Copyright Act sets forth broad categories of works that are eligible for copyright protection, whose liberal definition is supported by the legislative history of this section. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 53 (1976) ("[T]he list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories."); *see also* House Comm. on the Judiciary, 89th Cong., 1st Sess., Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, pt. 6, at 3 (Comm. Print May, 1965). The word "creative" was introduced to modify the word "original" in the phrase "original works of authorship". "Creative" was dropped because Congress believed it was subject to too many different interpretations.

103. Cohen, *supra* note 2, at 179.

104. *But see* Visual Artists Rights Act, Pub.L. No. 101-650, Tit. VI, § 610, 104 Stat. 5128 (Dec. 1, 1990) (codified as amended at 17 U.S.C. § 101 note). The Visual Artists Rights Act does define what a *visual* work of art is. Yet, it does not define art per se. This section serves to afford greater protection to certain copyrighted works. It does not deny copyright protection to works that do not fall within the definition. It simply extends more protection to those works that are identified. This section defines the medium which is given this additional protection, rather than establishing any qualitative requirements.

105. Cohen, *supra* note 2, at 175.

106. Act of Oct. 23, 1989, Pub. L. No. 101-121, § 304, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 741 (codified at 20 U.S.C. § 954).

107. 17 U.S.C. § 102(a) (1988).

108. UNITED STATES INT'L TRADE COMMISSION, TARIFF SCHEDULES OF THE UNITED STATES

not define art as do various moral rights statutes do. The California moral rights statute is an example of a limited definition of fine art. Protected art is limited to fine art, defined as original painting, sculpture, or drawing of a recognized quality.[109]

Because of the way the Copyright Act is structured, judges should not interject their own aesthetic judgments into copyright decisions outside of the narrowest of limits.[110] Even though copyright protection is usually granted without regard to the artistic value of a work, judges do tend to rely on the artistic merit of a work in infringement cases. This is not a reflection of a problem inherent in the Copyright Act, but rather a reflection of the finder of fact's failure to correctly apply the law.

In *Edwards v. Ruffner*,[111] for example, the court considered two photographs of a dancer's lower legs and feet posed in ballet's fifth position. The court held that the defendant's photograph did not infringe the plaintiff's work because the models were in different attire and the photographs were taken at different angles.[112] Although the court found the idea of a ballet dancer in fifth position separable from the expression of the photograph, it could have held that the idea of a dancer in fifth position merged with the expression, and was therefore uncopyrightable. Undoubtedly, the court's assessment of the artistic value of this work was influenced by how the court regarded ballet and photography in general. These types of personal considerations affected how broadly the court was willing to define the unprotected idea in this case.[113]

Alva Studios, Inc. v. Winniger[114] is another example of a court considering the aesthetic value of a work in its determination of infringement. In *Alva* the court held that an exact replica of Rodin's *Hand of God* fulfilled copyright's originality standard even though there was no distinguishable variation from the original, except for the difference in size. Nevertheless, the court held that the skill and exactitude involved in the creation of the copy reflected sufficient artistic judgment and skill to render this work copyrightable.[115] Yet, compare this outcome to *L. Batlin & Son, Inc. v. Snyder*,[116] where the court denied protection to the plaintiff's plastic copy of a cast-iron bank in the public domain. The court held that the plastic bank exhibited only trivial variations from the original and did not display the exactitude and faithful reproduction of the copy in *Alva*.[117] Furthermore, the court applied a "substantial deviation" standard, as opposed to the less demanding "distinguishable variation" standard.[118] The way

---

ANN., sched. 7, pt. 11, USITC Pub. 1910 (1987).

109. *E.g.*, CAL. CIV. CODE § 987 (West Supp. 1990).

110. Bleistein V. Donaldson Lithographing Co., 188 U.S. 239 (1903).

111. Edwards v. Ruffner, 623 F. Supp. 511 (S.D.N.Y. 1985).

112. *Id.*

113. Cohen, *supra* note 2, at 216-217.

114. Alva Studios v. Winniger, 277 F. Supp. 265 (S.D.N.Y. 1959).

115. *Id.*

116. L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976).

117. *Id.*

118. *Id.* at 490.

that these two courts shaped the originality standard to reflect the individual outcomes reflects the judges' aesthetic judgments in that the traditional work of fine art (the copy of Rodin's *Hand of God*) was granted protection, while a cheap plastic copy of an obscure bank was denied protection. These cases demonstrate how a judge's prejudices can affect the outcome of a case, regardless of how the Copyright Act is structured. If judges were to interpret the Act in the way it was meant to be understood, subjective evaluations of artistic merit would have no place in evaluating the copyrightability of a work.

VII. OVERVIEW OF POST-MODERN ART

We now know that post-modern art redefines and challenges traditional definitions of art. It is important to understand why post-modern art does this. Such an understanding will help to explain why it would be unwise for the Copyright Act to accommodate post-modernism. "[P]ost-modernis[m] . . . critiques the very attributes that copyright law uses to define art: namely, artistic creativity and originality."[119] There is no predominant trend in post-modernism, rather there are different movements which use different elements of the modernist tradition. The fragmentation of post-modern art is a reflection of the "glut of images and confrontation of images taken straight from advertising media, television, film, and 'high' art . . . [that] are direct reflections of the contemporary experience."[120] Via a plethora of creative avenues, the post-modern artist questions the way society sees certain images by challenging the meaning society assigns to such images.[121] An example of assigning new meaning to an old image is Duchamp's *L.H.O.O.Q.*[122] By defacing the *Mona Lisa*, Duchamp gave new meaning to this seminal piece of renaissance artistry. He challenged the viewer to consider the work in a new, debased context, that mocked art history and the icons of classical art.[123]

A more contemporary example of questioning society by assigning new meaning to icons of popular culture is the work of Cady Noland. Noland's installation of columns of Budweiser cans in a room decorated with depictions of violence is an example of images of the mass media and mass consumption being used to challenge traditional notions of consumerism and pop culture.[124] Post-modern art, like Modernism before it, is atypical in the art history continuum because it does not use nature as a referent, rather it looks to a "closed system of fabricated signs,"[125] reflected in consumer products, pop icons, media images, and contemporary (copyrighted) works of art. It is through

119. Greenberg, *supra* note 3, at 1.

120. BERNICE ROSE, ALLEGORIES OF MODERNISM: CONTEMPORARY DRAWINGS 1 (1992) (exhibition brochure).

121. Ames, *supra* note 1, at 1480.

122. *See supra* notes 85-88 and accompanying text.

123. *See id.*

124. *See* McEvilley, *supra* note 57, at 100.

125. John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 111 (1988).

the use of these familiar images that post-modern art strives to redeem the meaning of commonplace words, philosophies, and politics.[126] By employing such unusual strategies, the post-modern artist pushes the envelope of traditional notions of art by seeking "unheard of revolutionary forms of expression and sensation, going that one final step beyond which it is impossible to go."[127] Thus, the incentive for the post-modern creation is in questioning art to the extreme. It is a competition between artists. Each artist tries to go one step farther than the other in redefining art. This type of art may not lead to museum masterpieces,[128] and it may not even sell, but economic incentives are not what fuel the post-modern artist. Stretching the limits of what is art is what motivates post-modern creation.

VIII. UTILITARIAN OBJECTS AND THE ROLE OF INTENT

A. *DEFINITION OF UTILITARIAN OBJECTS*

The treatment of utilitarian objects[129] by courts also demonstrates how judges often fail to evaluate works by the objective standards that the Copyright Act mandates. This treatment may shed some light on what could potentially happen if a judge were faced with evaluating a piece of Conceptual art. As such, the role artistic intent plays in granting copyright protection to utilitarian object will be examined. Judges have mistakenly considered intent in determining whether a utilitarian item is worthy of copyright protection. Allowing intent to play such a role in the determination of copyrightability would radically change the copyright law and would lead to arbitrary decisions. The arbitrary results and aesthetic judgments by fact finders that result from such a system being applied to utilitarian designs are the same type of problems that would result if the Copyright Act were to extend protection to artistic ideas.

Copyright protection is granted to the applied arts but not to works of industrial design. Courts therefore must establish what is an original creation, and if the work is useful, whether it is protected applied art or industrial design.[130] It is in making these determinations that judges sometimes inject their own subjec-

126. GARDNER, *supra* note 4, at 106.

127. *Id.* at 14.

128. *See* Smith, *supra* note 23, at 264.

129. The Copyright Act defines a useful article as, "an article having intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" 17 U.S.C. § 101 (1988).

> 'Pictorial, graphic, and sculptural works' include two-dimensional and three-dimensional works of fine . . . and applied art . . . .Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

Id.

130. Leonard DuBoff, *What is Art? Toward a Legal Definition,* 12 HASTINGS COMM. & ENT. L.J. 303, 305 (1990).

tive evaluations into the process.

B. PHYSICAL SEPARABILITY TEST IN MAZER V. STEIN

The first test courts used to determine whether a work is applied art or industrial design was the physical separability test. Functional components of industrial design, no matter how artistically designed, have been denied copyright protection unless they are physically separable from the useful article.[131] In *Mazer v. Stein*[132] the court granted copyright protection to lamp bases in the shape of dancers, holding that the statuettes that made up the bases were physically separable from the lamp. Because the statuettes could stand alone as works of art, apart from the lighting fixture, they were granted copyright protection.

If the design is merged into the useful article as in the case of a modern streamlined chair, there is no physical separability.[133] Yet, if one were to make the frame of the chair separately as a modern sculpture and then weld the seat onto it, there would arguably be physical separability and therefore protection.

C. DISCRIMINATION AGAINST MODERN DESIGNS IN ESQUIRE, INC. V. RINGER

Despite Justice Reed's pronouncements in *Mazer* that, "[i]ndividual perception of the beautiful is too varied a power to permit a narrow or rigid conception of art,"[134] the physical separability requirement discriminates against modern designs.[135] *Esquire, Inc. v. Ringer*[136] also involved an artistically designed lamp. Unlike *Mazer*, the lamp in *Esquire* was a modern design. The court denied copyright protection holding that the aesthetic elements of the modern lamp were not separable from its utilitarian nature.[137] The court stated that copyright protection is not extended "when all the design elements . . . are directly related to the function of the article."[138] Although the district court found that to deny protection to this modern lamp design would give protection to works of traditional art over modern designs,[139] the Court of Appeals argued that this discrimination against modern designs is an "unintentional disproportionate impact on one style of artistic expression."[140]

---

131. *Id.* at 318.
132. Mazer v. Stein, 347 U.S. 201 (1954).
133. *See* GOLDSTEIN, *supra* note 6, at § 2.5.3.
134. *Mazer*, 347 U.S. at 214.
135. DuBoff, *supra* note 130, at 314.
136. Esquire, Inc. v. Ringer 591 F.2d 796 (D.C. Cir. 1978).
137. *Id.*
138. *Id.* at 798.
139. *Id.* at 799.
140. *Id.* at 805. The court also stated that denying copyright protection for industrial designs was rooted in administrative efficiency, rather than aesthetic discrimination. Copyrightability of utilitarian design, whether separable or not, would lead to widespread copyrightability of industrial designs such as planes, subways, and bathtubs. There would be no end in sight. *Id.* at 801.

D. OVERVIEW OF CONCEPTUAL SEPARABILITY

Because physical separability can lead to such arbitrary results, some courts began to use the standard of conceptual separability. Professor Paul Goldstein of Stanford University defines conceptual separability by stating that, "a pictorial, graphic or sculptural feature incorporated in the design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it."[141] Under this definition, the lamp base in *Mazer* would still be useful if the sculptural attachment were detached, but the modern chair would not be useful if the cushion were detached from the frame. Thus, the more traditional lamp would be granted protection, while the modern design of the chair would be denied protection. As such, conceptual separability, like physical separability, has caused much concern over aesthetic considerations in that it has a discriminatory effect against modern designs.[142]

E. CONCEPTUAL SEPARABILITY AND DESIGNER'S INTENT IN BRANDIR V. CASCADE PACIFIC LUMBER

Allowing an artist's intent to be instrumental in the determination of copyright protection can lead to arbitrary results and unworkable standards. In *Brandir International v. Cascade Pacific Lumber*,[143] the court considered a bike rack, originating in a minimalist sculpture of wire tubing. The court employed the conceptual separability standard, a different approach than the court in *Esquire*. Judge Oakes considered whether "the design elements can be identified as reflecting the designer's judgment exercised independently of functional influences."[144] This independent artistic test focuses on the circumstances and subjective intent of the artist and takes the process of creation into consideration. The court decided whether the artistic elements of the work in question were significantly influenced by functional considerations.[145] The artist's intent of creating a bike rack, not a sculpture, was instrumental in the defeat of copyright protection in *Brandir*.[146] This is significant because the court allowed intent to defeat a claim of protection.[147] This may lead to the conclusion that intent should also be allowed to establish a claim of protection. The notion of allowing creative in-

141. *Id.*

142. James H. Carter, *They Know It When They See It: Copyright and Aesthetics in the Second Circuit*, 65 ST. JOHN'S L. REV. 773, 788 (1991).

143. Brandir International v. Cascade Pacific Lumber, 834 F.2d 1142 (2d Cir. 1987).

144. *Id.* at 1145.

145. *Brandir*, 834 F.2d 1142. *But see Esquire*, 591 F.2d at 800. Esquire argued that it designed its fixture with the sole intent of creating modern sculpture. The court did not give this argument much credence.

146. *Brandir*, 834 F.2d 1142.

147. An artist's intent is not confined just to questions of utilitarian design. In *Batlin*, the court evaluated the artist's reasons for the variations in his copy of an Uncle Sam bank in a different medium. L. Batlin & Son v. Snyder, 536 F.2d 486 (2d Cir. 1976) (en banc) (copyright denied due, in part, to variations inspired by economic considerations, not creative considerations).

tent to play a role in decisions of copyright protection would radically change the face of copyright law.

Considering the artist's intent in cases of industrial design could have potential implications for the Conceptual artist. If Marcel Duchamp *designed* his bottle rack instead of using a pre-existing item, which he termed "ready-mades," he could potentially get copyright protection under this analysis by stating that his intent was to create a sculpture, even though the bottle rack's function and aesthetics were fused. This type of analysis would leave the door open to designers feigning artistic intent and would potentially flood the copyright office with work that they specifically sought to avoid.[148] Thus, extending copyright protection to conceptual art would lead to arbitrary judgments based on whether an artist's intent is genuine. It would lead to huge administrative problems in determining which works had an underlying bona fide artistic purpose. Judges may then have to interject their own subjective standards in determining what ideas are truly original and what are not. Copyrightability could turn on the personal experiences of the fact finder. One judge could consider an idea original while another could consider it commonplace. Because ideas are amorphous and intangible, it would be a logistical problem to register such mental creations. These types of administrative problems and arbitrary results would do nothing to further the dissemination of works of art to the public. If anything they would discourage it.

IX. Overview of Appropriation Art

Appropriation art is another movement within post-modern art that has its own distinct copyright problems. The appropriation artist lifts images from others, sometimes in their entirety. Thus, many of these derivative works not only lack originality, but they often infringe copyrighted works. Appropriation art began in the nineteenth century with literary borrowing from existing works such as James Joyce's *Ulysses* and T.S. Elliot's *The Wasteland.* By the twentieth century, art began to incorporate images from the mass media and pop culture, as well other works of art. Appropriation artists employ a wide range of techniques, from incorporating a single element of a pre-existing work into a new work (collage) to totally appropriating another image without alteration (appropriation).[149] Through collage and appropriation, the artist challenges the very concepts of creativity, originality, and authorship, values upon which fine art has traditionally been evaluated.[150] Artists utilize these techniques to comment on our image-saturated society and to help us understand the process by which the mass media has subsumed a huge portion of our daily lives. By juxtaposing images and placing them in new contexts, the viewer is forced to exam how different contexts can dramatically effect meaning.[151] An example of the startling effects of recontextualization is Keith Haring's collage, *Mob Flees at Pope*

148. *See supra* note 140.
149. Ames, *supra* note 1, at 1478-1479.
150. Carlin, *supra* note 125, at 108.
151. Martha Buskirk, *Appropriation Under the Gun,* Art in America, June 1992, at 29.

Rally, which is comprised of a newspaper clipping of the Pope wiping tears from his eyes with words from newspaper headlines pasted above the picture.[152]

X. TENSION BETWEEN APPROPRIATION ART AND COPYRIGHT LAW

A. *RESTRICTIVE GRANT OF FAIR USE PARODY DEFENSE: ROGERS V. KOONS*

For appropriation art to work, an artist must borrow from an image that already exists as a familiar part of our collective social consciousness. In this way, the artist can challenge ideas about ownership, originality, and meaning.[153] The use of pre-existing contemporary images implicates three sections of the Copyright Act: the exclusive right to reproduce a work,[154] the exclusive right to prepare derivative works,[155] and the exclusive right to display a work publicly.[156]

In *Bleistein* Justice Holmes said that, "[o]thers are free to copy the original. They are not free to copy the copy."[157] By original, Holmes meant the referent in nature. For the post-modern artist, the referent is not nature, but a self-contained systems of contemporary images.[158] The character of post-modern art, and its emphasis on a different conception of the original, blurs Justice Holmes's distinction of what one is allowed to copy.

A balance must be struck between protecting appropriation as an important vehicle of social commentary and safeguarding the incentives of the original artist.[159] In *Rogers v. Koons*,[160] the court tilted the scales in favor of the original artist. To many, this case signaled the death knell of appropriation art.[161] In *Rogers*, artist Jeff Koons appropriated an image of a couple with German Shepherd puppies from a photograph taken by Art Rogers. Koons made almost an exact replica of Rogers' work in a garishly painted sculpture.[162] Koons's idea was distinct from Rogers', although his expression was not. The purpose of Koons's *String of Puppies* was to comment on society's obsession with reproducible images, while Rogers' purpose in his *Puppies* was to show an inoffensive, charming scene.[163]

Koons argued that his work was both a parody and legitimate social criticism. To this end, the court applied the fair use test.[164] The court considered the pur-

---

152. BARRY BLINDERMAN, KEITH HARING: FUTURE PRIMEVAL 22 (1990).
153. Ames, *supra* note 1, at 1482.
154. 17 U.S.C. § 106(1) (1988).
155. 17 U.S.C. § 106(2) (1988).
156. 17 U.S.C. § 106(5) (1988).
157. *Bleistein*, 188 U.S. at 249.
158. *See supra* note 125 and accompanying text.
159. Ames, *supra* note 1, at 1515.
160. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
161. Greenberg, *supra* note 3, at 25.
162. *Id.*
163. Cone, *supra* note 19, at 26.
164. 17 U.S.C. § 107 (1988).

> [T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. In

pose and character of Koons's use of Rogers' copyrighted photograph and incorporated a good faith standard into its formulation of the commercial purpose test.[165] The court first determined that Koons's use was for commercial purposes, rather than for the public interest.[166]

Koons claimed parody as a defense, claiming that he was commenting on the denigration of society caused by the glut of consumerism and mass reproduced images. The court rejected the parody defense, stating that the "copied work must be, at least in part, an object of parody, otherwise there would be no need to conjure up the original."[167]

In *Campbell v. Acuff-Rose Music, Inc.*,[168] the Supreme Court stated that, "[p]arody needs to mimic an original to make its point . . . "[169] The court found that 2 Live Crew's parody of Roy Orbison's "Oh, Pretty Woman" was a fair use even though it had taken the signature opening riff and opening words of the Orbison song, together with the same style of refrain.[170] The court explained that

> recognition is quotation of the original's most distinctive and memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend . . . on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original.[171]

What distinguishes Koons's sculpture from Campbell's song is that Koons was not parodying Rogers' work, instead he was using it as a vehicle to comment on society in general. Again, the court in *Campbell* gives us guidance on post-modern art's claim of parody.

> If . . . the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly . . . , and other factors,

---

determining whether the use made of a work in any particular case is fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

165. Koons ripped the copyright notice off of Rogers' postcard of *Puppies*, thus showing bad faith. *Rogers*, 960 F.2d at 309.

166. *Rogers*, 960 F.2d 301.

167. *Id.* at 310.

168. Campbell v. Acuff-Rose, Inc., 114 S. Ct. 1164 (1994).

169. *Id.* at 1172.

170. *Id.* at 1164.

171. *Id.* at 1176.

like the extent of commerciality loom larger.[172]

In this sense, it seems that Koons shot himself in the foot by stating that his work parodied society and not Art Rogers' photograph.[173] Nonetheless, this is not necessarily true. At the heart of parody is, almost invariably, a well-known expressive work.[174] Koons's claim of parody also failed because Rogers' *Puppies* is not a generally known image. As such, the general public would not be able to understand this criticism.[175]

The court in *Rogers* therefore dismissed appropriation as a legitimate form of criticism. Possibly, Koons's criticism may have been too subtle for the court to accept its legitimacy.[176]

Koons's use also failed on the other three prongs of the fair use test. The court found that Rogers' work was a creative work, that Koons copied the essence of Rogers' work, and that the sculpture resulted in future harm to Rogers' market.[177]

B. ALTERNATIVES FOR THE APPROPRIATION ARTIST

Most appropriation art, like that of Koons, will fail the fair use test because the artist usually sees the necessity to take the heart of the image or the image in its entirety.[178] After *Rogers*, an appropriation artist now has four options: (1) get permission from the original artist before using another's work; (2) pay a licensing fee, (3) credit the original artist; or (4) make a distinction between an appropriation artist's one time use of an image (as in a painting) and multiple uses (as in prints or derivative works).[179]

The problem with getting permission from the copyright holder of the original source is that the holder may become a private censor who can chill the expression of the artist by limiting the sources of material on which an appropriation artist can comment.[180] As with parody, some appropriation art possesses social and political values that outweigh any economic loss to the copyright owner that results from the parodist's use. Copyright owners face this type of economic loss because some types of social criticism may be so biting that they will refuse to grant a license out of fear that the parody exposes the owner to an undue amount of criticism, and the parodist will, nevertheless, use the copyrighted image, shielded by fair use.[181] As with parody, copyright holders may be unwilling to

172. *Id.* at 1172.

173. However, Justice Kennedy warns in his concurrence that since parody is an affirmative defense, doubts as to whether something is a parody should be not be resolved in favor of the self-proclaimed parodist. *Id.* at 1180.

174. *Id.* at 1174.

175. *Rogers*, 960 F.2d 301.

176. Buskirk, *supra* note 151, at 30.

177. *Rogers*, 960 F.2d 301.

178. Ames, *supra* note 1, at 1498.

179. Carlin, *supra* note 125, at 135.

180. Ames, *supra* note 1, at 1526.

181. GOLDSTEIN, *supra* note 6, at § 10.2.1.2.

license their works to post-modern artists who ridicule the copyrighted work (or, in the case of appropriation art, use it as an instrument of societal ridicule).[182]

Nevertheless, parody is distinguishable from appropriation art. In *Rogers*, the court stated that, "[u]nder our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the type of creativity protected by the copyright law."[183] Appropriation art, unlike parody, sometimes lifts a whole image in its entirety and simply places it in a new context. This type of use adds nothing original to the creative expression of the underlying work. A parody, however, reproduces *elements* of the underlying work and incorporates these elements into a new, original work.[184] In this way, a parodist contributes something original to a work, which is encouraged under the Copyright Act. An appropriation artist, on the other hand, characteristically fails to contribute any original expression to the underlying work, which is contrary to the Copyright Act's incentive structure.

Furthermore, in contrast to parodists, appropriation artists do not use well-known works. Some argue that the willingness of courts to allow fair use for parodies of well-known underlying works is overly restrictive in the context of post-modern art.[185] Maybe courts should be less restrictive because parody's goal is mocking, while art tries to make something of timeless value.[186] Because appropriation artists comment on society in general, rather than on a specific work, the fair use standard that only applies if the underlying work is parodied is also considered by some to be overly restrictive.[187]

Appropriation artists may have some hope in a First Amendment defense since much of their art functions as political commentary.[188] An example of such art is Keith Haring's *Reagan Slain by Hero Cop*,[189] which is another collage using newspaper clippings and a copyrighted wire service photograph. This work is overt political commentary, and as unorthodox speech, it enriches public discourse. Under a First Amendment defense, *Reagan Slain By Hero Cop* could not be constrained in any way by the copyright holder. The appropriation artist would be free to use another's work in whatever way he deemed appropriate. This approach would lead to unlimited copying and would subsume the Copy-

182. Ames, *supra* note 1, at 1494.

183. *Rogers*, 960 F.2d at 310.

184. GOLDSTEIN, *supra* note 6, at § 10.2.1.2.

185. *Id.* at 1501.

186. Carlin, *supra* note 125, at 125-126.

187. In *Elsmere v. National Broadcasting Co.* the court held that "Saturday Night Live's" skit which included the song "I Love Sodom," sung to the tune of "I Love New York," was a fair use parody even though it commented on New York society in general, in addition to the New York jingle. The court went on to state that even if the song did not parody the "I Love New York" song, such a finding would not preclude a finding of fair use. Elsmere v. National Broadcasting, 482 F. Supp. 747 (S.D.N.Y. 1980), *aff'd*, 623 F.2d 252 (2d Cir. 1980). This seems to be contrary to the Supreme Courts holding in *Campbell. See supra* notes 149-152 and accompanying text.

188. Ames, *supra* note 1, at 1508.

189. BLINDERMAN, *supra* note 152, at 22.

right Act.[190] The Copyright Act is structured in such a way that an artist's interest in the free flow of ideas is protected without having to rely on the unconstrained results of a First Amendment defense. The Copyright Act shares several aspects of doctrinal consonance with the First Amendment's free flow of ideas. The fair use exception for critical works and the protection of expression, as opposed to ideas, assures the free flow of information, consistent with the First Amendment.[191] The First Amendment defense alternative is thus unnecessary in light of the current Copyright Act.

Another potential solution for appropriation artists is a fair use standard that takes into account the unique constraints of the visual arts. Under one such view, proposed by E. Kenly Ames, the appropriator must have used an appropriated image in a work of visual art. A work of visual art is distinguished from a mass-produced item. Jeff Koons's *String of Puppies* would be a work of visual art, but posters of the statue would not be works of visual art. This requirement would protect an artist's image from being marketed as consumer goods. Undoubtedly, this kind of mass marketing would result in grave economic harm to the copyright owner that is distinguishable from the economic harm from the sale of a one-of-a-kind appropriation piece. There would be a presumption that this kind of limited edition work was for social commentary and no consideration would be given to the commercial value of the work.[192] The problem with this approach is that in today's art market, the amount of money an appropriation artist could make from the sale of a one-of-a-kind piece may well rival the amount of money to be made from mass marketed consumer goods.[193]

The test for using an image would not be whether the observer recognized the specific image used, but whether the observer would recognize the image as being part of a particular genre. This would allow artists like Jeff Koons to use images that are not well known, such as Art Rogers' *Puppies*. Appropriation artists would then be allowed to draw on a wealth of images in our society, and not just those that are so well known that they fall under the fair use parody exception.[194] Yet, defining what is part of a particular genre would be difficult to determine. It may likely require judges to make subjective, aesthetic judgments of the type Justice Holmes believed had no place in copyright law.

The court would then consider the substantiality of the work taken, but would not require that the secondary work directly criticize the underlying work. This factor would operate in contrast to parody's requirement of direct criticism of the underlying work. In this way, the unique ability of appropriation art to make sweeping statements about society in general through the use of certain generalized images would be fostered.[195] Nevertheless, a parodist combines original

190. Ames, *supra* note 1, at 1508-1509.

191. GOLDSTEIN, *supra* note 6, at § 10.3.

192. Ames, *supra* note 1, at 1518-1519.

193. Although Jeff Koons's *String of Puppies* was not a one-of-a-kind piece, it was a limited edition. His three copies sold for a total of $367,000. Cone, *supra* note 19, at 25.

194. Ames, *supra* note 1, at 1519.

195. *Id.* at 1522.

elements with the underlying work, thus adding to society's creative vocabulary. If an appropriation artist does not comment directly on an underlying work, there may be no need to add anything original to the underlying work. This would do nothing to encourage new artistic expression, which is the driving force behind the Copyright Act.

The copyright holder would have to demonstrate a substantial effect on their market due to the appropriator's work; speculative art licenses would not be enough. Ames argues that when a copyright holder claims lost licensing fees when her work is parodied, such a claim is unreasonable because the copyright owner would never have licensed the work in the first place. Even if an artist licenses her work for derivative pieces, such as hats or shirts bearing a copyrighted photograph, Ames believes that this should have no bearing on a copyright owner's claimed losses due to appropriation. A copyright holder could consider how critical the appropriation piece is going to be and charge accordingly. This type of private censorship could be discouraged by disallowing consideration of potential licensing fees. Nonetheless, special consideration would be given to the harm of markets for derivative works, which is a large part of the economic incentive for original artists.[196]

Finally, good faith would be judged not on the actions of the creator, but on whether the secondary work should be encouraged.[197] Jeff Koons's act of ripping the copyright warning off of Rogers' card would be disregarded, while the societal importance of his message would be given precedence. The court in *Rogers* found this behavior reprehensible and stated that such willful exploitation of another's work does not benefit the public good.[198] Such bad faith totally obscures any socially valuable message in the work itself. The work then conveys a message distinct from its valuable social commentary, that theft of another's work is permissible.

Changing the Copyright Act to accommodate appropriation art is problematic for other reasons as well. In *Rogers* the court stated that if an artist could avoid copyright infringement by claiming artistic purpose, there would be no limit to this defense.[199] A good example of this is the work of Sherrie Levine. She actually took pictures from others and called them her own. Stealing other people's art and attributing it to herself was her point. She was challenging the notions of "originality, intention, and authorship."[200] Changing the copyright law to accommodate appropriation art, as Ames suggests, could lead to a flood of this type of abuse. Although there is potential social benefit to be gained from appropriation art, one should simply not profit from another's creative, copyrighted expression by hiding under the guise of legitimate social commentary.

196. Think of all the Haring and Warhol merchandise on the market.
197. Ames, *supra* note 1, at 1518-1521.
198. *Rogers*, 960 F.2d at 309.
199. *Rogers*, 960 F.2d 301.
200. Carlin, *supra* note 125, at 137.

XI. CONCLUSION

It is the nature of post-modern art to stretch the limits on what is considered art. If the Copyright Act were to accommodate post-modernism, it would have to be continually re-written as artists redefine and rewrite the rules of creativity, originality, and authorship. We are at a time where everything can be art, even Duchamp's bottle rack. If art has no limits, should copyright have no limits? Clearly, this is an unworkable proposition. The original incentives of the Copyright Act to encourage unique and original works[201] would be seriously undermined.

The current Copyright Act fails to protect most works of post-modern art. Yet, this is not the result of an intentional bias. Conceptual art and appropriation art expand the definition of art in a manner that is almost limitless. A workable statute, on the other hand, needs limits. Art needs to be limited by definition for administrative purposes. Art also needs to be limited by definition so protection has some meaning. If the Copyright Act were extended to the outer limits of post-modern art, it could lead to everything being protected art, as in the case of the copyrightability of ideas. Alternatively, it could lead to nothing being protected, as in the case of allowing appropriation artists to steal the work of others so long as there is some artistic purpose. The Copyright Act imposes limits that are broad, unbiased, and workable. These limits embrace the largest amount of work possible without undermining the incentives of fostering new works of original expression. Post-modern art, by definition, undermines original expression. Any laws that would accommodate this type of art would, therefore, undermine the essence of the Copyright Act.

201. Greenberg, *supra* note 3, at 16.