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Copyright Protection in Contemporary Art: A State of Insufficiency

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Abstract

Copyright Law is the chief means of regulating the creative production; yet whether in its current form it manages to sufficiently accommodate contemporary art's special needs remains questionable. This dissertation aims in identifying the main ways in which contemporary art practices collide with fundamental principles of Copyright and present them collectively in light of both common and civil law provisions, while taking into account the applicable harmonizing attempts conducted within the EU 'Acquis Communautaire'. In the pursuit of clarifying how does the Copyright legal regime respond to the special needs set by present-day works, first the reader will be introduced to the basics of contemporary art; thereafter a comparative analysis between the two distinct legal traditions will be performed, while emphasizing on those particularities that introduce copyright's inadequacy to satisfyingly protect specific works of the contemporary visual arts, posing instead key-challenges to their copyrightability. Intending to introduce its state of insufficiency the divergent 'originality' assessments and the exclusionary effects of subsidiary requirements for attracting protection will be addressed; the unique problems put forward by appropriation art and the extent to which interactivity may interfere with authorship will be stressed. Throughout the study, contemporary works that defy Copyright law principles will be exhibited, relevant national and regional legislation will be cited and pertinent case law will be annotated.

Keywords: copyright, contemporary art, originality, fixation, idea-expression dichotomy, subject matter, appropriation, authorship

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Preface

Circumstances made my encounter with the Art of Law possible, and gave rise to a stimulating meet with intellect and serendipity. This work would not have been the same if not for my supervisor, Dr. Irimi Stamatoudi, a role-model and an exceptional professional, whose valuable guidance and support helped me accomplish this research. Last but not least, I owe very special thanks to my dearest professor Dr. Platon Mavromoustakos, who, during my first academic years, taught me everything I know about the ways of scientific writing.

Contents

ABSTRACT	III
PREFACE.....	IV
CONTENTS.....	V
I. INTRODUCTION.....	1
1.1. CONTEMPORARY ART: A BRIEF INTRO	1
1.2. IN COLLISION COURSE WITH COPYRIGHT LAW	2
1.3. AIM AND STRUCTURE OF THE RESEARCH.....	3
II. CONTEMPORARY ART & COPYRIGHT LAW	6
2.1. THE ORIGINALITY CRITERION: INTRODUCING NOTIONS OF CREATIVITY, AUTHORSHIP, AND AUTHENTICITY	6
2.1.1. <i>The Common and Civil Law Tradition</i>	6
2.1.2. <i>The EU Acquis</i>	9
2.1.3. <i>Deviations of Artistic Practice</i>	11
2.2. OTHER REQUIREMENTS FOR PROTECTION.....	15
2.2.1. <i>The Mercantile & the Semantic: A Clash between Expressions and Ideas...</i>	15
2.2.2. <i>Transitory Nature v. Fixation</i>	18
2.2.3. <i>Classifying Subject matter</i>	24
2.3. APPROPRIATION ART: TRANSFORMATION OR COPY?.....	29
2.3.1. <i>Appropriation Art</i>	29
2.3.2. <i>Appropriation Art: A Defense</i>	31
2.3.3. <i>Some Further Remarks</i>	34
2.4. INTERACTIVITY & AUTHORSHIP	36
2.4.1. <i>Authorship at Law</i>	36
2.4.2. <i>Assessing Copyright Authorship in Interactive Visual Art</i>	39
III. CONCLUSIONS	42
3.1. THE CURRENT PROTECTION	42
3.2. A STATE OF INSUFFICIENCY	43
3.3. AN EPILOGUE.....	45

IV. BIBLIOGRAPHY	47
4.1. ARTICLES	47
4.2. BOOKS	49
4.3. CASES	50
4.4. LEGAL INSTRUMENTS.....	52
4.5. ON-LINE SOURCES	52
APPENDIX	1

I. INTRODUCTION

1.1. Contemporary Art: A Brief Intro

Strongly related, though not interchangeable, with terms like the ‘avant-garde’ and ‘postmodernism’, ‘contemporary’ is used to describe artistic creation from the mid 20th century and on, usually choosing as a starting point the end of WWII, while almost exclusively referring to works of the visual arts. Intertwined with the use of ‘found objects’, as introduced by Marcel Duchamp in the beginning of the last century, on its quest to elevate art to a philosophical statement, contemporary art has since embraced the ‘conceptual’ and ‘land’ art of the 60’s, the ‘appropriation’ and ‘pop’ art of the 80’s, and grew, through the years, to incorporate a vast variety of multiple, different styles and techniques, including ‘installation art’, ‘performances’, and, in an expanded sense, encompassing ‘multimedia’ and ‘digital’ art. Contemporary art “*it seems, can literally be, as one recent commentator suggests, anything, anywhere.*”¹

Absent a definition of what exactly comprises ‘contemporary art’, any designation attempts shall be governed by a descriptive inventorying of the usually common denominators shared amongst the various artworks of the aforementioned period. Contemporary art’s lack of a normative definition standing, in part, for its notorious breach with modernism’s formalism, is a first indicator of the movement’s deliberate departure from the ‘canonical’. What really constitutes the main characteristic of contemporary art is its sublime emancipation from the long-adored Romantic notion of the ‘original’, what Nicolas Bourriaud has ingeniously described as “*relational aesthetics*”²; it advocates “*that one is always already enmeshed in the constant circulation of signs, images and discourses, and that in this realm there can be no “outside” or neutral point of view since one’s perspective is always already informed and contained by this restricted discursive economy.*”³ The zenith of this maxim is no doubt ‘appropriation art’, where the futility of artistic authority and originality are not just under speculation, but taken for granted instead.

¹ “While “contemporary art” understood as a descriptive category of modes and products now includes much that would not have been recognized as visual art at all before the 1960s—for example, those classes of objects and events deemed “performance” and “conceptual” works—its relations to architecture, graphic and environmental design; to folk, popular and mass culture; and to advertising and digital culture have become ever more integral to the circuits of its production, dissemination and consumption.” Harris, 2017, p. 8.

² Contemporary art “has ended up producing linked artistic practices: an art form where the substrate is formed by inter-subjectivity, and which takes being-together as a central theme, the “encounter” between beholder and picture, and the collective elaboration of meaning.” Bourriaud, 2010, p. 15.

³ “Postmodernism challenges the traditional notions of an unaffected, external perspective and of the possibility of originality within this all-embracing pre-written world primarily by means of pastiche or parody. Through their foregrounding of intertextual relations these parodic forms of art lead, as Linda Hutcheon maintains, to “a vision of interconnectedness” which acknowledges history and the factors of social determination at the same time as it both sees through the fallacy of the “histoire” and recognizes that the “reality of the past is discursive reality” rather than objective fact.” Murphy, 2004, pp. 262-3.

The commodification of the artwork is yet another feature typical for many contemporary art practices.⁴ Defying ‘originality’ and ‘authorship’ gave way to the mechanization of the very process of creation, in a twofold attempt: depersonalizing the *genus* from the *genius*, while identifying the ‘referent’ as the ‘signifier’. Other characteristics of contemporary artworks call for ephemerality, like in the cases of ‘land art’, where the direct landscaping using only non-permanent, natural materials takes place, in ‘performance art’, a hybrid of highly improvisatory theatrical practice and traditional visual art⁵, or even in ‘installation art’⁶; for conceptuality, found by definition in ‘conceptual art’⁷ but also stretching in some extent to all contemporary works; and for an increasingly extended use of technology.

1.2. In Collision Course with Copyright Law

All the aforementioned distinctive features of contemporary art pose each a different challenge on copyrightability. The idea of Copyright law being inadequate to sufficiently accommodate the needs of these particular artworks is far from new, yet it would seem that the issue is accompanied by a persistent unwillingness of taking any substantial action towards resolving it. The extensive literature on the justifications, theories and historical background of Copyright law indicate that this insufficiency stems in part from the strong bond of Copyright with Romanticism, its obsession with ‘originality’ and its totalitarian conception of ‘authorship’, as well as the law’s similarities with Modernism’s formalism. These theoretical foundations that cast the current legal regime’s views on the creative process result in letting certain types of contemporary artworks vulnerable to infringements, for instance works of conceptual art that largely depend on the protection of their underlying ideas, while at the same time deem others as infringing -the case for appropriation works-; may jeopardize authorship, something that can occur in interactive works usually installations, and in some cases even question art itself, through the assessment of the relevant criteria for granting copyright protection.

⁴ “(...) contemporary art boom saw the rise of a great deal of populist art—that is, an art of simple character, wide popular appeal, and an enthusiastic engagement with commercial mass culture delivered through branded artistic persona. The heights of the market, at any rate, were peppered by such work, with the figures of Jeff Koons, Richard Prince, Takashi Murakami, and Damien Hirst standing at the head. Warhol, who it should be remembered was for long a despised and isolated figure for his commercialism and celebrity-chasing, has arguably replaced Marcel Duchamp as the founding father of contemporary art.” Dumbadze & Hudson, 2013, p. 42.

⁵ Shonack, 1994, p. 291.

⁶ “The term Installation Art is used to describe large-scale, mixed-media constructions, often designed for a specific place or for a temporary period of time.” Tate. The definition gives away three of installations’ features, namely the employment of mixed-media, site-specificity and transience in nature. Interactivity and high levels of conceptuality may also be there. Installations aspire to provide the viewer with an immersive, completely unified, experience; inviting him or her to interact with the artwork in order to further decipher the conceptual origins behind its aesthetic intervention while, at the same time, emerging in an imaginable dialogue that addresses contemporary social issues. In Installation Art, what comprises the final artwork is the configuration and arrangement of space and material.

⁷ “Conceptual art communicates message and meaning through the more permanent media, two dimensional or three dimensional or both, often in combination with printed text. The primary purpose is to get across an idea, a concept, with whatever visual means are available.” Karlholm, 2009, p. 725.

To this end scholars and commentators have proposed a number of different approaches and alternatives, with the most radical one being a law amendment providing for a renewed protection field that will be more specific and tailor-made upon the needs of contemporary art. Critics of this proposal had argued that a law reform will prove even more restricting, thus avoiding the complications of amending the relevant law, and that sticking to it no matter the given gaps is the optimal path. Another solution may present itself in sheltering those needs under substitutes of hard law. In that view, common practices and rules of conduct of the art-world, including the contractual relationships amongst all relevant parties, and as regulated by underlying policies, may provide authors with some certainty. On the other extreme stand renowned ‘Copyleft’ advocates and many artists that, surprisingly enough, renounce copyright’s incentivizing role, both under a ‘less is more’ placard, defending creative commons licensing systems and reaching for a stronger public domain, as the only feasible and sustainable alternative.⁸

1.3. Aim and Structure of the Research

Conducting this research essentially targets on identifying the main ways in which contemporary art practices collide with Copyright law; by emphasizing on those characteristics of contemporary art that prove them unable to satisfyingly protect, and presenting them collectively under the prism of both civil and common law jurisdictions, taking also under consideration the relevant harmonizing attempts present within the EU ‘Acquis Communautaire’. In a pursuit to clarify the level of protection that the current Copyright legal regime does, actually, grant to contemporary artworks, a comparing analysis between the two distinct legal traditions will be performed, intending to introduce its state of insufficiency to effectively do so. Secondly, by adopting a critical position against the existent protection gap, while showcasing how this gap is being maintained, this work aspires to redraw the attention on the issue, which this author sees as necessary, while shedding some light on whether Copyright legislation achieve its goals, namely to further boosting artistic creation by providing economic incentive and a safe space for all authors,⁹ when it comes to contemporary art.

⁸“*One interesting recent attempt of utilizing (...) communal, processual, and joyously playful modes of artistic critique in the context of copyright is a project entitled No Ghost Just A Shell by French artists (...) Pierre Huyghe and Philippe Parreno.*” In 1999, the artists visited an agency that developed animated figures for the Japanese Manga industry and purchased the copyright to a rather plain character named Ann Lee they then “*released Ann Lee to the public domain, and invited other artists to contribute their ideas, stories, and contexts to the polyvocal and fluid mixture that is Ann Lee’s identity. No Ghost Just A Shell is the culmination of these collaborative efforts by 18 artists in which Ann Lee’s empty shell is filled with a plethora of significations in the form of video animations, paintings, posters, books, neon works, and sculptures. (...) During the project Ann Lee would go through a fundamental transformation of identity from a commodity to a gift and in so doing partake in the formation of a community. Thus, whereas commodity exchange establishes quantitative relationships (equivalence of exchange value) between the objects transacted, gift exchange establishes personal qualitative relationships between the subjects transacting.*” Rosenmeier & Teilmann, 2005, pp. 108-10. Another collaborative initiative ‘*The One Million Masterpiece Project*’ took place in Australia, in 2010. The project was as follows: “*Each artist will take Creative Commons licensed images, create a new work based on those images, and in turn license their image for others to remix – legally. Through this process, the project utilizes emerging copyright practices to demonstrate new models of distribution, collaboration and commerce.*” Stokes, 2012, p. 163.

⁹“*Copyright law exists to solve a particular economic problem - optimizing creative production through the balanced provision of incentives.*” Buccafusco, 2016, p. 1281.

Due to the vastness of the subject particular focus will be given in the utmost problematic areas. The first chapter of part II, (2.1.) '*The Originality Criterion: Introducing Notions of Creativity, Authorship, and Authenticity*', elaborates on how the 'originality' criterion, the sole unanimous prerequisite for granting copyright protection, is assessed in different jurisdictions, examining whether such assessments could result in the exclusion of particular contemporary artworks from the subject matter of copyright, while showcasing the ways in which contemporary art inevitably deviates from the legal notion of 'originality'. The second chapter, (2.2.) '*Other Requirements for Protection*', explores the effects of assessing subsidiary protection requirements, besides 'originality', upon contemporary artworks' copyrightability. More specifically, subchapter (2.2.1.) focuses on the binary opposition widely known as the idea and expression dichotomy; the following (2.2.2.) addresses the requirement for 'fixation' as opposed to the transitory nature evident in many contemporary works of art; ultimately, (2.2.3.) delves into the juxtaposition between the common and civil law approaches on classifying Copyright subject matter.

The third chapter, (2.3.) '*Appropriation Art: Transformation or Copy?*', is devoted in presenting the main line of defense in the event of legal disputes as regards to works of appropriation art, where the lines between intertextuality and infringement are willingly blurred. In this chapter the US 'fair use' doctrine, the UK 'fair dealing', and the protection granted under some of the EU 'exceptions and limitations' provisions will be discussed. The last chapter, (2.4.) '*Interactivity & Authorship*', comments upon the theoretical concern that high levels of interactivity in a work may imply a 'grey zone' status of 'collective' authorship shared amongst the artist and all the alleged participants. Part III, '*Conclusions*', constitutes the concluding section of the work. Throughout the study, examples of contemporary artworks that defy Copyright law principles will be provided; relevant national and regional legislation will be cited and pertinent case law will be annotated.

II. CONTEMPORARY ART & COPYRIGHT LAW

2.1. The Originality Criterion: Introducing Notions of Creativity, Authorship, and Authenticity

“Originality is nothing but judicious imitation.”

-Voltaire

The threshold for the originality criterion although slightly different amongst jurisdictions, it seems that what the law interprets as ‘originality’ amounts to the quite literal ‘originating’, meaning that for most jurisdictions it suffices that a work originates from its author.¹⁰ Contemporary artists, once more, challenge this principle either by the use of ready-mades and found objects, by creating rather ‘simplistic’ works, such as minimalist works or monochromes, by using methods of mechanical reproduction in order to produce a work,¹¹ or by appropriating familiar images so to convey their message. This chapter focuses on how the ‘originality’ criterion, the sole unanimous prerequisite for granting copyright protection, is assessed in different jurisdictions, aiming in drawing the attention to whether or not the exclusion of particular contemporary artworks from the subject matter of copyright protection¹² constitutes a plausible scenario, while showcasing the ways in which contemporary art inevitably deviates from the legal notion of ‘originality’.

2.1.1. The Common and Civil Law Tradition

Amongst the numerous differences between Common law jurisdictions and the Author’s rights systems fairly lies their disparate approach towards originality. Traditionally, common law jurisdictions’ approach, essentially including UK and the US, echo John Locke’s labour theory of property, protecting the author’s ‘sweat of the brow’ or what is commonly refer to as his ‘skill and labour’ from both unfair competition and free riders.¹³ On the other hand the civil law tradition employs a more

¹⁰ *“Indeed, in the modern context, some scholars argue that originality is "synonymous with authorship”.*” Balganes, 2017, p. 36.

¹¹ *“Originality connected the creator with the divine, while imitations were mechanical.”* Baldwin, 2014, p. 131. *“As a term of approbation, “authenticity” transcends its market application to encompass a romantic sensibility. This attitude was strongly asserted in the nineteenth century on the grounds that the connection between the creative artist and the work created was an essential ingredient not just in the work’s coming-into-being but, also, in its historical significance and present meaning. Thus, originality was especially prized!”* Brilliant, 2011, p. 167.

¹² *“It should be noted that whether or not a work is protected by copyright is not just about whether the author has economic rights (...) that can be exercised. If the work is not protected by copyright, then the moral rights and ARR will not apply either.”* Stokes, 2012, pp. 230-1.

¹³ *“(…) copyright protects the author’s property that the author has created (i.e. the copyright work). This idea is in the spirit of John Locke: as a person’s property is protected to protect the person’s liberty, the person himself becomes protected through the protection of the property the person makes. Thus, the author as property maker obtains indirect protection through the direct protection of the property he has created: the copyright work protected by copyright indirectly protects its author, especially the author’s economic standing. It is not (artistic)*

personalistic view of originality looking for credential in what is called ‘the authors’ personal stamp’, a unique differentiator expressed in a work that ‘reflects his personality’.

Under UK copyright law¹⁴ “works that originate from the author and are the product of the author’s own sufficient skill, labour and effort, expenses and judgement (not necessarily all criteria at the same time) obtain copyright protection. Artistic originality or ingenuity, creativity and novelty, is irrelevant.”¹⁵ Without requiring more than “trivial effort and skill”¹⁶ being exercised by the author, the UK originality standard has been characterized as very low, generally granting the status of original to almost any work¹⁷. Case law in the area has consistently shaped the criterion over the years, since the Copyright Act, itself, does not further define the concept of ‘originality’. In *University of London Press v. University Tutorial Press*¹⁸, a case about whether or not examination papers constituted subject to copyright, the issue of originality has also been addressed:

*“The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work,’ with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act [Copyright Act 1911] does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.”*¹⁹

Another frequently cited case, *Ladbroke (Football) v. William Hill (Football)*²⁰, “cemented the centrality of the requirement of “labour, skill and/or judgment” to any finding of originality under British law”²¹. In *Interlego AG v Tyco Industries Inc.*²², the court, interestingly, held that in order to be original, a derivative work must present a visually significant manifestation of the author’s ‘skill and labour’²³, often involving

creativity, but the potential (not actual) economic value of the author’s investment, skill and labour deployed in the making of a property (the copyright work) which copyright protects.” Rahmatian, 2013, p. 13.

¹⁴ Article 1(a) of the CDPA (1988) states that copyright subsists in “original literary, dramatic, musical or artistic works”. Copyright, Designs and Patents Act 1988.

¹⁵ Rahmatian, 2013, p. 12.

¹⁶ Rosenmeier & Teilmann, 2005, p. 134.

¹⁷ “Ultimately, courts have deemed the requirement satisfied whenever the work is “independently created” by its author, which amounts to no more than a requirement that the author not have “copied” the work from any other work or material.” Balganes, 2017, p. 37.

¹⁸ *University of London Press v. University Tutorial Press*, 1916.

¹⁹ Rosenmeier & Teilmann, pp. 133-4.

²⁰ The case concerned the alleged infringement of the plaintiff’s football pools coupons. *Ladbroke Football Ltd v William Hill Football Ltd*, 1964.

²¹ Cambridge.

²² Also known as the ‘Lego case’ since subject of the case was the alleged copyright infringement of the well known Lego bricks by the defendant. Due to the plaintiff wanting to acquire further copyright protection –the case was primarily an issue of registered design- raised was also the issue of originality. *Interlego AG v Tyco Industries Inc*, 1989.

²³ Concerning ‘skill and labour’ the Judge also commented that: “it takes great skill, judgement and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was

‘some element of material alteration’.²⁴ A more recent case, *Designer Guild Ltd v. Russell Williams (Textiles) Ltd*²⁵, seems to have added another parameter to assessing originality, namely the substantiality of a copied work. The House of Lords ruled that: “generally speaking, in cases of artistic copyright, the more abstract and simple the copied idea, the less likely it is to constitute a substantial part. Originality, in the sense of the contribution of the author's skill and labour, tends to lie in the detail with which the basic idea is presented. Copyright law protects foxes better than hedgehogs.”²⁶

In the US, according to Section 102(a) of the code “copyright protection subsists, (...) in original works of authorship”²⁷, and following the decision of the cornerstone case *Feist Publications v Rural Telephone Service Co.*²⁸, to confer originality to an ‘independent creation’ a minimum degree of creativity been exercised is required²⁹. In view of *Feist* the US originality criterion presents a twofold analysis: “first, the work must “owe [] its origin” to the claimant (i.e., the author); and second, it must exhibit a “modicum of creativity,” a requirement that is fairly easy to satisfy in practice even though it appears to connote a higher bar in theory”³⁰. According to the Court: “originality does not signify novelty; a work may be original even though it closely resembles other works so long as the familiarity is fortuitous, not the result of copying.”³¹ In addition: “*Feist* explicitly rejected the “sweat of the brow” interpretation of originality, (...). Instead, the court emphasized that the creativity - mandated by the originality requirement - had to be found in the choices and decisions made by the author, manifested in the work itself rather than in the creative process.”³²

The justification behind the ‘modicum of creativity’ standard stems from US copyright’s bound to the constitutional obligation “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive

an ‘original’ artistic work in which the copier is entitled to claim copyright.” Stokes, 2012, p. 137.

²⁴ “Skill, labour and judgment expended solely in the process of copying could not confer originality. There had to be some additional element of material alteration sufficient to make the work an original work. It was the quality rather than the quantity of the addition which merited protection.” Swarblaw, 2017.

²⁵ The House of Lords had to decide whether the defendant’s design, ‘*Marguerite*’, had infringed the plaintiff’s, ‘*Ixia*’, two designs with undeniable similarities. *Designers Guild Ltd v Russel Williams (Textiles) Ltd*, 2000.

²⁶ *Ibid.*

²⁷ 17 USC.

²⁸ *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 1991. “*Rural*, the plaintiff in these proceedings, as a condition of its monopoly franchise for telephone services in northwest Kansas, published a white pages telephone directory listing its subscribers alphabetically. *Feist* published area-wide directories, and for these purposes approached 11 telephone companies in northwest Kansas and requested their permission to use their white pages listings in return for a fee. Only *Rural* refused, but *Feist* went ahead and used their listings without their consent. *Rural* sued for copyright infringement.” Torremans, 2007, pp. 3-4. “The Court’s opinion in *Feist* notes, in the context of originality, that only some selections, coordinations, and arrangements of facts will trigger copyright protection - that is, those that are done “in such a way” that they are original and minimally creative.” Buccafusco, 2016, pp. 1274-5.

²⁹ Resembling the UK ‘trivial skill and effort’ requirement.

³⁰ Balganes, 2017, p. 36.

³¹ Drassinower, 2015, p. 58.

³² Balganes, 2017, pp. 37-8.

*right to their respective writings and discoveries*³³. In that light copyright, and by extension originality, “*should be viewed as a contract between society [the public] and the author*”³⁴ reaching to “*encourage authors to publish innovations for the common good -- not to threaten them with loss of their livelihood if their works of authorship are found insufficiently imaginative*”³⁵.

Civil Law jurisdictions purportedly run a stricter criterion that requires that the work reflects ‘the author’s personality’³⁶, and binds originality to the element of the ‘statistically unique’. For instance, the “*traditional originality test in France is that the work must express or reflect the author’s personality*”³⁷. Accordingly, under Greek Copyright Law 2121/1993³⁸ “*the traditional criterion calls for assessing originality on the basis that statistically unique elements are indices of creativity*”³⁹. Notions of ‘originality’, ‘creativity’, or ‘statistical uniqueness’, are not further defined anywhere in the statute, but “*as one decision puts it a work [is original] if another author, under similar circumstances and with the same aim in mind, would not reasonably reach the same creative outcome or if the work at issue presents an individual particularity or a modicum of creativity such that the work can be distinguished from everyday productions or from other similar and known works*”^{40, 41}.

Author’s rights systems have had a conceptual struggle in order to warrant originality, therefore to grant copyrightability, to works like databases, photographs and software, where the author’s personal imprint appears more latent.⁴² Originality in such works “*can only be a normatively established originality, not a real one, because an individual stamp of the author can hardly be detected with works of that kind.*”⁴³ It is due to that common philosophical basis on which the majority of the EU’s Member States rely and their shared effort to protect such works that the first steps towards regional harmonization were taken specifically addressing these three categories, namely databases, photographs and software.

2.1.2. The EU Acquis

The existence of today’s harmonized notion of ‘originality’, within the *acquis communautaire* can be attributed to two different courses of action; the ‘vertical’

³³ Article I, Section 8, Clause 8. U.S. Constitution.

³⁴ Gervais, 2002, p. 953.

³⁵ See *supra* note 34, p. 955.

³⁶ Droit d’auteur systems “*were conceived of in terms of the natural right of authors to the creations of their mind*”. Torremans, 2007, p. 8.

³⁷ Gervais, 2002, p. 968.

³⁸ According to the Greek Copyright Act and Article 2(1) a protectable work is “*any original creation*”. Law 2121/1993 on Copyright, Related Rights and Cultural Matters.

³⁹ Koumantos & Stamatoudi, 2014, p. 22.

⁴⁰ Torremans, 2007, pp. 22-3.

⁴¹ Here, “*individual particularity*” refers to the author’s personal stamp made visible on the work, while the “*modicum of creativity*” element, necessarily, resembles the particular phrasing opted for the US originality criterion as aforementioned. Due to similarities like that some commentators tend to view the two jurisdictional traditions as converging instead of growing apart.

⁴² “*(...) the highly formalistic German approach, which requiring a high degree of creativity, created problems particularly in relation to computer related works.*” Torremans, 2007, p. 20.

⁴³ Rahmatian, 2013, p. 19.

harmonization achieved in the area by a number of Directives, on the one hand, and the increasingly important role of the CJEU's case law and preliminary rulings in shaping EU law, on the other. The so-called 'vertical' harmonization of originality concerns the harmonization of specific subject matter, namely databases, realized with the 1996 Database Directive⁴⁴, photographs, with the 2006 Term Directive⁴⁵, and later for software with the enactment of the 2009 Software Directive⁴⁶. Those Directives were in fact a first attempt towards uniformity, and a strong indication of the general direction towards which the EU's interpretation of originality will lean to, but they only resulted in partial harmonization. It was only "*under the influence of the ECJ case law, [that] a European concept of originality has emerged, which applies to all categories of works and is a middle way between the British 'skill and labour' test and the German requirement of a certain level of creativity*"⁴⁷.

As deriving from the interpretations of the CJEU, the EU standard of 'originality' is reached if the work is its 'author's own intellectual creation'. This terminology is, basically, the result of five leading case decisions. More specifically, *Infopaq International v. Danske Dagblades Forenin*⁴⁸ is considered the milestone case in the field for a number of reasons.⁴⁹ In *Infopaq* the criterion was first defined to extend coverage to all kind of works, while proving originality the sole criterion for deciding copyrightability, and ruling that it should be read "in a uniform and autonomous manner throughout the EU preventing Member States from using their national legal systems for defining it."⁵⁰ At the same time it elevated the EU criterion to a qualitative rather than a quantitative one, since an extract of just eleven words was found to carry the author's personal stamp⁵¹. In *Football Association Premier League and*

⁴⁴ Paragraph (16) of the preamble of the Database Directive defines originality "*in the sense of the author's intellectual creation*", and qualifies it as the sole criterion for determining the eligibility of a database for protection. Directive 96/9/EC.

⁴⁵ Paragraph (16) of the preamble states of the Term Directive that: "*a photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account.*" Later in Article 6, the same phrasing maybe found: "*photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection.*" Directive 2006/116/EC.

⁴⁶ "*A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.*" Article 1(3), Directive 2009/24/EC.

⁴⁷ Stamatoudi & Torremans, 2014, p. 13.

⁴⁸ *Infopaq International A/S v. Danske Dagblades Forenin*, 2009. In 2009, Infopaq, a media monitoring and analysis business that was sending customers summarized articles from a number of Danish newspapers by email, brought an action before the Danish Supreme Court against Danske Dagblades Forening (DDF), an association of Danish newspaper publishers that engages in assisting its members with copyright issues that after becoming aware of the Infopaq unauthorized reproductions complained to Infopaq.

⁴⁹ "(...) *when in the Infopaq decision the Court of Justice proposes a European definition of the notion of originality in the absence of a text on this point, it is clearly moving from a harmonizing role ('EU law should be implemented in the same manner everywhere') to a creator of EU law ('this is how EU law should look like').*" Stamatoudi I. A., 2016, pp. 440-1.

⁵⁰ Torremans, *Research Handbook on Copyright Law: Second Edition*, 2017, p. 66.

⁵¹ Yet, this determination is for the national court to make.

Others v. QC Leisure and Others and *Karen Murphy v. Media Protection Services*⁵², and in *Eva-Maria Painer v. Standard VerlagsGmbH and Others*⁵³ and *Football Dataco v. Yahoo! UK and Others*⁵⁴ the CJEU further clarified that “*the author's own intellectual creation is present when authors can exercise free and creative choices and put their personal stamp on the work*”⁵⁵. In addition, the *Dataco* case also ruled that “*skill and labour, even in significant amounts, are not conducive to (...) free and creative choices and therefore do not lead to the creation of a work possessing the required originality*”⁵⁶ It has been argued that the EU originality criterion comes closer to the civil than the common law one;⁵⁷ it has also been characterized as being “*unique and pervasive in the sense that no other tests are allowed under domestic laws*”⁵⁸, nevertheless the implementation of the uniform criterion is yet to be seen under the light of future national case law.

2.1.3. Deviations of Artistic Practice

What is evident, having mapped the outline of the present legal ‘originality’ assessments, is that ‘originality’ in terms of ‘originating’ from an author, does not seem relevant to a number of contemporary artistic practices, since the latter through the process of “*depersonalization, the involvement of random choice, and anti-art*”⁵⁹

⁵² *Football Association Premier League and Others v. QC Leisure and Others*, 2011 and *Karen Murphy v. Media Protection Services*, 2011, joined cases. “*Murphy concerned the extent to which system licences for the retransmission of football matches, which grants broadcasters territorial exclusivity per Member State and which prohibits television viewers from watching these broadcasts with a decoder card in other Member States, is contrary to EU law. The issue of originality was dealt with in the context of the Court considering whether sporting events, which formed the object of the retransmission, were protected by copyright.*” Torremans, *Research Handbook on Copyright Law: Second Edition*, 2017, p. 66.

⁵³ *Eva-Maria Painer v. Standard VerlagsGmbH and Others*, 2011. The plaintiff, a freelance photographer, has photographed Natasha Kampusch when at nursery school. Painer had sold copies of those photographs without conferring any rights over them or consenting to their publication. In 1998, Natasha Kampusch was abducted and held captive until she escaped in 2006. Austrian and German Newspapers and magazines published the plaintiff’s photographs after the escape, without Painer’s authorization, she then sued for copyright infringement in Austria.

⁵⁴ *Football Dataco v. Yahoo! UK and Others*, 2012. “*Football Dataco and other applicants in this case drew up annual fixture lists of the football leagues in England and Scotland on the basis of particular rules and procedures. The process of preparing the football fixture lists (...) required very significant skill and labour (...) particularly where the computer program found no solution for a given set of constraints. The applicants claimed (amongst other things) that they were entitled to copyright and sui generis right protection under the Database Directive for their fixture lists.*” Torremans, *Research Handbook on Copyright Law: Second Edition*, 2017, p. 71.

⁵⁵ Margoni, 2016, pp. 94-5.

⁵⁶ *Ibid.*

⁵⁷ “*(...)the definition of originality in copyright as developed in the Infopaq judgement (...) scandalized a part of the British commentators very much attached to the idea of ‘skill and labour’ traditionally adopted in UK copyright law*”. Stamatoudi I. A., 2016, pp. 445-6.

⁵⁸ “*However, it will be a matter for national courts to establish whether a specific work meets the “author’s own intellectual creation” definition. In so doing it is safe to assume that courts will be guided—consciously or unconsciously—by their own traditional legal constructions.*” Margoni, 2016, p. 101.

⁵⁹ Schubert & McClean, 2002, p. 173.

deliberately drift into an ocean of “*authorship, authenticity and identity*”⁶⁰ confrontation. If the law translates ‘originality’ as ‘authorship’, then what is to be deemed as ‘original’ in, for instance, ready-mades and found objects, in minimal art and monochromes or in appropriation works; it is apparent that such artistic practices deviate from that originality notion. But are those works excluded from protection as not satisfying the sole unanimous criterion for copyrightability, and, if so, is their exclusion justified?

In Germany, for example, “*objets trouvés and ready-mades have been denied copyright protection*”⁶¹ on the basis of the requirement of ‘creativity’. Ready-mades and found objects⁶² are mere everyday manufactured items, de-contextualized from their primal use, and elevated to the state of art. They owe that elevation, their very artistic subsistence, to their author’s personality not because he created them from scratch, but in the sense that after he made free and creative choices⁶³ a new ‘original’ artwork was reanimated bearing his personal imprint. So it appears that although not that obvious, the author’s personality, nonetheless, remains indisputably stamped on such works. This is quite understood in the UK where, when considering ready-mades, the court will look into the intention of the artist, into whether or not the work was created with an artistic purpose in mind, in order to decide copyrightability.⁶⁴

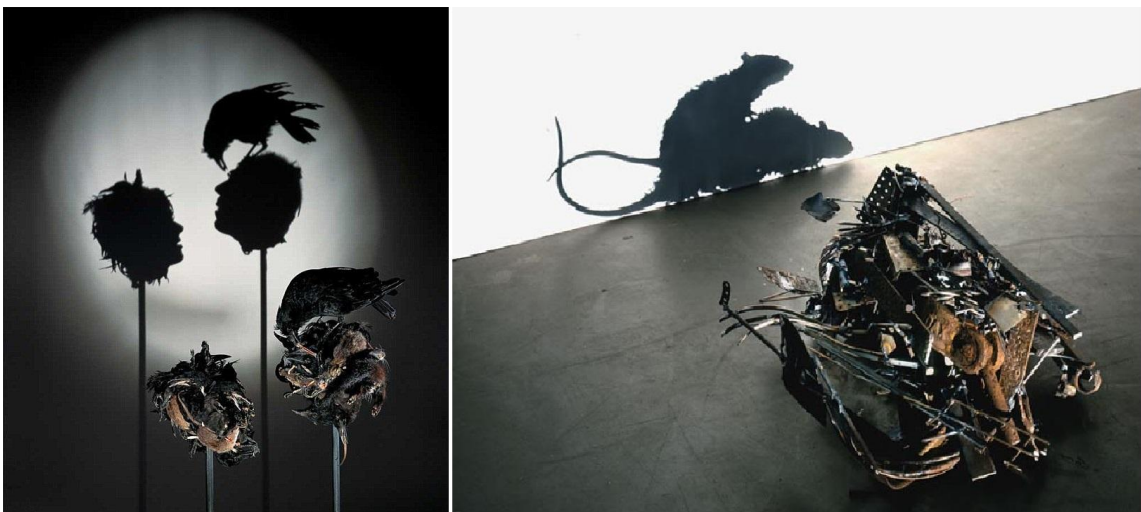


Image 1: Tim Noble & Sue Webster, shadow art using found objects and taxidermy. (Left) ‘*Kiss of Death*’, 2003, 80 x 50 x 180 cm. (Right) ‘*Metal Fucking Rat*’, 2006, 51.5 x 53 x 19.6 cm.

Considering the protection of minimalistic works, where high levels of abstraction are involved, such as monochromes, may appear even trickier. Taking into account the fundamental common law principle of protecting ‘skill and labour’ it is not surprising that “*the amount of labour involved need not be great*”⁶⁵. In *British Northrop Ltd v*

⁶⁰ Margoni, 2016, p. 376.

⁶¹ Stokes, 2012, pp. 32-3.

⁶² They were first used by French artist Marcel Duchamp.

⁶³ And what is art if not choices. “*In an unpublished interview, Duchamp, without the slightest ambiguity, lay the foundations of a syllogism: the word ‘art means to make and, (...) to make is to choose and always to choose.*” Schubert & McClean, 2002, p. 190.

⁶⁴ Stokes, 2012, p. 165.

⁶⁵ Torremans, *Copyright Law: A Handbook of Contemporary Research*, 2007, p. 9.

*Texteam Blackburn Ltd*⁶⁶ the Judge commented in relation to drawings: “it may indeed be that something may be drawn which cannot fairly be called . . . a drawing of any kind: a single straight line drawn with the aid of a ruler would not seem to me a very promising subject for copyright. But apart from cases of such barren and naked simplicity as that, I should be slow to exclude drawings from copyright on the mere score of simplicity.”⁶⁷

From the above a twofold observation arises: for one thing, the court did not exclude works from protection on grounds of simplicity, and yet minimalism has indeed given birth to artworks of “such barren and naked simplicity” as “a single straight line”.⁶⁸ In addition under author’s rights systems copyright, where the ‘skill and labour’ criterion is replaced by the requirement of the ‘author’s personal stamp’, such works seem even harder to protect. After all, conveying rights to an author over a monochrome is, *nolens volens*, granting him propriety exclusivity over a colour. Such difficulty in “assessing the stamp of the author’s personality in contemporary works of art has prompted some representatives of legal literature to propose an objective concept of originality (...) where the criterion of novelty (...) would replace that of the author’s personal stamp”⁶⁹. This author believes that such a notion of originality cannot be sustained as regards to artistic works since no art is created *ex nihilo*, thus novelty is a rather vague concept that would ultimately turn copyright into a significantly narrower ‘tool’.

Finally, appropriation artworks put copyrightability under an interesting test, since they are by definition non-original, seeing that “here the expressive form (...) of [an] original work is copied”⁷⁰. Appropriation essentially defies every legal originality assessment by simultaneously redefining both authorship and creativity. Warhol, for instance, has often renounced his personalistic and authoritarian relationship to his works either by statements like “I want to be a machine”⁷¹, or by signing the famous “This is not by me” prints, or even by lending his appropriation works to other artists for further appropriation⁷². It would seem that whether or not an appropriation work will be found to satisfy the ‘skill and labour’ criterion, altering the original work in a “visually significant”⁷³ way, or the ‘modicum of creativity’ requirement, or, even less likely, the

⁶⁶ British Northrop Ltd v Teatex Blackburn Ltd, 1974. The case regarded literary copyright.

⁶⁷ Torremans, Copyright Law: A Handbook of Contemporary Research, 2007, p. 9.

⁶⁸ Such are most of the works of American artist Barnett Newman. For example, his famous painting entitled ‘Be I’ consists of a monochrome divided in half by a straight white line. Another “example of a minimalist artist’s failure to overcome the original-expression requirement is Kazimir Malevich’s work *White on White*. As its title suggests, *White on White* is a painting of a “white square on a white background.” Plaster, 2017, p. 1133.

⁶⁹ Schubert & McClean, 2002, pp. 183-4.

⁷⁰ Stokes, 2012, p. 167.

⁷¹ Schubert & McClean, 2002, p. 377.

⁷² Artist’s Elaine Sturtevant first exhibition featured, amongst other works, “silkscreened images that were almost indistinguishable from the breakthrough *Flowers* series by the then emerging art superstar Andy Warhol. (...) Sturtevant’s ‘repetitions’, as she called them, were designed to disorientate. They were intended to be precise enough to persuade viewers that they were looking at an ‘authentic’ Warhol or Johns, and at the same time sufficiently free and inexact to suggest that another hand might be at work (...) ‘I create vertigo’, the artist-repeater liked to say.” Shore, 2017, p. 15.

⁷³ “Although in the process of appropriation, the meaning of the work is changed by placing it in a new context, its visual significance may well not be. Hence it may not benefit from copyright protection.” Stokes, 2012, p. 167.

continental test for ‘originality’, is only a matter of case by case analysis. Then again appropriation artworks examined under the light of reflecting their ‘author’s personal stamp’ should be seen as in the proposed view for ready-mades, in other words, as being the result of their author’s carefully-thought, free and creative choices, bearing therefore his personal imprint.



Image 2: (Left) Andy Warhol, ‘*Flowers*’, 1964. The Andy Warhol Museum, Pittsburgh; Founding Collection, Contribution: The Andy Warhol Foundation for the Visual Arts, Inc. (Right) Sturtevant, ‘*Warhol Flowers*’, 1964–65. Estate Sturtevant, Paris; Courtesy: Galerie Thaddaeus Ropac, Paris–Salzburg.

Having displayed how the aforementioned works deviate from originality, as presumed by the law, it must be stressed that the opting for a stricter, closely related to the notion of authorship as found in the civil law tradition, EU originality interpretation, may cause further difficulties in protecting such contemporary artworks. Albeit, following the latest EU case law in the field even the slightest intervention may suffice for protection, when artists decide to challenge the system and do not abide by its rules it is only natural that they may end-up finding themselves excluded from tasting its fruits.

2.2. Other Requirements for Protection

‘Originality’ may be the sole unanimous prerequisite for granting copyright protection, yet, in a number of jurisdictions, it remains inseparably connected to other auxiliary requirements.⁷⁴ This chapter focuses on showcasing how the so-called idea/expression dichotomy⁷⁵, the common law fixation requirement, and the classification of subject matter do dictate copyrightability in their own terms, proving in times detrimental for the thoroughgoing and meaningful protection of contemporary art.

2.2.1. The Mercantile & the Semantic: A Clash between Expressions and Ideas

*“The contemporary artwork’s form is spreading out from its material form: it is a linking element, a principle of dynamic agglutination. An artwork is a dot on a line.”*⁷⁶

-Nicolas Bourriaud

A core value of Copyright Law is that it necessarily protects only the ‘material expression’ of a work while any ideas behind it remain copyright resistant.⁷⁷ For creativity to flourish it is the *sine qua non* that ideas remain public property. On the contrary, many artists nowadays tend to find the idea far more important than the material expression that succeeds it, in some cases going as far as claiming that what constitutes their very artwork it’s the idea itself. The pioneering conceptual art of the 70s, for instance, “*militated (...) in favour of the disappearance of the art object. (...) conceptual art sought to replace the circulation of works of art with that of ideas...conceptual artists thus revealed that, after all, the work of art possibly had no value itself, contrary to what people had thought – almost obsessively – during the previous decade*⁷⁸, and that the work was merely the residue of a vast process that had enabled it to exist. The art object was just the left-over of a thought.”⁷⁹

⁷⁴ “The idea/expression dichotomy is inseparable from the doctrine of originality. It provides that not originality per se but rather original expression is at stake in copyright law: ideas, even if original, are “free as the air to common use.” An author’s claim to exclusivity in respect of her original expression—i.e., her work of authorship—thus leaves ideas expressed therein freely available for others to express or develop anew.” Drassinower, 2015, p. 56.

⁷⁵ Though, for some commentators “protecting ideas is mostly a question of scope rather than a question of requirement”, since Patent Law, for instance, do protect them. Derclaye, 2009, p. 136.

⁷⁶ Bourriaud, 2010, p. 20.

⁷⁷ “The liberation of ideas from copyright is but the affirmation of a work as an invitation to dialogue.” Drassinower, 2015, p. 66.

⁷⁸ Curator and art critic, Nicolas Bourriaud, detects a dual artistic nature, consisting of a binary opposition between its mercantile nature and its semantic value: “the work of art represents a social interstice. This interstice term was used by Karl Marx to describe trading communities that elude the capitalist economic context by being removed from the law of profit: barter, merchandizing, autarkic types of production, etc. The interstice is a space in human relations which fits more or less harmoniously and openly into the overall system, but suggests other trading possibilities than those in effect within this system.” Bourriaud, 2010, p. 16.

⁷⁹ Schubert & McClean, 2002, p. 175.

Enter the infamous idea/expression dichotomy.⁸⁰ “*Law is an agent of the past and evolves more slowly in its processes than most other societal units*”⁸¹, as one commentator puts it, or as Henry Lydiate accurately observes: “*no one knew anything of Dadaism, Marcel Duchamp and conceptual art when the (UK) legislation was framed, and in contemporary art – where the idea is more important than the form – there is a lack of protection for ideas*”⁸². Usually the idea/expression dichotomy is relevant “*in cases where style, technique, or other aspects of a design or painting have been reproduced but there has been no complete copying*”⁸³. In *Ladbroke v William Hill*⁸⁴, regarding originality, it was mentioned that “*it is not required that [an] idea is new, because the idea is not covered by copyright at all*”⁸⁵. In the more recent *Designers Guild Ltd v. Russell Williams Ltd*⁸⁶ case, the Court of Appeal ruled that “*copyright subsists, not in ideas, but in the form in which the ideas are expressed*”⁸⁷.

This is in fact a reality in all jurisdictions irrespective of being expressly regulated by statute or not.⁸⁸ “*The concept has no statutory basis in the United Kingdom.*”⁸⁹ Neither does under Greek law 2121/1993, where the only relevant mention concerns computer programs, in Article 2(3) where: “*Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected under this Law.*”⁹⁰ In the US code, §102(b), one may find the following phrasing: “*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.*”⁹¹ Likewise, in France, ideas are defined “*as ‘de libre parcours’, that means ‘free career’. No one is able to own them because they have a mental form exclusively produced by the mind.*”⁹²

⁸⁰ “*This familiar distinction highlights the equally familiar observation that (...) the law of copyright—through the originality requirement—focuses not on an author’s contribution to existing knowledge, but rather on the form in or through which the author communicates her thinking. Expressing an old idea in one’s own words is sufficient to give rise to a finding of originality for copyright purposes.*” Drassinower, 2015, p. 57.

⁸¹ Kearns, 2013, p. 67.

⁸² Torsen, 2006, p. 54.

⁸³ Schubert & McClean, 2002, p. 51.

⁸⁴ *Ladbroke v William Hill*, 1964. “*The case arose out of a dispute over the subsistence and the infringement of copyright in William Hill’s “fixed odd” football coupons, a sheet of paper on which lists of forthcoming matches were printed. William Hill had been using these coupons since the early 1950s and, when Ladbroke had decided to enter the field, it adopted a similar product.*” Cambridge.

⁸⁵ Torremans, 2007, p. 31.

⁸⁶ *Designers Guild Ltd v Russel Williams (Textiles) Ltd*, 2000.

⁸⁷ Stokes, 2012, p. 60.

⁸⁸ The idea/expression dichotomy certainly applies to all 162 parties of the TRIPS Agreement. Article 9 (2) of Part II of the Agreement states that: “*Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.*” TRIPS Agreement, 1995.

⁸⁹ Schubert & McClean, 2002, p. 59.

⁹⁰ Law 2121/1993 on Copyright, Related Rights and Cultural Matters.

⁹¹ 17 USC.

⁹² Derclaye, 2009, p. 134.

Two usually cited cases that touch on the concept of that dichotomy, exposing the adversity in separating the idea from its expression when it comes to contemporary art, consider the environmental works of artistic duo Christo and Jeanne-Claude, and more specifically the wrapping of the Pont-Neuf Bridge in France.⁹³ In the first case the French court had to decide whether the unauthorized photographing of the aforementioned work by two news companies was infringing, thus having to determine whether the work was indeed protected. The Paris Court of Appeal “noted that *‘The idea of accentuating the pureness of the lines of a bridge and its lampposts by means of a cloth and ropes so as to bring out the bridge’s form and pure lines constitutes an original work eligible as such for protection (...) This language followed from the Court’s finding of an ‘idea that is formulated and thus defined, determined, perceptible and capable of being proved.’*”⁹⁴ The second case had the diametrically opposite result. Christo brought a suit against an advertising agency for covering the subject of a photo shooting in a similar cloth. The “court decided that the principle of packaging in an artistic way different constructions was not the property of Christo”⁹⁵.⁹⁶ Consequently, copyright would only prevent someone from wrapping the exact same object in the exact same type of cloth.

There is an abundance of contemporary art examples that, like Christo’s wrappings, would definitely fuddle the courts in case of a dispute. What is to be protected in installations such as Jannis Kounellis’s *‘Untitled (12 Horses)’* (2015), where the artwork consisted of live horses randomly tied in a gallery, in which case the ‘physical carrier’, in other words the expression, of the work was not an object but a living organism in a particular space, or in Virginia Mastrogiannaki’s *‘Jargon’* (2016), where the artist turned her body into a human clock counting each second for eight hours a day and for seven weeks.⁹⁷ “Similarly, it is not clear what rights Damien Hirst might have under copyright law were someone else to show a work which involved a shark floating in a glass tank of formaldehyde, or were someone to market postcards or posters of that or other of his preserved animal works.”⁹⁸

Hence it is crucial that a balance is formulated between providing artists with sufficient protection for their concepts and sustaining the public right to the free dissemination of ideas.⁹⁹ Rather unfortunately, with no clear line separating ideas from expressions, the

⁹³ This work was part of a series of the duo’s projects which consisted of wrapping a number of movables and immovable in a particular type of cloth. For more information see the artist’s personal webpage. Christo.

⁹⁴ Schubert & McClean, 2002, p. 174.

⁹⁵ Derclaye, 2009, p. 137.

⁹⁶ “The trial court denied him protection on the grounds that *‘the law...protects only creations of particular, individualized, and perfectly identifiable objects and not a category or a family of forms that have features in common only because they all correspond to a style or a process arising from an idea’*.” Schubert & McClean, 2002, p. 174.

⁹⁷ The idea of replacing conventional clocks with alternatives has been used many times in the past. In Christian Marclay’s *‘The Clock’* (2010), a montage of thousands of different scenes with clocks, a real time 24-hour clock was made up. Ideas being blocked, artists would not be able to build upon such a concept no more.

⁹⁸ McDonald, p. 8.

⁹⁹ “This may be the most difficult issue in copyright law, namely the border between protected ‘expression’ and unprotected ‘ideas’ (...) What is the point of inflexion past which protection against the creation of derivatives imposes too high a social welfare cost on other creators? What is the proper level of abstraction of copyright law, or should it be formulated as the

semantic from the mercantile, contemporary artworks are condemned as both vulnerable to being infringed and to potentially infringe.¹⁰⁰ Yet it is not advisable for legislators and the courts to commence an idea blocking crusade; this stumbling block for substantial protection may only be satisfyingly addressed as a matter of copyright policy and doctrinal resynthesis.



Image 3: Jannis Kounellis, ‘Untitled (12 Horses)’, 2015, Gavin Brown's Enterprise in NYC.

2.2.2. Transitory Nature v. Fixation

“Art is born when the temporary touches the eternal; the shock of beauty is when the irresistible force hits the immovable post.”¹⁰¹
- G.K. Chesterton

Functional purpose of the fixation requirement is to separate the idea from the expression, facilitating the commodification of a work, while providing indicia for its existence, making it easier to prove, amongst other things, infringement.¹⁰² Expressly

protection of the concrete and specific forms of literary and artistic expression (at a finer degree, each ‘category’ of protected works is itself subject to abstraction)? (...) It can also be said (...) that copyright protects the signifier, not the signified (the idea/expression dichotomy), and if one posits that ideas are more valuable than a particular expression thereof, then copyright’s inherent limits are good for human progress and the public domain.” Torremans, 2007, p. 76.

¹⁰⁰ “Given the indeterminate character of the idea/expression dichotomy and the broad reach of what constitutes “substantial similarity,” speakers who seek to build upon existing ideas often risk finding themselves on the receiving end of a copyright infringement action.” Netanel, 2008, p. 62.

¹⁰¹ Chesterton, 1928. The modern art theory of formalism provides some interesting parallels with the legal requirement for specific form.

¹⁰² “The law has not found it possible to give full protection to the intangible. But it can protect the intangible in certain states, and one of them is when it is expressed in words or print.” Stokes, 2012, p. 17.

found only under common law jurisdictions,¹⁰³ the fixation requirement, dictates that in order for a work to gain protection under copyright it needs not only being original but, also, fixated in a permanent form. This requirement, again, seems rather contradictory for contemporary creations that are either made of temporary materials, or that are highly improvisatory. Such works' present a twofold crux regarding fixation "*they are transitory in nature, but also (...) often make a point of incorporating elements of change over time*"¹⁰⁴, having therefore a dynamic character. It is this dynamic and ever-changing character which collides with the ideal permanence of fixation.¹⁰⁵

Land art¹⁰⁶, is a primary example of intended artistic temporality.¹⁰⁷ Critically acclaimed Scottish land artist, Andy Goldsworthy, "*invokes transience as key to his artistic approach*"¹⁰⁸ as he explores notions of natural wear and the destructive effects of time. In 2001, he built one of his famous Cairns on the shore to be destroyed by incoming tides and thoroughly documented their decay, by videotaping and photographing them.¹⁰⁹ Another eminent artist, James Turrell, employs a not only transitory but intangible medium, light. "*His installations (...) use the medium of light to make apparently solid objects seem to be hung from walls or suspended in air. While pieces may appear to be made of matter, they are comprised of light*"¹¹⁰. The dynamic element of contemporary creation could not be more evident than in the case of Bioart; an artistic practice that operates by utilizing "*living things, such as live tissues, bacteria, or living organisms*"¹¹¹ in a controlled environment, involving the alliance of Art and Science. 'Victimless Leather', "*A Prototype of Stitch-less Jacket grown in a Technoscientific 'Body'*"¹¹², is part of a number of TC&A's¹¹³ research projects that link art to tissue engineering. By using stem cells to grow a semi-living, leather-like type of miniature jacket, the project highlights the moral implications of "*our*

¹⁰³ "*The Berne Convention allows nations to choose whether to require fixation.*" Carpenter & Hetcher, 2014, p. 2258.

¹⁰⁴ See *supra* note 103, p. 2225.

¹⁰⁵ "*Professors Melville Nimmer and David Nimmer conclude that "certain works of conceptual art stand outside of copyright protection." For example, a work constituting the action of an artist throwing colored streamers from an airplane, thereby "call[ing] attention to the higher spirit of mankind" by "sculpting in space," would be outside copyright protection for failure to satisfy the fixation requirement.*" Plaster, 2017, p. 1134.

¹⁰⁶ "*Land art or earth art is art that is made directly in the landscape, sculpting the land itself into earthworks or making structures in the landscape using natural materials such as rocks or twigs.*" Tate.

¹⁰⁷ "*When [Robert] Smithson dumps dirt down a hillside, though, it is not clear what documentation would suffice to fix the resulting mass of earth. (...) Photographs are normally taken to record these events, but protection may extend only to the photographs themselves.*" Shonack, 1994, p. 325.

¹⁰⁸ Carpenter & Hetcher, 2014, p. 2228.

¹⁰⁹ "*While such photographs have the effect of "fixing" the work for copyright purposes, the work itself remains unfixed according to the statutory language*" of some jurisdictions. See *supra* note 108, p. 2229.

¹¹⁰ See *supra* note 108, p. 2230.

¹¹¹ See *supra* note 108, p. 2232.

¹¹² TC&A.

¹¹³ The acronym stands for 'Tissue Culture & Art Project'.

exploitation of other living beings”¹¹⁴, while presenting a “somewhat ironic take into the technological price our society will need to pay for achieving “a victimless utopia”.”¹¹⁵



Image 4: (Left) James Turrell, ‘*Raethro Pink (Corner Projection)*’, 1968. Image 5: (Right) ‘*Victimless Leather*’, 2004.



Image 6: Yannis Generalis and Sybrand Wiegiers, ‘*Dragon*’; Jozi Land Art, November 2014. Photo by Gail Wilson.

Other examples of ‘finite’ works involve ephemeral installations of flowers, like Rebecca Louise Law’s flower arrangements, Azuma Makoto’s ‘*Iced Flowers*’, or Giuliano Mauri’s ‘*Cattedrale Vegetale*’, “a structure in the shape of a church through which saplings will grow over time, ultimately forming a huge, tree-shaped cathedral.”¹¹⁶, and interactive works¹¹⁷. Performance Art, also, shares the same

¹¹⁴ Carpenter & Hetcher, 2014, p. 2229.

¹¹⁵ *Ibid.*

¹¹⁶ McCutcheon, 2017.

problems when it comes to fixation. The highly improvisatory nature of a practice whose main medium is the artist's own body, makes each performance both impossible to pre-fixate and unique,¹¹⁸ freeing art from any futile need of tangible and permanent manifestations. For example, artistic duo Gilbert and George “*devised their trademark performance art called Living Sculptures, where they wandered through the city streets covered in metallic make-up. The idea [behind their performance] was to “collapse the distance between art and artists.”*”¹¹⁹

The stricter fixation requirement is to be found under US copyright law. Under §102(a) of the 17 U.S.C., copyright protection applies to “*original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*”¹²⁰ The §101 Definitions Section further defines fixation: “*A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.*”¹²¹ This phrasing is especially problematic for works that despite being fixed in a tangible medium, this medium is intentionally transitory in nature. In addition, fixation grants protection not to a work *per se* but to its “*by proxy*” documentation.¹²²

In the notorious case *Kelley v. Chicago Park District*¹²³, the Court had to decide whether Chapman Kelley’s ‘*Wildflower Works*’, a conceptual work “*promoted as “living art”*”¹²⁴, comprising a garden installed in Chicago by 1984, was copyright protected, in order to examine whether any of his moral rights were infringed.¹²⁵

¹¹⁷ “*In interactive art the nature of the work is embodied not just in how it looks or what images are used, but in the way that it behaves when people interact with it.*” Edmonds, Bilda, & Muller, 2009, p. 141.

¹¹⁸ “*Artists perform on street corners, in small clubs, or any place where they desire to express themselves. Under copyright law, these performances are not fixed, and thus they cannot be given protection.*” Shonack, 1994, p. 325.

¹¹⁹ Gallagher, 2011.

¹²⁰ 17 USC.

¹²¹ *Ibid.*

¹²² “*Any fixation of the piece, as that is understood in copyright terms, is merely representational of the piece rather than the piece itself—a fixation by proxy.*” Carpenter & Hetcher, 2014, p. 2229.

¹²³ *Kelley v. Chicago Park District*, 2011.

¹²⁴ *Ibid.*

¹²⁵ “*Wildflower Works, composed of two giant elliptical flowerbeds, approximately a football field in size, featuring a wide variety of native wildflowers set within borders of gravel and steel. Kelley selected between forty-eight and sixty species of self-sustaining wildflowers for the piece, and he designed the initial placement of the wildflowers so they would “blossom sequentially, changing colors throughout the growing season and increasing in brightness towards the center of each ellipse.” Kelley sued the Chicago Park District for violating his moral right of integrity under VARA when [in 2014] the Park District decreased the size of Wildflower Works to less than half its original size, made the elliptical borders rectilinear, and replanted the wildflowers in a smaller garden without his approval.*” Carpenter & Hetcher, 2014, p. 2234. The Visual Artists Rights Act (VARA) gives artists of the visual arts some limited moral rights. Provision 3(A) of section §106A of the 17 U.S.C., implementing VARA, grants the right “*to prevent any intentional distortion, mutilation, or other modification of that*

Particular emphasis was given in the fixation requirement, in accordance to which the 7th Circuit found that the volatile character of the work's nature as a garden averted fixation: "A garden's constituent elements are alive and inherently changeable, not fixed. . . . [I]ts appearance is too inherently variable to supply a baseline for determining questions of copyright creation and infringement."¹²⁶

The question posed here is one of accessing copyright in a constantly developing work; in which of its states/phases shall copyright be vested? The Court approached the issue reasoning that "because plants are constantly growing, there is no point at which they can give rise to more than temporary, uncopyable images."¹²⁷ And though it stated that "[w]e are not suggesting that copyright attaches only to works that are static or fully permanent (no medium of expression lasts forever), or that artists who incorporate natural or living elements in their work can never claim copyright"¹²⁸, the Court seem to imply a requirement of immutability by precluding 'Wildflower Works' the status of fixed. Many commentators have criticized this stance since the definition of fixation "does not require stasis or permanence per se, and does not prevent kinesis in a work. It simply demands non-transient perceptibility, which may be of a kinetic, even an ephemeral, work"¹²⁹, a requirement satisfied by a garden in which changes happen not instantly but gradually as nature intended.

It has been argued that such 'in progress' works may be viewed as 'unfinished', a category that has already benefited from protection under US copyright in the past.¹³⁰ Another point that has been, reasonably, raised, regarding the 'non-bypassable' evidentiary properties of fixation is that "fixation is a moment in copyright law (...) not an enduring condition"¹³¹, meaning that since "postcreation destruction of an originally fixed work does not affect the status of the underlying copyright in the work (...) There is barely any difference between a case where there was never any fixation at all, and a case where there was a fixation that was destroyed before the relevant litigation

work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right". 17 USC.

¹²⁶ Brown, 2014, p. 26.

¹²⁷ *Ibid.*

¹²⁸ McCutcheon, 2017.

¹²⁹ *Ibid.*

¹³⁰ In *Rodrigue v. Rodrigue*, *Rodrigue v. Rodrigue*, 1999, a dispute on whether the wife of an artist (divorced at the moment) had or not any property rights on the works he created while in marriage, the Court stated that "a copyright attaches in favor of the author at each step of creation—each word, musical note or brush stroke—from the first expression of the work." McCutcheon, 2017. In another case, *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, *Massachusetts Museum of Contemporary Art Foundation, Inc. v. Büchel*, 2010, absent a written agreement between artist Christoph Büchel and the Museum that would govern the materialization of the artist's installation 'Training Ground for Democracy', and after numerous conflicts between the parties, the project was never finished, "the Museum went to federal court seeking a declaration that it was "entitled to present to the public the materials and partial constructions" it had collected for "Training Ground for Democracy." Büchel responded with several counterclaims under VARA and the Copyright Act, seeking an injunction that would prevent MASS MoCA from displaying the unfinished installation and damages for the Museum's alleged violations of his rights under both VARA and the general Copyright Act" Reuters. "The First Circuit adhered to precedent in concluding that the unfinished work fell within the scope of the Copyright Act." Carpenter & Hetcher, 2014, p. 2257.

¹³¹ McCutcheon, 2017.

commenced.”¹³² Moreover, it is possible that works of a transitory nature benefit from protection similar to that provided for in the 1994 anti-bootlegging statute covering the recording and distribution of unauthorized live musical performances.¹³³

Under UK law the application of the fixation requirement is more ambiguous. The only provision mandating fixation concerns literary, dramatic and musical works¹³⁴ and although “*there are no similar provisions for artistic works (...) a similar requirement may be demanded by the courts*”¹³⁵. For instance, in *Merchandising Corp of America v Harpbond Ltd*¹³⁶, or the Adam Ant case, as it is mostly known, the court found that make-up was not an artistic work “*as it was not permanently affixed to a surface*”¹³⁷. On the contrary, in *Metix v GH Maughan*¹³⁸ Laddie J noted that “*a sculpture made from ice in no less a sculpture because it may melt as soon as the temperature rises*”¹³⁹.

Civil law jurisdictions, as already mentioned, usually do not adopt a fixation requirement. “*Greek law requires no fixation for the recognition of copyright: thus a work improvised and performed live on the spot would be protected.*”¹⁴⁰ Similarly, in France there is no such requirement. Case law in the area confirms that even speeches, once they become perceptible by the very action of speaking, qualify for protection.¹⁴¹ “*In addition, the Paris Supreme Court for Judicial Matters found that unauthorized photographs of a fashion show infringed the copyright over the shows as performances. (...) in interpreting the requirement, the court held that the fixation was merely an evidentiary requirement for the infringement action, not a prerequisite for the existence of copyright.*”¹⁴² Under French law the recognition of a fixation requirement would also

¹³² Carpenter & Hetcher, 2014, p. 1246.

¹³³ “*Congress has provided protections for “unfixed” works in one area: the Uruguay Round Agreements Act, adopted in 1994, grants certain protections for live musical performances. Specifically, unauthorized recording of live musical performances and distribution of copies of such recordings violates federal law. While violators are subject to remedies contained in the Copyright Act, the anti-bootlegging provisions do not in themselves grant copyright protection to unfixed live performances and do not preempt state law.*” Loren, 2016, p. 948.

¹³⁴ Section 3(2) of the CDPA provides that: “*copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise.*” Copyright, Designs and Patents Act, 1988.

¹³⁵ Stokes, 2012, p. 53.

¹³⁶ *Merchandising Corp of America Inc v Harpbond*, 1983. The case concerned the publication, reproduction and alteration of copyrighted photographs.

¹³⁷ Rosenmeier & Teilmann, 2005, p. 56.

¹³⁸ *Metix (UK) Ltd v G.H. Maughan (Plastics) Ltd*, 1997. The case examined whether or not the plaintiff’s moulds made for casting industrial products were copyright protected as works of sculpture.

¹³⁹ Stokes, 2012, p. 54.

¹⁴⁰ “*Any manifestation of a work of the mind susceptible of being communicated to others suffices for its recognition as a subject matter of copyright (...) this manifestation may be an act that only momentarily makes the work accessible to the senses, especially to human sight or hearing (...) in practice, sufficient evidence of the work must be presented for the purposes of a given case.*” Koumantos & Stamatoudi, 2014, pp. 21-22.

¹⁴¹ Both the *Lacan* and *Barthes* cases concerned the publication of speeches without the consent of their author. In both cases the French Courts ruled that such an action is infringing. Derclaye, 2009, p. 141.

¹⁴² Carpenter & Hetcher, 2014, p. 2259.

contradict the moral right of divulgation, according to which artists “*are able to decide upon the access of the public to their work*”.¹⁴³

Concluding, it is not unreasonable to wonder whether an unknown fixation of a work, such as a recording, photograph or other, absent an authorized one would constitute an ‘*actio contraria*’ or not. Fortunately the US phrasing for fixation makes clear that such a recording would indeed infringe the rights of the artist.¹⁴⁴ On the other hand, UK law expressly requires the consent of the author only for the exploitation of fixed performances¹⁴⁵, while paragraph (3) of Section 3 of the CDPA, concerning the fixation of literary, dramatic and musical works, states that: “*It is immaterial for the purposes [of conferring copyright to a fixed work] whether the work is recorded by or with the permission of the author; and where it is not recorded by the author, nothing in that subsection affects the question whether copyright subsists in the record as distinct from the work recorded.*”¹⁴⁶ Thus, since the fixation requirement “*will be satisfied even if the recording is carried out by someone other than the creator (with or without their permission) (...) it could be tempting to consider the owner of the copy as the owner of the work.*”¹⁴⁷

2.2.3. Classifying Subject matter

*“If there is still one hellish, truly accursed thing in our time, it is our artistic dallying with forms, instead of being like victims burnt at the stake, signaling through the flames.”*¹⁴⁸
-Antoine Artaud

Scholars, artists, lawmakers and judges have been struggling with the long unanswered question of ‘what is art’, and by extension what exactly comprises an artwork; all unable to come up with an intellectually satisfying answer. This terminology *lacuna* leads to tremendous complications when it comes to defining the subject matter of a law in which the ‘work’ holds a pivotal role,¹⁴⁹ decisive for the fate of many creations.¹⁵⁰ Copyright law adopts two distinct approaches in resolving the aforementioned perplexity. Either by opting for an ‘open-ended’, illustrative and non exclusive list of subject matter, enter the Civil law jurisdictions’ approach, or by embracing a radical formalism which entails a definitive, ‘closed list’ of specifically enumerated works that qualify for protection, found under Common law jurisdictions. Evidently, contemporary works that fail to comply with traditional normative forms of art, as seen under

¹⁴³ Derclaye, 2009, p. 141.

¹⁴⁴ ““A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author”. 17 USC.

¹⁴⁵ Section 180 (1). Copyright, Designs and Patents Act , 1988.

¹⁴⁶ See *supra* note 145.

¹⁴⁷ Derclaye, 2009, p. 145.

¹⁴⁸ Artaud, 1994, p. 13.

¹⁴⁹ “The idea that the copyright work is ontologically unstable led Pila to suggest that even if the instability could be “resolved for certain doctrinal purposes, “it still” undermines the law’s claim to theoretical coherence, and the possibility of understanding the copyright work.”” Sherman, 2011, p. 119.

¹⁵⁰ “Defining copyright’s subject matter results in including and excluding entire categories of material from protection.” Reese, 2017, p. 113.

Common law, such as ‘ready-mades’ and installation artworks, strive to fit into one of those specific classes, resulting to the very turmoil formalism was set to eliminate.¹⁵¹

The Civil law approach is primarily characterized by flexibility. Under Greek Copyright law, for instance, article 2(1) defines the term “work” as “*any original intellectual literary, artistic or scientific creation, expressed in any form*”¹⁵², and provides for an indicative list of categories.¹⁵³ French law protects “*all works of the mind, whatever their kind, form of expression, merit or purpose*”¹⁵⁴, without providing any “*statutory definitions of what can or cannot constitute protectable subject matter*”¹⁵⁵. In addition, France, also, “*protects works of applied art through both copyright and design protection*”¹⁵⁶. The US stands somewhere in between the two approaches, by “*technically [taking] the illustrative approach but practically (...) operat[ing] under an exhaustive categorisation.*” § 102(a) of the 17 U.S.C. grants protection to “*original works of authorship*”, which “*include*”¹⁵⁷ eight categories of works. “*The use of the word ‘include’, which the statute defines as being ‘illustrative and not limitative’ indicates that copyright could be recognised in works that do not fall within any expressly enumerated category, and the statute’s legislative history suggests that this may have been the drafters’ intent to some degree.*”¹⁵⁸ Moreover, ‘useful articles’ “*having an intrinsic utilitarian function*”¹⁵⁹ are excluded from copyright protection. Nevertheless, according to one commentator even though the U.S. subject matter list is not meant to be exclusive in reality “*when new forms of authorship emerge...they’re pushed in one of the existing categories.*”¹⁶⁰

In the UK, the exhaustive list of subject matter set in Section 1 of the CDPA, grants, amongst other categories, protection to artistic works¹⁶¹, which are later in the Act defined as: graphic works, including any painting, drawing, diagram, map, chart or plan, engraving, etching, lithograph, woodcut or similar work; photographs, sculptures, including a cast or model made for purposes of sculpture, collages, works of architecture and works of artistic craftsmanship¹⁶².¹⁶³ Failure to fall within one of these categories will preclude protection.¹⁶⁴ The CDPA’s classification system presents a strong nexus to the fixation requirement, discussed above, by “*focusing on the material*

¹⁵¹ “*Yet the effect of this taxonomic approach to defining the objects of copyright is certainly discriminatory, simply because the narrowness of the law’s classifications cause it to fail to reflect the diversity of contemporary art.*” Schubert & McClean, 2002, p. 284.

¹⁵² Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters.

¹⁵³ “*Thus, even works that cannot be classified in one of the statutorily enumerated categories may still be protected, making it less critical to define the different categories in the list.*” Koumantos & Stamatoudi, 2014, p. 27.

¹⁵⁴ Reese, 2017, p. 128. Article L112-1, Intellectual Property Code (‘IPC’).

¹⁵⁵ Derclaye, 2009, p. 57.

¹⁵⁶ Stokes, 2012, p. 70.

¹⁵⁷ § 102(a). 17 USC.

¹⁵⁸ Reese, 2017, pp. 128-9.

¹⁵⁹ Section § 101. 17 USC.

¹⁶⁰ Hunter, 2012.

¹⁶¹ Section 1, Article (1) (a). Copyright, Designs and Patents Act , 1988.

¹⁶² Section 1, Article 4 (1), (2). See *supra* note 161.

¹⁶³ The need for a restrained definition “*on public policy grounds it has been argued that as copyright is in the nature of a monopoly, there must be certainty in its subject matter to avoid injustice.*” Stokes, 2012, p. 53.

¹⁶⁴ Derclaye, 2009, p. 54.

embodiments through which visual representations of [each category] are 'normally' made manifest"¹⁶⁵. Case law in the area indicates that absent a blanket appreciation for Art and competency, Judges try not to make aesthetic inquiries focusing on the process of creation of a work instead. Indeed, Courts have found guidance in examining how a work has been construed, defining it in technical terms, "*when considering whether copyright has been infringed.*"¹⁶⁶

In the previously cited case *Merchandising Corporation of America v Harpbond*¹⁶⁷, the Court of Appeal rejected the claim of make-up being a 'painting' due to the fact that it lacked permanence, thus ruling that no infringement has taken place. In another case, *Creation Records v News Group Newspapers*¹⁶⁸, the assemblage of a number of objects for the purposes of an album cover photo-shoot for the group Oasis, failed to qualify as a 'collage' because "*the traditional understanding of that word is that it involves the use of glue or some other adhesive*"¹⁶⁹, in which case it did not. It also failed to fall under any other category of the CDPA, thus the Court, once again, found no infringement, a debatable outcome according to the plaintiffs who argued that the "*1988 Act should not be construed to deny protection to the 'great variety of novel forms' of visual art as artistic works under s.4.*"¹⁷⁰. In *Metix v Maughan*¹⁷¹ Laddie J rejected the claim that moulds for making cartridges were copyright protected as 'sculptures', on the basis that "*although it was not possible to say with precision what is and what is not a sculpture, the persons making the moulds did not appear to consider themselves (nor were considered by anyone else) to be artists when they designed the moulds, and their only consideration in making the moulds was to achieve a precise functional effect rather than any aesthetic appeal.*"¹⁷² Hence, the Court, interpreted 'sculpture' "*in its ordinary sense: 'a three dimensional work made by an artist's hand'*"¹⁷³, and gave particular attention to the subject's utilitarian aspect and status of its creator in order to decide whether or not to characterize it as a 'work'.

A more complicated case is that of *Lucasfilm Ltd v Ainsworth*¹⁷⁴, a case disclosing that if Courts are *a priori* determined not to grant protection to a specific work, the CDPA's

¹⁶⁵ Schubert & McClean, 2002, p. 293.

¹⁶⁶ Sherman, 2011, p. 105.

¹⁶⁷ *Merchandising Corp of America Inc v Harpbond*, 1983.

¹⁶⁸ *Creation Records Ltd and Others v News Group Newspapers Ltd*, 1997. "*In this case, an ensemble of objects was arranged by Noel Gallagher for the purposes of a 'photo-shoot', the results of which would be used for the front sleeve of the Oasis album 'Be Here Now'. The defendant newspaper engaged a freelance photographer to take an unauthorized photograph of the scene, which it subsequently published and offered for sale. (...) an action for an interlocutory injunction restraining further publication of the photograph [followed].*" Derclaye, 2009, pp. 68-9.

¹⁶⁹ Stokes, 2012, p. 42.

¹⁷⁰ Schubert & McClean, 2002, p. 294.

¹⁷¹ *Metix(UK) Ltd v G.H. Maughan(Plastics) Ltd*, 1997.

¹⁷² Stokes, 2012, p. 41.

¹⁷³ *Ibid.*

¹⁷⁴ *Lucasfilm Ltd and Others v Ainsworth and Another*, 2011. In the 70s, the plaintiff, George Lucas, employed three artists for the prop making of one of the characters featured in the film, based on the concept conceived by him. The artists, amongst other parts, were commissioned to produce the character's helmet. One of the artists, Andrew Ainsworth, the defendant, based on a clay model, produced a number of prototype helmets. In 2004, the defendant produced a number of new pieces which he sold. The copyrights to these items were registered in the US under the

classification system serves as an irrefutable alibi for them to do so.¹⁷⁵ The dispute raised in 2004 concerning the distributing rights of a number of props and moulds used for the first movie of the Star Wars Saga, *Star Wars Episode IV: A New Hope*. A number of decisions regarding the case ruled that the helmets at stake (part of the props) were not sculptures despite the fact that they were based on cast model and notwithstanding of being ‘three dimensional works made by an artist’s hand’, ruling that there was no copyright in the works under UK law; “*the decision of the Court of Appeal [2009] (affirmed by the Supreme Court) [2011] (...) suggests that the courts are now unlikely to take the approach of just looking at the process used to create a work*”¹⁷⁶. The utilitarian function¹⁷⁷ of the Imperial Stormtrooper helmets -though practically they serve no purpose in real life- was invoked in order to disqualify them from being a work of ‘sculpture’.¹⁷⁸ The helmets also failed to fall under the category of ‘artistic craftsmanship’, reasoning that “*the author had to be both a craftsman and an artist*”¹⁷⁹, which apparently the Court found not to be the case. Copyright law, indeed, “*protects better foxes than hedgehogs*”¹⁸⁰.

EU harmonization on what constitutes subject matter of copyright has been limited to databases, photographs and software with the implementation of the Database¹⁸¹,

plaintiff. In 2005, Lucasfilm sued Ainsworth in the US for copyright infringement; the United States District Court of California granted Lucasfilm a compensation for damages, finding that both trademark and copyright infringement have taken place. The plaintiff “*also filed suit in the Chancery Division of the English High Court, bringing claims of copyright infringement under English law and under U.S. law, as well as a claim for enforcement of the U.S. judgment.*” 20 J. Intell. Prop. L. 87, 2012. The trial held in 2008 dismissed all infringement claims, along with Ainsworth’s claim to copyright ownership. In 2011, the U.K. Supreme Court addressed two issues concerning this dispute one of which was whether the helmet qualified as a sculpture under the CDPA.

¹⁷⁵ The proceedings lasted a total of 5 years. Only a few months before the issuing of the last judgment, a media report concerning the case, mentioned that “*the outcome of the dispute will have “major implications for the UK film industry”, in that if Ainsworth prevails and the court holds that copyright protection is limited to 15 years, it could consequently serve as a deterrent for film and television studios to utilize UK-based prop makers as they could later sell unlicensed replicas of props that they design and produce under the employ of the production companies.*” Debord, 2011.

¹⁷⁶ Stokes, 2012, p. 38.

¹⁷⁷ In an earlier case *Wildash v Klein*, *Wildash v Klein*, 2004, the Court found that the craftworks at stake, despite their functional purpose, were works of ‘sculpture’ or alternatively ‘of artistic craftsmanship’, due to the fact that they were designed to have aesthetic appeal.

¹⁷⁸ “*The purpose of the helmet was that it was to be worn as an item of costume in a film, to identify a character, but in addition to portray something about that character – its allegiance, force, menace, purpose and, to some extent, probably its anonymity. It was a mixture of costume and prop. But its primary function is utilitarian. While it was intended to express something, that was for utilitarian purposes. While it has an interest as an object, and while it was intended to express an idea, it was not conceived, or created, with the intention that it should do so other than as part of character portrayal in the film. (...) I think that the ordinary perception of what is a sculpture would be over-stretched by including this helmet within it, and when rationalised the reasons are those just given. It is not that it lacks artistic merit; it lacks artistic purpose. I therefore find that the Stormtrooper helmet is not a sculpture.*” *Lucasfilm Ltd v Andrew Ainsworth*, 2009.

¹⁷⁹ Stokes, 2012, p. 48.

¹⁸⁰ *Designers Guild Ltd v. Russell Williams (Textiles) Ltd*, 2000.

¹⁸¹ Directive 96/9/EC.

Term¹⁸² and Software¹⁸³ Directives respectively. If the ironclad common law approach were to be resolved by further EU subject matter harmonization in the future, as it has been argued that according to EU standards the UK protected subject matter should be broader in scope¹⁸⁴, denouncing the certainty of norms and adapting to the resilience and simplicity of the continental categorization¹⁸⁵, any such hope can now be safely abandoned in view of the impending implementation of ‘Brexit’. Concluding, the effect of the taxonomic approach to subject matter can be summarized in George Lucas’ words following the issuing of the last *Lucasfilm v Ainsworth* judgment: “*The decision unfortunately also maintains an anomaly of British copyright law under which the creative and highly artistic works made for use in films [being only one example of the anomaly] – which are protected by the copyright laws of virtually every other country in the world – may not be entitled to copyright protection in the UK.*”¹⁸⁶

¹⁸² Directive 2006/116/EC.

¹⁸³ Directive 2009/24/EC.

¹⁸⁴ In the *Infopaq* case it was mentioned that “‘works’ must be ‘intellectual creations’”. Stokes, 2012, p. 183.

¹⁸⁵ A shift that would undoubtedly lead to “a more ‘open-minded’ approach (...) [and] to more generous interpretations of ‘collage’, ‘sculpture’ and ‘painting’.” Derclaye, 2009, pp. 69-70.

¹⁸⁶ Garner, 2011.

2.3. Appropriation Art: Transformation or Copy?

2.3.1. Appropriation Art

“To deny artists the right to copy is to deny their right to be creative”¹⁸⁷
-Karsten Schubert



Image 7: (Left) Velázquez, Diego Rodríguez De Silva, ‘Las Meninas’, 1656, 318 cm × 276 cm; Museo del Prado, Madrid. (Right) Pablo Picasso, ‘Las Meninas’, 1957, 194 cm × 260 cm; Museu Picasso.

The reliance of any new creation on ‘reference’ is undeniably significant. Throughout Art’s history authors have looked into past works for inspiration, scholarship, motivation, guidance and even purpose. Raimondi made his living out of copying Raphael’s paintings.¹⁸⁸ Shakespeare incorporated altered parts of other authors’ literary works in some of his most memorable plays.¹⁸⁹ Picasso found inspiration in the remaking of world-famous paintings.¹⁹⁰ Artists have always found invaluable aid in

¹⁸⁷ Shcubert & McClean, 2002, p. 372.

¹⁸⁸ Under the employment of Raphael, Marcantonio Raimondi made “an absolutely faithful rendering of Raphael’s composition for general distribution, allowing artists who were not able to see Raphael’s original to learn from it.” Author Karsten Schubert further notices that “Raimondi’s etching is also a reminder of the important role copies play in history: with Raphael’s original lost, Raimondi’s etching is the only firsthand record of the work known to us.” See *supra* note 187, pp. 362-363)

¹⁸⁹ “It’s well known that [Shakespeare] stole a lot of his plots from published sources. (...) And it wasn’t just plots that he stole from his sources; it was often enough their language, too (...) For instance, when he sat down to write *Anthony and Cleopatra* (...) he had a copy of Plutarch’s *Lives of the Noble Grecians and Romans*, translated by Sir Thomas North (1579), open at his elbow. (...) he in significant part copied, the most famous bit of cribbing being the speech in which Enobarbus describes the Egyptian queen floating in gilded splendor down the Nile.” Shore, 2017, p. 21.

¹⁹⁰ The most well-known examples of Picasso’s appropriation are his versions of Delacroix’s ‘*The Women of Algiers*’ (1954-55), Velazquez’s ‘*Las Meninas*’ (1957), and Manet’s ‘*Dejeuner sur l’herbe*’ (1959). As Timothy Anglin Burgard states in his article ‘*Picasso and Appropriation*’, for Picasso “appropriation was not merely an artistic exercise in which he critiqued the Modernist reverence for originality and explored his relationship to great art and artists. Indeed, the artist perceived appropriation as a magical transference of power that could

their predecessors' 'creations of the mind'; yet, it wasn't until the 20th century that 'appropriation', a word bearing such a negative stigma¹⁹¹, was used to describe a whole 'new' artistic movement.¹⁹²

Appropriation art contradicts, by definition, basic principles of copyright law since it "raises questions of originality, authenticity and authorship"¹⁹³. Although a different degree of copying is involved in each case¹⁹⁴, it is that 'iconoclastic' dimension of Appropriation art, which poses obvious challenges on the efficient application of copyright law, granting it its infamous characterization as the most problematic artistic practice, up to date, concerning Intellectual Property issues¹⁹⁵. Under that very prism, every time there is involvement of an appropriation artwork in a copyright case it constitutes the infringing and not the infringed work. This chapter focuses on summarizing and presenting the main line of defense for appropriation artworks in case of legal disputes, granted under 'exceptions and limitations' provisions; particular emphasis will be given in the common law jurisdiction exception of 'fair use', in the US, and 'fair dealing', in the UK, while underlining the uncertainty surrounding the ruling of such cases, therefore pinpointing the importance of a strong 'exceptions and limitations' regime carried out with as much clarity and consistency as possible, without undermining flexibility.¹⁹⁶

be applied to both historical and contemporary art and to objects and people." Burgard, 1991, p. 479.

¹⁹¹ The negative aura surrounding the word, mainly, derives from its association with colonialism.

¹⁹² "Appropriation in art and art history refers to the practice of artists using pre-existing objects or images in their art with little transformation of the original." Tracing its roots back to practices of the early 1900s, Appropriation art is often associated with numerous types of works ranging from the cubist collages and the use of readymades to Pop-art and the Neo-Geo movement. Tate. According to another definition: "appropriation is the intentional borrowing, copying, and alteration of preexisting images and objects. It is a strategy that has been used by artists for millennia, but took on new significance in mid-20th-century America and Britain with the rise of consumerism and the proliferation of popular images through mass media outlets from magazines to television." MoMA.

¹⁹³ Tate.

¹⁹⁴ Copyright Professor Johnson Okpaluba groups appropriation in art into three types: "First, the copying of whole images with or without attribution to the copyright owner. Here, the original may be altered, as in *L.H.O.O.Q.* (or 'she's got a hot arse'), Marcel Duchamp's famous addition of a moustache to a postcard of the *Mona Lisa*; or it may be copied in unaltered form as in Sherrie Levine's reproductions of iconic photographs by Walker Evans and Edward Weston. Second, the practice of montage that involves incorporating images from several sources into a work, as seen in the screen prints of Robert Rauschenberg. Third, the practice of simulationism: the appropriation of whole genres and styles." Shcubert & McClean, 2002, p. 27.

¹⁹⁵ The use of popular and generally identifiable images by appropriation artists extends to issues concerning also trademark law which is not the subject of this research. See for example *Coca-Cola v. Gemini Rising*, *Coca-Cola Company v. Gemini Rising, Inc.*, 1972, where Gemini Rising produced a poster using the Coca-Cola Trademark, replacing the 'Enjoy Coca-Cola' tagline with 'Enjoy Cocaine'; and *Mattel Inc. v. Walking Mountain Prods*, *Mattel Inc. v. Walking Mountain Prods*, 2003, in which photographer Thomas Forsythe, the defendant, was brought before the court by the manufacturers of Barbie for his work 'Food Chain Barbie', where he depicted Barbie dolls juxtaposed with vintage kitchen appliances.

¹⁹⁶ Although the 'fair use' analysis instigates for ad hoc measures, being open for case by case translation –its goal is not to exclude works by deeming them infringing, by stifling creativity,

2.3.2. Appropriation Art: A Defense

The ‘fair use’ doctrine has been said to constitute “*by far the most enigmatic doctrine in U.S. copyright law and by far the most important*”.¹⁹⁷ Section 107 of the US Copyright Act provides for a four-step-test under which the courts should examine each case in order to determine whether an act falls within ‘fair use’. With no other definition of ‘fair use’ provided anywhere in the Act, judges are authorized to interpret and apply the following provision as they see fit:

*“In determining whether the use made of a work in any particular case is a 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.”*¹⁹⁸

Though, considering this particular phrasing, none of the factors is to be valued as having greater importance than the others, case law indicates that courts beg to differ. In *Harper & Row v. Nation Enterprises*¹⁹⁹, the fourth factor was named “*undoubtedly the single most important element of fair use*”²⁰⁰. Impairment in the market was also called the most important factor, along with the commercial nature of the use at stake, in both *Corp. of America v. Universal City Studios, Inc*²⁰¹, and *Williams & Wilkins Co. v. United States*^{202, 203}. On the contrary, in *Campbell v. Acuff-Rose Music*²⁰⁴, concerning a

but to facilitate a fair, just and efficient application of the law instead—, artists many times cannot be sure whether in case of a dispute their work will be seen as infringing or not. In a panel discussion that took place in the context of 2016 London Art Fair, director of the Jerwood Charitable Foundation, Shonagh Manson mentioned that “*so much of copyright law is expressed in terms that are very subjective and hard to determine. As a result it’s very difficult to establish whether a particular work is OK or whether it transgresses copyright law.*” Shore, 2017, p. 65.

¹⁹⁷ Barton Beebe continues: “*we continue to lack any systematic, comprehensive account of our fair use case law and the actual state of our fair use doctrine. Instead, our conventional wisdom derives from a small set of conventionally agreed-upon leading cases.*” Beebe, 2008, p. 550.

¹⁹⁸ Section 107 also sets an indicative list of fair uses: “*fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (...), scholarship, or research, is not an infringement of copyright.*” 17 USC.

¹⁹⁹ The case concerned the publication of an article by The Nation magazine quoting Nixon’s pardon from President Ford’s memoirs ‘*A Time to Heal*’. Harper & Row, who held the rights to the memoirs, have previously contracted with the Time magazine for the exclusive pre-publication preview, but when the Nation’s article came out Time magazine chose to cancel their contract. *Harper & Row, Publishers INC., ET AL. v. Nation Enterprises, ET. AL.*, 1985.

²⁰⁰ Beebe, 2008, pp. 582-3.

²⁰¹ In what is also known as the ‘Betamax case’, the court had to examine whether Sony was to be held liable for contributory copyright infringement, being the manufacturer of the Betamax home video recording machine, for the potential uses by its purchasers. *Sony Corp. of America v. Universal City Studios, Inc.*, 1984.

²⁰² The plaintiff, publisher of medical journals and books, sued the National Institute of Health and the National Library of Medicine for copyright infringement, because they would photocopy articles in medical journals, published by Williams & Wilkins, and distribute them to the requesting researchers. *Williams & Wilkins Co. v. United States*, 1975.

parody of the song ‘Oh Pretty Woman’, the court ruled that “*the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use*”²⁰⁵, naming, this time, the character of the work as of outmost relevance in determining alleged infringement. This variation in court decisions not only highlights the subjectivity lurking in the application of the fair use defense but also exposes another systemic structural glitch:

“*Courts tend first to make a judgment that the ultimate disposition is fair use or unfair use, and then align the four factors to fit that result as best they can. At base, therefore, the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.*”²⁰⁶

In the landmark case of Appropriation art, *Rogers v. Koons*²⁰⁷, the defendant invoked the fair use defense for parody²⁰⁸. He argued, that the sculpture at stake, being part of his exhibition ‘*The Banality Show*’, “*was designed to provide a critique of the conspicuous consumption, greed, and self-indulgence of modern consumer society*”²⁰⁹. As many commentators have already noted, a successful parody, unlike plagiarism, “*requires taking a sufficient amount of expression from an underlying work to recognize (...) the original.*”²¹⁰ But according to the court this argument can be raised only when the derivative work is a parody directly targeting the original work and not in instances where use of the original work aims in general societal critique, which was found to be the case here. In addition, the ‘for-profit’ motives of Koons’ work in combination with the fourth factor, proved detrimental for the defendant; “*the court ruled that because Koons produced his sculpture for profit, the likelihood of future harm could be presumed and, therefore, the market for Rogers’ work was prejudiced.*”²¹¹ It remains only a matter of literature debate what would have been the outcome of *Rogers v. Koons*, if the case was trialed after the issue of the *Campbell* decision.²¹²

²⁰³ Both cases prove that “*it is possible that a court may find fair use even when an entire work is copied and the market for the original work is not impaired*”. Shcubert & McClean, 2002, p. 206.

²⁰⁴ *Campbell v. Acuff-Rose Music*, 1994.

²⁰⁵ Stokes, 2012, p. 144.

²⁰⁶ Beebe, 2008, p. 589.

²⁰⁷ The case concerned the making of a sculpture (three copies of it) by world famous artist Jeff Koons entitled ‘*String of Puppies*’, based on a black and white photograph taken by photographer Art Rogers entitled ‘*Puppies*’, that Koons found on a postcard. *Rogers v. Koons*, 1992.

²⁰⁸ Although, according to Simon Stokes, under UK law “*the artist can himself be open to a complaint of plagiarism or copyright infringement, even if a defense of ‘parody’ or of fair dealing for the purpose of criticism or review is raised.*” Stokes, 2012, p. 167.

²⁰⁹ “*In theory, when an artist places a familiar image in a new context, the manoeuvre forces the viewer to reconsider how different contexts affect meaning and to understand that all meaning is socially constructed...*” Shcubert & McClean, 2002, p. 200.

²¹⁰ Eisenstein, 2000, p. 897.

²¹¹ Shcubert & McClean, 2002, p. 206.

²¹² As previously mentioned, “*the Court found that, in addressing the fourth factor, courts should consider the transformative nature of the parody rather than its commercial nature when evaluating the parody’s likely market harm to the original*”. Eisenstein, 2000, p. 903.

Indeed, the post *Campbell* trend seems to have shifted towards transformativeness, as the decisive factor of the fair use test.²¹³ This trend is strongly evident in both *Blanch v. Koons*²¹⁴ and *Cariou v. Prince*²¹⁵ decisions. In *Blanch v. Koons* the court ruled that the incorporation of the plaintiff's photograph in the defendant's painting without her prior authorization, did nonetheless, constitute fair use, even though "*the defendant's work was commercial and did not parody the plaintiff's work*".²¹⁶ In *Cariou v. Prince*, the court also found fair use. Appropriation artist Richard Prince incorporated a number of the plaintiff's previously published photographs of Jamaican Rastafarians into a series of collages entitled '*Canal Zone 15*', again without the photographer's prior authorization. Although Prince neither attempted to obtain a license, nor even to claim a transformative use²¹⁷, the 2nd Circuit court held that a work may be transformative even if the work serves the same purpose as the original when it adds "*new expression, meaning, or message*"²¹⁸. The court called forth the 'reasonable observer' test²¹⁹, "*holding that twenty five of Prince's works "manifest[ed] an entirely different aesthetic from Cariou's photographs" and were therefore transformative*"²²⁰.

No matter the doctrine's blind corners current developments in US case law combined with the particular phrasing of the 'fair use doctrine' showcase an unprecedented flexibility expressly found in no other jurisdiction.²²¹ For example, until October 2014, that the relevant amendments were made, one could not find under UK copyright law a specific parody exception. The implementation of the "*caricature, parody or pastiche*"²²² as a 'fair dealing' defense in the CDPA was only the result of both the 2001 Information Society Directive²²³ and the CJEU's preliminary ruling concerning 'parody' that followed the Belgian *Deckmyn v. Vandersteen*²²⁴ case. According to the CJEU, parody is an autonomous EU concept, essential characteristics of which "*are that it: evokes an existing work, while being noticeably different from it; and constitutes an expression of humour or mockery.*"²²⁵ Furthermore, the court added that "*unlike works that have been copied for the purpose of criticism and review, the parody need not*

²¹³ "Over time (...) transformative use has become identified with protection for free speech, which thereby comes to be identified with fair use." Tushnet, 2004, p. 550.

²¹⁴ *Blanch v. Koons*, 2006.

²¹⁵ *Patrick Cariou v. Richard Prince*, 2013.

²¹⁶ Bell & Parchomovsky, 2016, p. 1068.

²¹⁷ "When asked [Prince] whether he intended his adaptations to be transformative, he answered that "he [didn't] really have a message" and that "he was not 'trying to create anything with a new meaning or a new message.'" *Ibid.*

²¹⁸ *Patrick Cariou v. Richard Prince*, 2013.

²¹⁹ The phrase refers to "a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability." Farlex.

²²⁰ 2014, p. 1231.

²²¹ "The fair use defense in the U.S. is closely bound up with constitutional guarantees of free speech (...) and vigorous notions of free competition underpinned by antipathy towards monopolies." Shcubert & McClean, 2002, p. 461.

²²² Chapter III of Part 1, section 30A. Copyright, Designs and Patents Act 1988.

²²³ Article 5 of the Directive sets an exhaustive list of all the exceptions and limitations that a Member State may opt to implement in national law. Directive 2001/29/EC.

²²⁴ In *Deckmyn v Vandersteen*, 2014, Vandersteen, a member of the Belgian political party Vlaams Belang, produced and distributed calendars with a drawing that resembled the cover page of a copy-righted comic book authored by Deckmyn.

²²⁵ Lagarde & Ang, 2016.

relate to the original work or mention the source of the parodied work”²²⁶. So it is only after 2014 that an Appropriation artwork may benefit directly from a ‘fair dealing’ defense, other than that for the purposes of criticism²²⁷, under UK law. Nonetheless, it is definite that distant sounds of older case law will continue to echo in new UK awards the years to come²²⁸, since the CJEU also held that it is upon the national courts to decide whether the requirements for parody are in each case fulfilled, while striking a balance between authors’ and users’ rights²²⁹.

It should be noted, that most *Droit d’auteur*, or civil law, jurisdictions, like France, Germany and Greece, differ significantly in their exceptions and limitations provisions. Greek copyright law 2121/1993, for instance, “does not refer to any general limitations on copyright such as ‘fair use’, ‘fair dealing’, or ‘incidental uses’, but it rather enumerates specific uses of works for which copyright liability is exempted.” Furthermore, “Article 281 of the Greek Civil Code prohibits the ‘abuse’ of any right. This provision may be invoked to limit the exercise of copyright in appropriate cases, notably where assertion of the right is outside the limits imposed by good faith or morality or by the social and economic purpose of the right.”²³⁰ Meaning that in the event of an Appropriation art case, although there is no specific parody or criticism provision under law 2121/1993, it is possible for an unauthorized derivative work to be found not infringing if (1) licensing for use from the original author has been attempted and declined or (2) the work does not interfere with the normal exploitation of the original author’s economic rights, in other words if it does not cause impairment on the original work’s market. On the other hand, France, for example, includes a specific parody exception in Article L 122-5, 4° of Chapter II of the French Code of Intellectual Property²³¹.

2.3.3. Some Further Remarks

Along with significant changes in the way that Appropriation art materializes, the digital era, has brought an even stronger ambiguity of how ‘fair use’ is being assessed²³². “Digitization, indeed, makes technologically possible the infinite manipulability of existing works, opening up a myriad of possibilities for transformative uses.”²³³ Many questions remained unanswered as to how will the courts assess cases

²²⁶ *Ibid.* A similar judgment as the one held by the court in the *Rogers v. Koons* case, implying that under EU law Appropriation art may not find shelter under the ‘criticism’ exception when the derivative work aims not in criticizing the original but commenting on society in general.

²²⁷ Chapter III of Part 1, section 30. Copyright, Designs and Patents Act 1988.

²²⁸ Previous UK case law in the area has set a number of parameters in examining ‘fair dealing’; these parameters present undeniable similarities to the US ‘fair use’ test. For instance, in *Hubbard v. Vosper*, *Hubbard and Another v. Vosper and Another*, 1972, the court held that: “you must consider first the number and extent of quotations and extracts...Then you must consider the use made of them...If they are used to convey the same information as the author, for a rival purpose, that may be unfair”. Shcubert & McClean, 2002, p. 207. Raising therefore factors (1), (2) and (4) of the ‘fair use’ test.

²²⁹ *Deckmyn v Vandersteen*, 2014.

²³⁰ Koumantos & Stamatoudi, 2014, p. 91.

²³¹ Code de la propriété intellectuelle.

²³² Takeyama, Gordon, & Towse, 2005, p. 62.

²³³ Netanel, 2008, p. 196.

involving artworks like Antonio Roberts' *'Transformative Use'*²³⁴; whether having to pay money, in order to reuse a work, is as problematic as it seems "*in an era where everyone with a computer and an artistic sensibility can become an appropriation artist*"²³⁵; or how to strike a fair balance between users' and authors' rights, when this "*individual empowerment, and the ensuing remix culture, has brought delight to millions of Internet users and grave concern to many copyright holders*"²³⁶. One thing is for sure, that "*given today's diversity of authors, 'more of them depend on limitations and exceptions than on exclusive rights*"²³⁷. In this light ADR (Alternative Dispute Resolutions) procedures may offer a safety valve for solving such cultural matters that rigid law is unable to do so.

²³⁴ *'Transformative Use'* "consists of a mosaic of colourful bits of wall-mounted vinyl whose outlines hint at elements of well-known cartoon characters –including a famous mouse-overlaid with a digital projection of an animated Disney film: (...) *Steamboat Willie*. Not that you'd necessarily be able to recognize the latter, because Roberts has made his own version of it by opening the original as a text file, where it presented itself as a series of 1s and 0s, and constitutes, as the title insists, a non-copyright-infringing 'transformative use' of the source." Shore, 2017, p. 61.

²³⁵ Hunter, 2012, p. 75.

²³⁶ Netanel, 2008, p. 44.

²³⁷ Frankel & Gervais, 2014, p. 15.

2.4. Interactivity & Authorship

Art is becoming increasingly experiential²³⁸ and creators eagerly look for innovative ways to actively engage their audiences with the artwork²³⁹. Nowadays unprecedented levels of interactivity have been reached, under the aegis of technology, an agent which has tremendously accommodated that venture,²⁴⁰ while “*blurring the boundary between producers and consumers*”²⁴¹. Interactive art understands the viewer as “*an activated presence*”²⁴², whose “*interventions into the work are part of the artistic calculation*”²⁴³, thus “*an interactive work is not complete without participants and because the nature of the interactive experience may depend significantly on context, an artist cannot finish the work alone in the studio.*”²⁴⁴ This chapter explores possible copyright complications emanating from interactivity as regards to authorship; more specifically, whether this advanced role of the viewer poses the foundation for claims of mutual copyright authorship shared amongst the artist - ‘conceiver’ of a work, and the audience that participates in that work’s materialization. It should be mentioned that such an issue may only arise in cases where the required interaction alters sufficiently the artwork at stake, with the participant making free and creative choices to the extent that he or she intervenes with how other participants experience and interact further with that artwork.²⁴⁵

2.4.1. Authorship at Law

The notion of the ‘author’ is yet lacking unanimous legal definition, nevertheless indications of what constitutes one are to be found in all jurisdictions, followed by empirical evidence visible in case law; in general “*legal systems (...) appear to agree that an author is a human being who exercises subjective judgment in composing the*

²³⁸ “*Since the 1960s an increasing number of artists have been taking active engagement further. Most famously, in the period of happenings, direct and physical audience participation became an integral part of the artwork or performance. Situations were set up, by the artists, in that the audience were meant to engage by actually taking part and so explicitly determine the work. The artwork itself is changed by the audience.*” Edmonds, 2010, p. 258.

²³⁹ “*Since the contemporary understanding of art has evolved to include essentially any activity, participatory works are able to invite public engagement in new ways. Such works both create and solicit the public sphere, and in doing so critique the traditional image of the artist as a uniquely creative individual. Contemporary participatory practices, indebted partly to technological transformations (the internet, most profoundly) (...) the viewer often becomes both the producer and consumer*”. Dumbadze & Hudson, 2013, p. 203.

²⁴⁰ “*Arguably the most important engine for artistic innovation in recent years has been the new information technologies, especially multimedia, hyper text, and the Internet. These technologies have made possible not only new means for distributing art but also new kinds of art, including “interactive art.”*” Lopes, 2001, p. 65.

²⁴¹ Towse, 2013, p. 1.

²⁴² Dumbadze & Hudson, 2013, p. 213.

²⁴³ See *supra* note 242, p. 274.

²⁴⁴ Edmonds, 2010, p. 260.

²⁴⁵ “*For example, consider a viewer interacting with a piece, becoming an active participant, engaging with the piece’s behaviour, performing in response, affecting the behaviour of piece, being affected herself, and affecting the ongoing state of the piece.*” MacDonald, Ledo, Nacenta, Brosz, & Carpendale, 2013.

work and who controls its execution.”²⁴⁶ On an international level, the Berne Convention “specifies authorship indirectly, by providing that an author is whoever says she is-if her “name appear[s] on the work in the usual manner”²⁴⁷, leaving for national law to further determine the issue in detail. On the regional level, EU Copyright law lacks “officially recognised consensus (...) as to who[m] an author is or as to whether the author or some other party is entitled to be regarded as the legal owner of the copyright”²⁴⁸.

For the civil law tradition ‘authorship’ is the absolute cornerstone of copyright.²⁴⁹ In Greece, national law dictates that “authors shall have, with the creation of the work, the right of copyright in that work”, including exclusive ownership of both economic and moral rights^{250 251}. Paragraph (2) of the same Article vests the author with the power to authorize or prohibit all relevant actions to the above mentioned rights concerning that work. In addition, Greek law identifies three different types of joint authorship: a “collaborative” one, where different authors are jointly copyright owners of the whole work, “to the extent that their respective contributions cannot be separately exploited”; a “composite” one, where different authors are again initial copyright holders of the entire work but also maintain copyright ownership “in the separate part [each] created to the extent that it can be separately exploited”; and a third type, the “collective” one, where initial copyright belongs to that person who directs “the creative contributions of a team of authors” resulting in a work, while each author has copyright ownership in their particular contribution “to the extent it can be separately exploited”.²⁵²

UK law distills ‘author’ down to its basics stating that it is the person who creates a work²⁵³, providing for a different rule when it comes to certain categories of works. CDPA also recognizes works of “joint authorship”²⁵⁴, similar to the “composite” found in Greek law, in which “the contribution of each author is not distinct from that of the

²⁴⁶ Ginsburg, 2003, p. 1066.

²⁴⁷ See *supra* note 246, p. 1069.

²⁴⁸ “The term ‘author’ is left open for national governments to determine, since the term is not defined under international law or under any instrument of European Union law – with one apparent exception. In respect of copyright in an original and creative database, Article 4 of Directive 96/9 defines ‘author as ‘the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation’.” Derclaye, 2009, pp. 203-4. “In respect of authorship and first ownership, there is indeed no true harmonisation, except for the film director. Strong differences remain in the legislation of Member States, especially as regards works made in the course of employment and commissioned works.” Stamatoudi & Torremans, 2014, p. 13.

²⁴⁹ “An emphasis on consumer welfare is the hallmark of copyright jurisprudence in the United States, just as an emphasis on author's right is the hallmark of the continental regimes. But viewed globally, and in the round, it is authorship that provides the cohering theme.” Goldstein, 1992, p. 80.

²⁵⁰ “These rights link the author to the work on the basis of his association with that work through an act of creativity. Being entirely personal in their nature, these rights may be waived but not assigned in the course of trade.” Derclaye, 2009, p. 206.

²⁵¹ Article 1(1). Law 2121/1993 on Copyright, Related Rights and Cultural Matters.

²⁵² Koumantos & Stamatoudi, 2014, pp. 46-50.

²⁵³ Provision 9(1). Copyright, Designs and Patents Act 1988.

²⁵⁴ “Note that a person who adapts an existing work may be able to claim joint authorship with the original author if the adaptor has contributed enough by way of skill and independent judgment to the finished work.” Stokes, 2012, p. 163.

other author or authors.”²⁵⁵ An early case, *Walter v Lane*²⁵⁶, indicates that in determining the author Courts incline to focusing on “*intellectual labour*” instead of physical effort.²⁵⁷ Under US law the initial copyright owner is also the author(s) of the work. Authors of “*a joint work are coowners of copyright in the work*”²⁵⁸, while in cases of “*collective*” works “*copyright in each separate contribution (...) is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution*”²⁵⁹. What US law adds to the joint authorship definition is the “*mutual intent*” parameter.²⁶⁰ According to the Code “*a “joint work” is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.*”²⁶¹ Along with taking into account “*intent*”, the US courts have also embraced other principles in evaluating authorship. The ‘level of control exercised’²⁶² reasoning has been followed in a number of cases, usually involving mechanical execution in the process of creation.²⁶³ A second principle is that of “*disproportionality*”, focusing “*on the intuitive mismatch between the actor's role in the creation of a work and the final consequences of authorship, which can be monetary, attributional, or distributional*”²⁶⁴; while a third one “*emerges from a desire to avoid a personality conflation in identifying the author.*”²⁶⁵

²⁵⁵Provision 10(A) further identifies works of “*co-authorship*” that only amount to “*the collaboration of the author of a musical work and the author of a literary work where the two works are created in order to be used together.*” Copyright, Designs and Patents Act 1988.

²⁵⁶ *Walter v Lane*, 1900. “*Reporters from The Times recorded speeches by Lord Rosebery in writing. (...) In this case, it was held that the reporters were the creators of the work and, as such, the authors.*” Torremans, 2013, p. 249.

²⁵⁷ The person “*who conceptualizes and directs the development of the work is the author, rather than the person who simply follows orders to execute the work.*” Ginsburg, 2003, p. 1072.

²⁵⁸ § 201 (a), 17 USC.

²⁵⁹ § 201 (c). See *supra* note 258.

²⁶⁰ Courts understand joint authorship as having two elements. “*First, each party or claimant must have contributed protectable expression to the final work. (...) Second, the parties need to have had an intention to be joint authors, a requirement that is often described as that of “mutual intent.” Once both elements are satisfied, each joint author obtains an equal ownership stake in the work, regardless of the amount or quality of expressive contribution made to its creation.*” In determining “*mutual intent*” the courts look at several external indicia including: “*control and decisionmaking authority, the way in which the parties characterize or bill themselves, agreements with third parties, and copyright registration.*” Balganes, 2017, pp. 40-41.

²⁶¹ § 101, 17 USC. In other words “*to qualify as joint authors, not only must each collaborator contribute independently copyrightable material to the whole, but she also must intend to be considered a joint author.*” Gallia, 2007, p. 249.

²⁶² “*Authorship is centrally a matter of responsibility, power, and creation, and distinguishing between authors and contributors rests on determining who has and employs the power to select and arrange elements as constitutive of a work and so has ultimate responsibility for that work's form and content.*” Hick, 2014, p. 152.

²⁶³ See, for instance, the *Burrow-Giles Lithographic Co. v. Sarony* case involving the authorship of a photograph of Oscar Wilde. *Burrow-Giles Lithographic Co. v. Sarony*, 1884.

²⁶⁴ Balganes, 2017, p. 67.

²⁶⁵ See *supra* note 264, p. 31.

2.4.2. Assessing Copyright Authorship in Interactive Visual Art

As far as this author is concerned there is no case law directly addressing authorship of interactive works of the visual arts, a token, perhaps, of the theoretical tenor underlying the topic. Instead Courts have been called to answer the issue concerning a different kind of interactive works, videogames.²⁶⁶ In *Williams Electronics, Inc. v. Artic Int'l, Inc.*²⁶⁷, for instance, one of the very first videogame cases, “the court held that the player’s “changes” were only to the manner of experiencing otherwise properly copyrighted elements”²⁶⁸, meaning that clearly when a participant has to make decisions from a number of predetermined options and patterns in order to experience the work there are no doubts concerning copyright whatsoever.²⁶⁹ Still, there are interactive works the formatting, and not the “*experiencing*”, of which depends upon the participants’ individual choices, a notion bound to ‘originality’ therefore to copyright protection.

One such work is Olafur Eliasson’s ‘*Collectivity Project*’, a title implying authorship complexities by virtue. The installation took place in New York City in 2015 and featured “white Lego blocks made into cityscapes by local New York architectural firms under Eliasson’s supervision”²⁷⁰. The project was carried out also in other capitals, while the concept remained the same: the artist invited visitors to alter the existing cityscapes according to their will. In theory, assessing ownership in this case is a matter of interpretation; at which state should this work be considered ‘fixed’. As mentioned previously, it is possible for ‘unfinished’ works to attract protection. In other words we may deem the project at stake ‘fixed’ for copyright purposes at the moment it enters the exhibition space, albeit not the final version of it, when only Eliasson’s interventions are present. Then he is, undoubtedly, the author. But is there a separate copyright in the work consisting of the final audience-made arrangement of the Lego pieces? Enter another interpretational issue as to which kind of joint authorship would be more appropriate.²⁷¹ If the participants’ contributions are understood as ‘non-separately exploitable’, then a claim for “*collaborative*” authorship may rise. On the other hand, if they are ‘separately exploitable’, then a “*collective*” one, under which Eliasson holds

²⁶⁶ Usually in the light of granting protection to a work in which interactive elements may prove fixation preventing.

²⁶⁷ The case examined the ‘fixation’ requirement concerning a videogame called ‘*Defender*’. *Williams Electronics, Inc. v. Arctic International, Inc.*, 1982.

²⁶⁸ Brown, 2014, p. 24.

²⁶⁹ The question though remains as to what will the Law reply when ‘computational creativity’ officially enters the gaming industry, and with it the question of ‘human authorship’. “Algorithmic or AI authorship seems poised to disrupt several areas of law that at their core concern the human author. Roughly speaking, algorithmic authorship is authorship by an algorithm — a computer program, rather than a human. Artificial intelligence usually refers to a more sophisticated and independent version of an algorithm; a closely related term is “*emergence*,” which describes programs that produce outputs their programmers and users could not predict.” Kaminski, 2017, p. 593.

²⁷⁰ Sherman, 2015.

²⁷¹ “A good analogy here might be the confusion that sometimes exists between collaboration and collectivity, where the latter implies an equally distributed input and sharing of actual labor and the former means to simply do something together, whether determined by the artist or jointly with others.” Dumbadze & Hudson, 2013, p. 209.

ownership of the whole work, as the supervisor-conceiver, while each participant holds rights on their own respective contributions, will be more suitable.²⁷²

The co-authored works of MacDonald L., Nacenta M., Brosz J. and Carpendale S. entitled ‘*A Delicate Agreement*’ and ‘*Conditional Balance*’, present similar problems. The works are based on human – computer interaction: “*In interdisciplinary interactive art (...) a new dichotomy is arising: now, through the interaction, the viewer can have an impact on the piece, as they experience and sometimes as all subsequent viewers experience it. This active role turns the viewer into a participant, and can range from minimal effect to substantial impact on the state of the piece, potentially re-shaping the piece (...). In our pieces, the participant is part of creating the underlying narrative.*”²⁷³ If creators themselves are ready to consider a shared authorship with the visitors, then in case of a dispute courts should be prepared to focus not on the work but “*on the process of authoring*”²⁷⁴ *per se* instead. On resolving this matter, Shyamkrishna Balganes²⁷⁵ proposes determining authorship in tort law fashion, borrowing its test for proving factual causation. In that light, a ‘but-for’ test would go as follows: but for the participation of the audience “*the particular work of expression in question would not have come into existence*”; accordingly, following the “*duplicative causation*” reasoning, which “*refers to situations in which two or more causes combine together to produce a result*”, both the artists’ and the participants’ interventions in the work would be treated “*as factual causes in the recognition that each is a necessary element of a set of actual conditions*” resulting to the work.²⁷⁶ Needless to mention, that both would prove in favour of a shared authorship with the participants.

²⁷² Then “*Eliasson, might have to share the wealth with (potentially) thousands of New Yorkers and tourists.*” Sherman, 2015.

²⁷³ MacDonald, Ledo, Nacenta, Brosz, & Carpendale, 2013.

²⁷⁴ Balganes^h, 2017, p. 4.

²⁷⁵ Professor of Law, University of Pennsylvania Law School.

²⁷⁶ Balganes^h, 2017, pp. 55-9.

III. CONCLUSIONS

Having introduced the reader to some of Contemporary Art's basic features facilitates the better understanding of their clash with fundamental principles that govern Copyright law. After performing a comparative analysis between the two distinct legal traditions, the civil and the common respectively, it is time to proceed to the 'sinful' task of drawing conclusions. Clarifying the controversies underlying the aforementioned 'points of tension' while answering to how the current protection afforded to contemporary artworks is, in a number of cases, intellectually and practically unsatisfying, form the purpose of this last chapter.

3.1. The Current Protection

'Originality' is the sole unanimous criterion for assessing copyrightability and as such its assessment entails threatening power over works that fail to satisfy it. Works incorporating elements of minimalism, appropriation or make use of found objects, fail under certain circumstances to qualify for protection due to their lack of 'originality'. Common law systems run a lower criterion than the Civil law ones, thus in the UK, for instance, where only 'trivial effort' suffices to conferring 'originality', courts have rather effortlessly granted protection to almost any work including a number of minimalistic ones; accordingly, in cases concerning ready-mades courts look into whether there is 'artistic intention' in order to proceed with their assessment. 'Originality' may prove trickier for appropriation works, here the substantiality of copying and whether any visually significant alterations have been made, will be examined. In similar fashion, US's only requirement for 'originality' is that an otherwise unspecified 'modicum of creativity' is evident in the work. This is not the case, though, for civil law jurisdictions under which 'originality' maintains a strong bond with 'authorship', therefore to be 'original' a work must carry its author's personal stamp. In Germany, for example, ready-mades have been denied protection on grounds of 'originality' for lacking creativity. Finally a turn of events that may cause further difficulties in protecting some contemporary works, this time on a regional level, is offered by EU's fully harmonized notion of 'originality' which comes closer to the continental one.

There are other requirements for protection which dictate copyrightability in their very own terms. Protecting 'conceptuality' has been proven *ultra vires* for copyright law, with ideas remaining copyright resistant in all jurisdictions, nevertheless pivotal to contemporary creative practices. In addition, the 'fixation' requirement, expressly found under Common law jurisdictions, serves as a purely practical agent separating the tangible from the intangible, the idea from its expression, providing material proof for a work's existence and aiding its commodification. In the case of contemporary art practices it may serve an additional purpose as well: excluding works of ephemeral nature from copyright protection. Land art and performance art, volatile by default, depend upon representational recordings in order to satisfy the requirement. Same goes for many temporary installations. Such contemporary works have been denied protection under both UK and US law due to their lack of permanence. Contrary to their 'originality' approach, author's rights systems seem to treat works transient in nature kinder than the common law ones do. Another field in which the civil law tradition

prevails is that of copyrightable subject matter designation. Without a definite answer to ‘what a work is’, author’s rights systems opt for an ‘open-ended’ list of protectable works, which is both flexible and non exclusive. Diametrically opposed stand the common law systems, especially the UK, which by adopting a technical and aesthetically neutral approach on the creative process clings onto formalism and goes for a ‘closed list’ of specifically enumerated works that qualify for protection. Failure to fall within one of these categories will preclude protection. The US stand somewhere in between by adopting a formalist approach at law, but in practice being more resilient.

Certain difficulties further rise for appropriation works, which are not only tricky to protect, by determining their ‘originality’, but also to defend in court. Their reliance upon reference makes them the ideal victims for accusation of infringements, while their best chance remains a find of use for the purposes of ‘parody’. Not surprisingly, the most flexible defense mechanism for such cases is offered by the US and its ‘fair use’ doctrine. Despite of the variation in decisions the extended precedency has generally set a trend of assessing the relevant four-step-test in favour of appropriation works. On a regional level, the EU provides for a list with all the ‘exceptions and limitations’ that one may find under national law of its Member States, including the one for ‘parody’, for which liability is exempted. In the UK a parody exception has only recently entered the law, thus a ‘fair dealing’ defense for appropriation art is now possible, though without any certainty for the outcome. Some civil law jurisdictions, France for example, expressly provides for a parody exception, whilst others, like Greece, absent a specific parody exception, employ a different reasoning which protects appropriation works given that authorization for use has been attempted and declined and that the new work does not cause impairment on the original work’s market.

Examining whether a shared authorship is possible on grounds of interactivity, seemingly a matter of mere scholarly interest, since in practice the contractual binding between a participant and an exhibition through a ticket could exclude him or her from any rights on the exhibited work, participatory or not, anything that could impeach to the very foundation of copyright law should be handled with extra care. Concluding it would seem that under US law, even if a participant is found to have added a protectable contribution to the overall work, where a protectable contribution would, based on the governing concept of ‘originality’, be generally the result of the participant making free and creative choices, absent “*mutual intention*”, there would be no joint authorship. But, even if not in the US, where the ‘intent’ parameter would have to be considered, UK courts for instance have a tradition of focusing on “*intellectual*” rather than physical labour. With no precedent available, one may content oneself in simply making educated guesses. Though, if in the case of a dispute, courts opt for a factual causation analysis then, yes, this author believes, a shared authorship being possible, under the condition that the participant has made an original addition to the work in question. After all it is only rewarding the participant’s ethical claim on his creation.

3.2. A State of Insufficiency

Starting with ‘originality’, it is easy to understand how granting protection to a monochrome would seem absurd even to minimalism’s most fanatic followers, being in reality conferring exclusive rights over a color. What remains both intellectually and practically unsatisfying is not granting protection to works of appropriation or works that make use of ready-mades, simply because their author’s personal touch, though still

present, is less evident. Ready-mades owe their place in Art's History to their author's personality in the sense that it was for the artist's free and creative choices that a new work was created, therefore bearing his personal imprint. Correspondingly, appropriation works are the result of their author's carefully-thought, free and creative choices, bearing therefore his personal imprint. To continue, the idea/expression dichotomy showcases that copyright may have good reasons for excluding ideas from its scope, yet it is necessary that a more efficient way is designated in order to balance artists' right to sufficient protection for their concepts and sustaining the public's right to the free dissemination of ideas. Within the current legal scheme conceptual works are left vulnerable to infringements, since only their material embodiment, in other words the 'trivial' manifestation of a conceptual work, is protected.

Furthermore, the 'fixation' requirement is detrimental for the protection of contemporary works. Firstly, inquiring copyrightability in constantly developing works should be viewed as a far easier a task, since there is provision for unfinished works to qualify for protection. Secondly, with recordings being the only indicia for a work's existence recognized at law, substitutes are what attract protection and not the 'works' themselves. Fortunately, US law requires authorization from the artist in order to exploit those recordings but UK expressly makes this requirement only for the exploitation of recorded performances; and in the UK, where the 'fixation' requirement is strongly related to the 'closed-list' of subject matter, alas land artist trying to classify your work as a performance under the CDPA! For one thing, works in order to obtain protection must satisfy the holy trinity of being 'original', 'fixed', and fall within one of the specific categories, but the UK classification system sabotaging for contemporary works does not end there. Courts may very well use it as an allegation, if predetermined not to grant protection to a specific work. Failure to protect under these circumstances equals negligence; it is the very structure of this classification that instigates infringement.

When it comes to appropriation art's at law defense, there is no certainty whatsoever for the expected results of any litigation. Even the notorious 'fair use' four-step-test, under which no factor should be taken as more important than the others, case law indicates that from time to time courts give emphasis to a particular factor, deciding *ex ante* if a work constitutes fair use or not, and then try to fit their judgment within the test's reasoning. In addition the fact that general critique may not qualify as a basis to exempt liability, under the parody exception, reveals the levels of incompetency in understanding basic objectives of contemporary art such as making societal comments. Moreover, recognizing that copyright owners are less likely to license derivatives that parody their own work should be enough to urge the law to step in and fill this creative gap.²⁷⁷ In an age where technology has vastly facilitated the digital manipulation of works and anyone can be an appropriation artist a number of new cases in the field are to come forward. ADR and expert consultation on a case by case basis shall provide for mutually beneficial agreements between creative parties. Concluding, the shared authorship inquiry alone should redraw the attention of lawmakers to the inconsistencies of the current legal regime as regards to contemporary artistic practices.

²⁷⁷*The problem of parody is one of 'market failure', as owners of copyright works are unlikely to grant licenses to permit the creation of parodies; and so the law should intervene to allow new creative works such as parodies to come into existence.*" Stokes, 2012, p. 177.

3.3. An Epilogue

Legal positivism instructs that the law does not necessarily stem out of notions of morality; it just is what it is. Meaning that instead of an all ‘just and fair’ law reform utopia, an amendment attempt will most likely result in an ever-strengthened law, too exclusive and inflexible, lacking the necessary insight for providing for future creation. It seems possible, though, that solution may be found outside the copyright realm. Contract law presents one such example. Like in the case of digital art, which is mainly distributed online so it can easily be subjected to mass produced contracts, containing tailor made clauses, made directly between the owner of the copyright and the user himself. At the same time, cultural policies are intertwined with those aspects of the law that concern culture, inevitably with copyright as well. Their subtle influence in shaping the law may prove a well fitted substitute to legal amendments. Moreover, the ‘art world’ as a whole is the most powerful factor guiding artistic creation, since it either accepts or rejects notions of art; its business conduct standards and market practices may also provide for some answers concerning to what is and what is not ‘acceptable’ in contemporary art.

Most contemporary artworks happen to be works of unique embodiment, meaning that their often whopping price and uniqueness lie upon the first copy of the work. Having said that it seems only reasonable that distribution of further derivative material could follow a more ‘Copyleft’ approach. That way many of the legal gaps presented above would seem irrelevant in every day real life transactions, the public domain would be enriched, leading to a blooming of creativity, and therefore copyright’s ultimate goal, that seems no other than to provide for an undisturbed abundance of artistic creation, will be achieved. The importance of authorship attribution must be stressed at this point, a moral incentive, as opposed to the economic: *“even authors who are happy to distribute their work freely, without compensation or other control, almost universally insist on receiving authorship credit.”*²⁷⁸ A sustainable and viable solution may be actually found in less copyright rather than in more of it.

Nevertheless, Copyright law remains the chief means of regulating the creative economy²⁷⁹, making the maintenance of its orderly functionality vital for the continuation of a healthy and prosperous art market. By excluding a vast amount of works that constitute eminent agents of that market from copyright protection, Copyright law not only fails to keep up with the very justification for its existence, but at the same time it also endangers its own presence as the pivotal administrative force for artistic creation. As put in the words of one scholar: *“If many are ignoring copyright as an increasing irrelevance, we should be prepared to ask challenging questions about the nature and scope of copyright (and the central role of the author as owner).”*²⁸⁰

²⁷⁸ Netanel, 2008, p. 216.

²⁷⁹ Towse & Handke, 2013, p. 3.

²⁸⁰ Stokes, 2012, p. 233.

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Appendix

Image 1: Tim Noble & Sue Webster, shadow art using found objects and taxidermy. (Left) *'Kiss of Death'*, 2003, 80 x 50 x 180 cm. (Right) *'Metal Fucking Rat'*, 2006, 51.5 x 53 x 19.6 cm..... 12

Image 2: (Left) Andy Warhol, *'Flowers'*, 1964. The Andy Warhol Museum, Pittsburgh; Founding Collection, Contribution: The Andy Warhol Foundation for the Visual Arts, Inc. (Right) Sturtevant, *'Warhol Flowers'*, 1964 – 65. Estate Sturtevant, Paris; Courtesy: Galerie Thaddaeus Ropac, Paris–Salzburg. 14

Image 3: Jannis Kounellis, *'Untitled (12 Horses)'*, 2015, Gavin Brown's Enterprise in NYC. 18

Image 4: (Left) James Turrell, *'Raethro Pink (Corner Projection)'*, 1968. Image 5: (Right) *'Victimless Leather'*, 2004. 20

Image 6: Yannis Generalis and Sybrand Wieggers, *'Dragon'*; Jozi Land Art, November 2014. Photo by Gail Wilson. 20

Image 7: (Left) Velázquez, Diego Rodríguez De Silva, *'Las Meninas'*, 1656, 318 cm × 276 cm; Museo del Prado, Madrid. (Right) Pablo Picasso, *'Las Meninas'*, 1957, 194 cm × 260 cm; Museu Picasso..... 29