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Copyright Opinions and Aesthetic Theory

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I. INTRODUCTION

This Article contends that judges should be conscious of aesthetics when deciding copyright cases. Intuitively, this proposition ought to be uncontroversial. Copyright exists "[t]o promote the Progress of Science and useful Arts."[1] Judges therefore need an overall understanding of art to make intelligent decisions about this progress. Deciding copyright cases without knowledge of aesthetics seems as implausible as deciding antitrust cases without knowledge of economics.[2]

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1. U.S. CONST. art. I, § 8, cl. 8.

2. Numerous antitrust opinions refer to economic concepts. *See, e.g.*, International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements); United States v. Trenton Potteries Co., 273 U.S. 392 (1927) (price-fixing); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (monopolization). Indeed, many leading antitrust scholars, most notably those associated with the "Chicago School," contend that economics is the only perspective from which to interpret antitrust law. *See* ROBERT BORK, THE ANTITRUST PARADOX 90-91 (1978); RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 4 (1976); Wesley J. Leibeler, *What Are the Alternatives to Chicago?*, 1987 DUKE L.J. 879 (noting and supporting Chicago School's emphasis on economic efficiency); Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979). Of course, others disagree with this perspective, contending that a narrow focus on economics overlooks important aspects of antitrust law. *See* Herbert Hovenkamp, *Fact, Value and Theory in Antitrust Adjudication*, 1987 DUKE L.J. 897; Herbert Hovenkamp, *Antitrust Policy After* Chicago, 84 MICH. L. REV. 213 (1985); John Shepard Wiley, Jr., *"After Chicago": An Exaggerated Demise?*, 1986 DUKE L.J. 1003.

However, orthodox interpretations of copyright law leave little, if any, room for aesthetics.[3] The reasons for this seem entirely plausible. First, the inherent ambiguity of aesthetics[4] is considered incompatible with the supposedly objective rules and principles that govern judicial opinions. Judges run an unacceptably high risk of being arbitrary or wrong if aesthetic choices influence their decisions.[5] Second, even if judges could make "objectively correct" aesthetic choices, judges should not impose these choices on society because such action suggests government censorship.[6]

Consider how copyright promotes the creation of art. If copyright did not exist, authors might not create for fear of appropriation by others. Copyright overcomes these fears by giving authors limited legal rights to prevent others from copying or borrowing copyrighted material.[7] The possibility of censorship arises because copyright does not protect all works,[8] nor does it prohibit all borrowing from copyrighted works.[9] Thus, when courts interpret the contours of copyrightable subject matter, they single out certain works for a special economic subsidy. Additionally, since copyright suits are often brought against defendants who have mixed their own creative labor with borrowed material,[10] judges wind up suppressing certain types of future creativity by declaring certain artistic practices infringement. If judges used their aesthetic tastes to make these determinations, they would presumably influence the kinds of art created in the future. Artists would prefer creating works that meet the aesthetic

3. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

4. *See* CLIVE BELL, ART 15 (1958); HAROLD ROSENBERG, THE DE-DEFINITION OF ART: ACTION ART TO POP TO EARTHWORKS 11 (1972).

5. *See Bleistein*, 188 U.S. at 251.

6. *See id.* at 252.

7. *See* Alfred C. Yen, *The Legacy of* Feist*: Consequences of the Weak Connection Between Copyright and the Economics of Public Goods*, 52 OHIO ST. L.J. 1343, 1364 (1991) (discussing how copyright works as an economic incentive for the production of copyrightable works).

8. *See* 17 U.S.C. § 102(a) (1994) (limiting the scope of copyrightable subject matter to "original works of authorship").

9. *See* 17 U.S.C. § 102(b) (1994) (prohibiting copyright in ideas, processes, and methods of operation); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (confirming that parodists may borrow from copyrighted works being parodied); Baker v. Selden, 101 U.S. 99 (1879) (allowing free borrowing of accounting system described in a copyrighted book); Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458 (1990) (allowing borrowing of route for a gas pipeline).

10. Consider the cases of *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), and *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970). In both cases, defendants lost copyright cases despite having added significant original work to material borrowed from plaintiffs' works.

preference of judges because other works would either not get the benefits of copyright protection or wind up being suppressed. People whose aesthetic sensibilities differ from the aesthetic sensibilities of judges might have difficulty finding or creating art that they prefer.

Because of these concerns, the general irrelevance of aesthetics has become a cornerstone of copyright jurisprudence.[11] Courts implicitly assume a sharp divide between aesthetic reasoning and legal reasoning. Aesthetic reasoning is subjective and indeterminate, while legal reasoning is objective and rigorous. The elimination of aesthetics from copyright therefore serves two related goals. If judges avoid considering aesthetics in copyright cases, aesthetic censorship seems logically impossible. Moreover, judges can now make copyright law appear objective by firmly establishing legal reasoning as the only legitimate basis for deciding copyright cases. This would make it impossible for aesthetics to affect future copyright cases because the objective, rigorous nature of legal reasoning would discipline courts away from the subjectivity of aesthetics. Copyright would become an objective, aesthetically neutral method of promoting all forms of art.[12]

However, as this Article shows, the distinction between aesthetic reasoning and legal reasoning is illusory.[13] To be sure, copyright opinions do

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11. *See supra* note 3. *See also* Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 305-7 (1991) (describing aesthetic neutrality principle); Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 184-95 (1990).

12. *See* Bleistein v Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."); Gracen v. Bradford Exchange, 698 F.2d 300, 304 (7th Cir. 1983) ("[J]udges can make fools of themselves pronouncing on aesthetic matters.... Artistic originality is not the same thing as the legal concept of originality in the Copyright Act.").

13. There are, of course, a broad range of views on whether legal reasoning is distinguishable from other methods of reasoning. At one end of the spectrum are those who distinguish legal reasoning from other methods of reasoning by arguing that legal reasoning relies on formal logic to derive the results of cases from fundamental first principles. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (describing the notion of logically deriving legal rules from a few fundamental principles as the heart of Langdellian formalism); David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1, 3-4 nn.3-6 (1992) (describing formalism as the dominant model of legal reasoning); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180-81, 184-85 (1986) (defining formalism as "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative" and describing positive economic analysis of law as the modern exemplar of formalism in common law); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) (generally supporting the idea that legal reasoning as applied to rules controls the outcome of cases); Catharine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L.J. 329, 329-30 (1994) (describing Langdellian formalism as based on logical deduction, resting on distinctly legal

not openly adopt specific aesthetic perspectives to justify case outcomes. Judges seem quite conscious of the dangers identified with aesthetic reasoning and therefore use legal reasoning to derive their conclusions. Nevertheless, the analytical premises of copyright opinions are practically identical to those of major aesthetic theories. Copyright law develops as judges change the premises governing interpretation of the law. In fact, those changes often seem necessary because existing precedent embroils the courts in aesthetic controversy. The new premises seemingly eliminate the controversy by directing judicial attention away from the aesthetically troubling determinations existing precedent requires. Unfortunately, these efforts ultimately fail because the move to a new analytical perspective is itself a decision of aesthetic significance. It is simply a matter of time until the unanticipated nuances of future cases draw the courts back into aesthetic controversy.

The above described phenomenon leaves copyright in a most peculiar state. Judges do not overrule existing precedent when they adopt new analytical perspectives. Analytically inconsistent cases therefore exist simultaneously as "good law." This means that the precedent which governs new cases may be inconsistent, and that the outcome of a case could depend on the precedent a judge chooses to apply. To the extent that these inconsistencies parallel differences in aesthetic theories, the judicial selection of controlling precedent in a given case effectively becomes a choice among competing aesthetic theories. In short, judges necessarily show a preference for certain aesthetic perspectives when they decide cases because copyright law simply requires aesthetic choices.[14]

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premises, and holding that proper application of legal reasoning insures a uniquely correct result for every legal case). At the other end of the spectrum are those who consider legal reasoning no different from other types of reasoning. *See* Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 891 (1985) (arguing that lawyers do not reason differently from others, but merely operate in a unique context with unique materials); Alan D. Hornstein, *The Myth of Legal Reasoning*, 40 MD. L. REV. 338, 339 (1981) (contending that legal reasoning is simply reasoning about legal materials); Homer C. La Rue, *Developing an Identity of Reasonable Lawyering Through Experimental Learning*, 43 HASTINGS L.J. 1147, 1147 (1992) (equating legal reasoning with thinking clearly and analytically). *See generally* Emily Calhoun, *Thinking Like A Lawyer*, 34 J. LEGAL EDUC. 507 (1984) (questioning any difference between legal reasoning and any other form of reasoning).

14. There are, of course, many ways in which to uncover the relationship between copyright law and aesthetics. First, one could simply note that any determination about art is, by definition, aesthetic. Second, one can observe how perceptions of a work's artistic value affect the amount of copyright protection it receives. *See* Cohen, *supra* note 11. Third, one can describe how a single aesthetic theory or idea dominates large portions of copyright. *See, e.g.*, MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) (analyzing historical connections between the concept of authorship and copyright in England); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, 18 COLUM.-VLA J.L. & ARTS 1 (1994) (discussing the effect of romantic authorship on copyright law); James Boyle, *A Theory of Law and*

The realization that judges necessarily make decisions of aesthetic significance in copyright casts doubt upon the orthodox belief that legal reasoning avoids discrimination among artistic practices. Since no aesthetic perspective can be neutral and all-encompassing, aesthetic bias becomes inherent in copyright decisionmaking because an aesthetic perspective must necessarily be chosen. An allegedly different method of reasoning such as legal reasoning cannot eliminate the problem of aesthetic bias in copyright. The inevitable aesthetic bias of copyright decisionmaking can only be controlled if those who exercise bias are aware of it and take affirmative steps to counter it. A truly open-minded copyright jurisprudence therefore requires explicit consciousness of aesthetics.[15]

This Article proceeds in three steps. First, the Article describes four major movements from aesthetic theory—formalism, intentionalism, institutionalism, and reader-response theory. These movements are important

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Information: Copyright, Spleens, Blackmail, and Insider Trading, 80 CAL. L. REV. 1413 (1992) (discussing the influence of romantic authorship on laws regulating information, including copyright); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (describing and analyzing the effects of romantic authorship on copyright law); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, LAW & CONTEMP. PROBS., Spring 1992, 139 (noting and analyzing the influence of romantic authorship on copyright law); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (linking modern copyright to romantic authorship); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725 (1993) (discussing how copyright embraces the literary idea of the autonomous work and its effects on copyright reasoning). When these observations are combined with those provided by this Article and others that will undoubtedly follow, it seems impossible to conclude that legal reasoning—or any other method of reasoning for that matter—can ever separate copyright from aesthetics. The question then becomes not whether aesthetics should affect copyright law, but how.

15. The positions taken in this Article have been influenced by legal pragmatism. The Article shares legal pragmatism's doubt that a single theoretical foundation can support a sufficiently encompassing version of truth to make judging an exercise in deducing the correct outcome of cases. Like pragmatists, the Article prefers a conception of truth as tentative, always subject to revision as experiences change and new perspectives emerge. In this sort of regime, judges cannot take the attitude that law prescribes the answer to all legal questions, thereby rendering unfamiliar or novel perspectives irrelevant. Instead, judges must realize that their personal perspectives and experiences are deeply implicated in adjudication. Thus, a better understanding of legal problems requires judges to affirmatively seek and consider perspectives other than their own. *See* Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1591 (1990) ("[T]he first pragmatist precept—based on the presumed incompleteness of every theory—is one familiar to every lawyer: 'hear the other side.'"). For other writings about pragmatism, see also Daniel C.K. Chow, *A Pragmatic Model of Law*, 67 WASH. L. REV. 755 (1992); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714 (1994); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Vincent A. Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory*, 57 U. COLO. L. REV. 45 (1985).

because they represent some of our culture's most thoughtful observations about art and its meaning. If the analytic premises of copyright opinions actually correspond to these markedly different aesthetic movements, then the aesthetic nature of legal reasoning in copyright cannot be dismissed as superficial. To the contrary, the aesthetic nature of copyright reasoning would have to be characterized as profound because it constitutes a version of the most sophisticated aesthetic debates our culture knows. Second, the Article analyzes cases from three major doctrines in copyright law: originality, the useful article doctrine, and substantial similarity. This analysis shows how legal reasoning appears to avoid aesthetic issues in copyright. The Article then goes on to describe the striking parallels between aesthetic reasoning and the legal reasoning of copyright opinions. Third, the Article argues for explicit consciousness of aesthetics as the best way to treat varying aesthetic viewpoints fairly.

II. SOME MAJOR THEMES FROM AESTHETICS

Aesthetics is a branch of philosophy dedicated to the study of art.[16] This section of the Article describes contrasting answers to two basic aesthetic questions: What is art, and how should art be interpreted? As will be shown later,[17] standard answers to these questions are practically the same as those given by courts when asked to define the existence and scope of copyright protection. Moreover, as in copyright law, the search for clarity and objectivity motivates many of the intellectual changes which have occurred in aesthetics. Aestheticians constantly propose new theories in response to problems with other theories, and evaluate them on the basis of whether they provide clear, unbiased descriptions of art and its interpretation.[18]

A. WHAT IS ART?

The question "What is art?" is important because the failure to define art leaves aesthetics completely open-ended.[19] Aestheticians have there-

16. *See* MARCIA MUELDER EATON, BASIC ISSUES IN AESTHETICS 2 (1988) ("[A]esthetics is sometimes identified as the 'philosophy of art.'"); W.E. KENNICK, ART AND PHILOSOPHY xi (2d ed. 1979) (describing art, and not beauty, as the central topic of aesthetics).

17. *See infra* Part III.

18. It is, of course, impossible to provide a comprehensive treatment of a field as broad as aesthetics in a law review article. See EATON, *supra* note 16, and KENNICK, *supra* note 16, for surveys of aesthetics. This Article therefore concentrates on those theories that most clearly illustrate the connection between the judicial interpretation of copyright and aesthetics.

19. *See* BELL, *supra* note 4, at 17 ("For either all works of visual art have some common quality, or when we speak of 'works of art' we gibber.").

fore spilled a fair amount of ink on the subject, but their efforts have not created a uniformly accepted definition of art.[20] However, three contrasting approaches to defining art are particularly relevant to this Article.[21] First, formalism emphasizes the physical configuration of a work.[22] Second, intentionalism focuses on the behavior of an object's creator.[23] Third, institutionalism prefers a contextual approach that concentrates on how members of a cultural tradition called "the artworld" treat a work.[24]

1. *Formalist Definitions of Art*

Clive Bell's *Art*[25] provides a good example of a formalist definition of art. According to Bell, "[a]ll sensitive people agree that there is a peculiar emotion provoked by works of art."[26] The key to defining art is the identification of the peculiar qualities that enable certain objects, but not others, to provoke this "aesthetic emotion."[27] Bell then asserts that "certain unknown and mysterious laws" govern whether humans react aesthetically when they look at an object.[28] Objects that cause aesthetic emotions must have literal formal qualities that conform to these laws. Bell labels these formal qualities "significant form" and claims that "[it] is the one quality common to all works of visual art."[29]

Bell's definition of art implies a disciplined, narrow focus. One identifies a work of art solely by specifying which formal properties provoke an aesthetic reaction.[30] Other things such as the creator's state of mind or things a work depicts are irrelevant.[31] Indeed, Bell claims that this narrow focus is precisely what gives his theory explanatory power:

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20. *See* ROSENBERG, *supra* note 4, at 12 ("No one can say with assurance what a work of art is—or, more important, what is not a work of art.").

21. *See* EATON, *supra* note 16, at 6 (grouping aesthetic theories according to emphasis on the maker, viewer, object, or context).

22. *See infra* notes 25-43 and accompanying text.

23. *See infra* notes 44-59 and accompanying text.

24. *See infra* notes 60-76 and accompanying text.

25. BELL, *supra* note 4.

26. *Id.* at 17.

27. *Id.*

28. *Id.*

29. *Id.* at 18.

30. *See id.* at 18 ("To be continually pointing out those parts, the sum, or rather the combination, of which unite to produce significant form, is the function of criticism."). *See also* EATON, *supra* note 16, at 81 ("The motivation of formalists then is the desire to identify those special elements that uniquely contribute to the aesthetic nature and appeal of artworks and other objects when they are viewed aesthetically.").

31. *See* BELL, *supra* note 4, at 19 ("In pure aesthetics we have only to consider our emotion and its object: for the purposes of aesthetics we have no right, neither is there any necessity, to pry behind the object into the state of mind of him who made it."); *id.* at 27 ("Let no one imagine that representa-

> The hypothesis that significant form is the essential quality in a work of art has at least one merit denied to many more famous and more striking—it does help to explain things. We are all familiar with pictures that interest us and excite our admiration, but do not move us as works of art. To this class belongs what I call "Descriptive Painting"—that is, painting in which forms are used not as objects of emotion, but as means of suggesting emotion or conveying information. . . . Of course many descriptive pictures possess, amongst other qualities, formal significance, and are therefore works of art; but many more do not. They interest us; they may move us too in a hundred different ways, but they do not move us aesthetically. According to my hypothesis they are not works of art.[32]

There are many reasons to find Bell's definition of art persuasive. If nothing else, Bell describes a process for identifying art that roughly parallels the things a layperson might do: Look at the object and identify its aspects that move her aesthetically. Moreover, Bell's emphasis on the object itself means that the lay observer can make informed aesthetic judgments without an expert's knowledge. For example, viewers often know little about an artist when they see a work. If aesthetic judgment depends on knowing an artist's life and thoughts, "uninformed" viewers would frequently be unable to appreciate a work properly.

However, many aestheticians believe that formalists like Bell err in emphasizing significant form to the exclusion of everything else. This mistake renders formalist definitions of art both over- and underinclusive. Consider the following possibilities.

First, suppose that a stone has a highly pleasing shape. It provokes a strong aesthetic reaction. Is it art? If a person shaped the stone, an object-oriented theorist like Bell would surely answer affirmatively because the stone obviously has significant form. But what if the stone's shape had occurred naturally through the forces of erosion?[33]

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tion is bad in itself; a realistic form may be as significant, in its place as part of the design, as an abstract. But if a representative form has value, it is as form, not as representation. The representative element in a work of art may or may not be harmful; always it is irrelevant."). *See also* EATON, *supra* note 16, at 81 ("To one who feels the language of pictorial form all depends upon *how* it is presented, nothing on what.") (quoting Roger Fry).

32. BELL, *supra* note 4, at 22.

33. John Dewey wrote:

> Suppose . . . that a finely wrought object, one whose texture and proportions are highly pleasing in perception, has been believed to be a product of some primitive people. Then there is discovered evidence that proves it to be an accidental natural product. As an external thing, it is now precisely what it was before. Yet at once it ceases to be a work of art, and becomes a natural "curiosity." It now belongs in a museum of natural history, not in a museum of art.

Second, suppose the existence of two paintings that cannot be distinguished to the naked eye. The first is a masterpiece of unquestioned authenticity. The second is a fake. Are both of them works of art?[34]

Third, suppose that an artist carefully stacks bricks in an art gallery, entitling the stack "Bricks." At the same time, a mason across town stacks bricks before starting a job. The two stacks are identical. Is either a work of art?[35]

Fourth, suppose that a urinal is exhibited in an art gallery. Is it art?[36]

Each of these possibilities catches the formalist in a contradiction. Intuitively, rocks and fakes are not art.[37] However, if formalists are truly serious about their position, they would have to call the above-described fakes and rocks art because they both have significant form. Similarly, one can easily imagine that the stack entitled "Bricks" would be widely accepted as art while the mason's stack would not be. If formalists were serious about their position, this outcome would be impossible because both stacks either have or do not have significant form. Finally, most formalists would probably be reluctant to call an ordinary urinal art, yet Marcel Duchamp's "Fountain"—a urinal turned on its side—is one of his best known works of art.[38]

Of course, formalists do not necessarily concede that they have been caught in a contradiction. Clive Bell agrees that fakes are not art. He states that fakes are not art because they inevitably differ from the works they imitate. These variances, no matter how small, prevent fakes from having significant form.[39] A formalist might also assert that nature cannot endow a rock with significant form.[40] These arguments have superficial

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EATON, *supra* note 16, at 14 (quoting JOHN DEWEY, ART AS EXPERIENCE (1934)). *See also id.* at 3 (discussing controversial aesthetic status of Carl Andre's "Stone Field," a work comprised of 36 boulders.).

34. *See* NELSON GOODMAN, LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS 99-112 (2d ed. 1976); COLIN RADFORD, THE EXAMINED LIFE 63-72 (1989) (recounting the case of Van Meegeren's fake Vermeers); Arthur C. Danto, *Artwork and Real Things*, 39 THEORIA 1, 12-14 (1973) (describing fakes as not being art).

35. *See* KENNICK, *supra* note 16, at 116; Robert B. Semple, Jr., *Tate Gallery Buys Pile of Bricks, Or Is It Art?*, N.Y. TIMES, Feb. 20, 1976, at 35.

36. *See* Richard Dorment, *Stripped Bare at Last*, THE TIMES LITERARY SUPPLEMENT, Apr. 4, 1997, at 3-4 (reviewing CALVIN TOMKINS, DUCHAMP: A BIOGRAPHY (1996), and discussing "Fountain"); J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. & ARTS 159 (1993).

37. *See* Danto, *supra* note 34, at 12-14.

38. *See* Dorment, *supra* note 36, at 3-4; Ward, *supra* note 36, at 164-65.

39. *See* Radford, *supra* note 34, at 68-69.

40. *See* EATON, *supra* note 16, at 3-4.

appeal. However, they lose their appeal on closer inspection because the formal differences that Bell refers to are often very small indeed. For example, Van Meegeren's fake Vermeer was so good that he routinely fooled scientists and critics alike.[41] If the differences between Van Meegeren's fake and an authentic Vermeer are so slight that even the most knowledgeable observers cannot detect them, how could those differences possibly determine the existence of significant form?[42] Indeed, the willingness of some formalists to change their minds about the aesthetic status of a work after learning it is a fake suggests that the supposed laws governing art are complete fictions that can be changed at the whim of the critic.[43]

2. *Intentionalist Definitions of Art*

Monroe C. Beardsley's *An Aesthetic Definition of Art*[44] offers a good example of an intentionalist definition of art. In contrast to Bell, Beardsley does not believe that "certain unknown and mysterious laws"[45] naturally provide the distinction between art and other objects. Instead, Beardsley considers art one of many cultural activities in which people participate.[46] The cultural genesis of art means that the laws hypothesized by Bell cannot control whether a given activity is artistic. Activity becomes artistic only if those who participate in it perceive it that way:

> Essential to our understanding of any culture is a grasp of the various forms of activity that it manifests, and of distinctions that are most significant to the members of the society that has that culture. When we observe someone carving wood or moving about in a circle with others, we must ask whether the activity is religious, political, economic, medical, etc.—or artistic. What function do the participants thinks of themselves as fulfilling, and how does it relate to other activities in which they engage?[47]

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41. *See* Radford, *supra* note 34, at 66.

42. *See id.* at 67.

43. *See* Nöel Carroll, *Anglo-American Aesthetics and Contemporary Criticism: Intention and the Hermeneutics of Suspicion*, 51 J. AESTHETICS & ART CRITICISM 245, 246 (1993) (referring to skepticism about essentialist claims in art theory).

44. Monroe C. Beardsley, *An Aesthetic Definition of Art*, *in* WHAT IS ART? 15-29 (Hugh Cutler ed., 1983).

45. *See supra* note 28 and accompanying text.

46. *See* Beardsley, *supra* note 44, at 18.

47. *See id.*

Beardsley therefore adopts the following definition of art: "An artwork is something produced with the intention of giving it the capacity to satisfy the aesthetic interest."[48]

Beardsley's emphasis on intent implies a focus that is as narrow as Bell's. Even if a person creates an extremely aesthetic work, it is not art unless she had the state of mind required by Beardsley during creation. Accidents, no matter how beautiful, cannot be art. "Paint may be spilled and pottery cracked unintentionally, and the pattern of paint or of the cracks may be capable of satisfying the aesthetic interest; but that alone does not make an artwork."[49] Although some might find this result unduly restrictive,[50] Beardsley apparently believed that his narrow focus was precisely what made his definition valuable.

First, he believed that intentionalism avoids formalism's subjective analysis of a work's form.[51] Second, intentionalism arguably avoids the contradictions that trapped the formalists. For example, an intentionalist has no trouble denying that beautifully shaped rocks are art because no person created them. Beardsley also argued that fakes might not be art because mere efforts to reproduce a work do not constitute the necessary intent. Only those fakes created for very special reasons could possibly be art.[52] Finally, the intentionalist has a basis for distinguishing between the two stacks of bricks mentioned earlier, for only one of them was created with the intent of satisfying the aesthetic interest.

The foregoing shows that intentionalism provides a very plausible definition of art, one that avoids some of the problems with formalism. However, this does not necessarily mean that intentionalists have provided a superior definition of art, even as compared to formalism.[53] At least four objections to intentionalism can be raised.

First, it is not at all clear that art actually is or should be identified by reference to intent. As noted above, formalists believe that the viewer has no right to inquire about the mind of an object's creator.[54] People create for all kinds of reasons. If someone accidentally creates a beautiful form,

48. *Id.* at 21. *See also* R.G. COLLINGWOOD, PRINCIPLES OF ART 15-17, 20-26, 109-11, 121-24, 305-08 (1938) (supporting intentionalism).

49. *See* Beardsley, *supra* note 44, at 28.

50. *See infra* notes 61-76 and accompanying text.

51. *See* Beardsley, *supra* note 44, at 28-29 (noting the goal of value neutrality and referring to intentionalism as having "no built-in value-judgments").

52. *See id.* at 26-27 (discussing forgeries).

53. *See* EATON, *supra* note 16, at 17 (characterizing intentionalism as highly controversial).

54. *See supra* note 31 and accompanying text; EATON, *supra* note 16, at 18-19.

isn't it still art?[55] What if the artist explicitly disclaims any aesthetic intent?[56] Second, emphasis on intent raises the possibility that the definition of art will become too broad. If someone tries to create art but fails miserably, the inclusion of the result in "art" cheapens the meaning of the term.[57] Third, the elusive nature of intent makes intentionalism appear far more subjective than Beardsley seems to admit. As Beardsley himself acknowledges, "intentions, being private, are difficult to know."[58] Even if evidence of intentions exists, it may be difficult for anyone to "correctly" interpret the evidence. As legal analysts are only too aware, personal biases easily infect attempts to discern the intent of others.[59] Fourth, intentionalism apparently fails to identify works like Duchamp's "Fountain" as art because urinals are not created with the necessary intent.

3. *Institutional Definitions of Art*

George Dickie's *Art and the Aesthetic: An Institutional Analysis*[60] provides the final definition of art considered by this Article. Dickie's views represent a clear reaction to the problems associated with formalist and intentionalist definitions of art. He recognizes the difficulties aestheticians have faced when defining art, but rejects the growing sense that art cannot be defined:

> The parade of dreary and superficial definitions that had been presented was, for a variety of reasons, eminently rejectable. The traditional attempts to define "art," from the imitation theory on, may be thought of as Phase I and the contention that "art" cannot be defined as Phase II. I want to supply Phase III by defining "art" in such a way as to avoid the difficulties of the traditional definitions and to incorporate the insights of the later analysis.[61]

Not surprisingly, Dickie considers formal properties and the creator's intent unimportant when deciding if an object is art. He turns instead to an

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55. *See* Semple, *supra* note 35, at 31; Arthur Danto, *The Artworld*, 61 J. PHIL. 571 (1964) (discussing ready-mades and Warhol).

56. *See* Harold Rosenberg, *De-Aestheticization*, NEW YORKER, Jan. 24, 1970, at 62-67 (relating the story of Robert Morris, who signed a statement disclaiming any aesthetic quality or content in one of his works).

57. *See* ROSENBERG, *supra* note 4, at 11-14 (criticizing emphasis on artist as opposed to object).

58. Beardsley, *supra* note 44, at 23.

59. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Larry Simon, *The Authority of the Constitution and its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985).

60. GEORGE DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS (1974).

61. *Id.* at 19-20.

examination of "what we do with certain objects."[62] Borrowing from a seminal article by Arthur Danto,[63] Dickie proclaims the existence of the "artworld": "the broad social institution in which works of art have their place."[64] This artworld is comprised of artists and viewers who participate in a traditional social practice of creating, presenting, and appreciating art.[65] Dickie then defines art as:

> (1) an artifact (2) a set of the aspects of which has had conferred upon it the status of candidate for appreciation by some person or persons acting on behalf of a certain social institution (the artworld).[66]

This means that objects become art when someone who believes that he is a member of the artworld invites others to view the object aesthetically.[67] If a museum displays something, Dickie would consider it art.[68] Indeed, artists may confer the necessary status on their own works.[69]

A major advantage of the institutionalist definition of art is the ease with which it accounts for modern art. As noted earlier, piles of bricks and urinals give formalists and intentionalists trouble. Formalists must refuse to recognize piles of bricks and urinals as art despite the fact that many others do.[70] Intentionalists flounder because the maker of a urinal could not possibly have intended to create an artwork.[71] How then did the urinal become art? Institutionalists, however, have no problems. Piles of bricks and urinals may not ordinarily be art, but they become art as soon as a member of the artworld confers the necessary status. If the person stacking the bricks presents the stack as art, Dickie would be satisfied.[72] If someone decides the urinal is worth displaying as art, Dickie calls the urinal art, no matter what the manufacturer initially intended.[73]

Of course, Dickie's comfort with modern art comes at a price. Dickie himself admits that his theory sounds like saying that an object is art if someone says it is art.[74] Although this doesn't bother Dickie too much, it

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62. *Id.* at 27.
63. *See* Danto, *supra* note 55.
64. DICKIE, *supra* note 60, at 29.
65. *See id.* at 23-27.
66. *Id.* at 34.
67. *See id.* at 35-37 (In addition, every person who sees himself as a member of the artworld is thereby a member.).
68. *See id.* at 37.
69. *See id.* at 38.
70. *See supra* notes 35-36 and accompanying text.
71. *See supra* note 59 and accompanying text.
72. *See supra* notes 66-69 and accompanying text.
73. *See* DICKIE, *supra* note 60, at 32-38 (discussing Dadaism).
74. *See id.* at 38.

deeply disturbs more traditionally minded theorists. For example, Beardsley complains that "we cannot follow those who hold that in order to justify the current avant-garde we must allow that anything is art if anyone says it is."[75] Later, he writes:

> To classify them as artworks just because they are exhibited is, to my mind, intellectually spineless, and results in classifying the exhibits at commercial expositions, science museums, stamp clubs and World's Fairs as artworks. Where is the advantage of that? To classify them as artworks just because they are called art by those who are called artists because they make things they call art is not to classify at all, but to think in circles. Perhaps these objects deserve a special name, but not the name of art.[76]

Formalism, intentionalism, and institutionalism all provide plausible approaches to defining art, but each theory has significant weaknesses that the others address. Formalism parallels the way many laypersons might identify art, but it has difficulty explaining trends in modern art and fakes. Intentionalism does a better job of handling fakes, but it still has trouble with some aspects of modern art. Institutionalism has no trouble with modern art, but its definition of art is so broad that it loses the discriminating sensitivity that formalism and intentionalism provide. This overlapping pattern of strengths and weakness practically guarantees that none of these theories will emerge as the comprehensive, authoritative definition of art. Instead, the theories will continue to exist in tension with each other, ready for use by viewers of art as circumstances may dictate.[77]

B. How Should a Work Be Interpreted?

The definition of art represents only the first step in aesthetic inquiry. Once a work of art has been identified, how should it be appreciated? How should its meaning be fixed? For some people, this question may seem a bit absurd because they think that viewers should appreciate art in whatever way they want. Lay expressions for this attitude might include "beauty is in the eye of the beholder" or "different strokes for different folks." Many aestheticians, however, take a different view. For them, it is important to identify correct interpretations of works because failure to do so may bring about chaos. As Jane Tompkins has observed:

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75. Beardsley, *supra* note 44, at 18.

76. *Id.* at 25.

77. For an example of a text taking multiple perspectives on art, see HORST WALDEMAR JANSON, HISTORY OF ART (2d ed. 1977).

> [T]he desire to preserve textual objectivity has its roots in a long-standing American "fear of subjectivity, of the individual interpreter's self." This fear derives from the idea that "if there were no determinate meanings the interpreter's freedom could make of a text anything it wanted." People would "feel free to impose their own subjective interpretations on any and all texts," a position that makes "a solipsistic mockery of literary criticism and at worst give[s] sanction to a thoroughgoing and destructive moral scepticism."[78]

Language as melodramatic as this suggests that serious disagreement exists over how meaning should be attached to a given text,[79] and a quick examination of aesthetic theory shows that this is certainly the case. Not surprisingly, many of the themes raised in defining art appear again, but in slightly different form.

1. *Formalist Theories of Interpretation*

Formalist theories of interpretation have assumptions similar to formalist definitions of art. Meaning exists entirely in the work itself. A

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78. Jane P. Tompkins, *An Introduction to Reader-Response Criticism*, *in* READER-RESPONSE CRITICISM: FROM FORMALISM TO POST-STRUCTURALISM xxiv (Jane P. Tompkins ed., 1980) [hereinafter READER-RESPONSE CRITICISM] (quoting Walter Benn Michaels, *The Interpreter's Self: Peirce on the Cartesian 'Subject'*, 31 GA. REV. 383-402 (1977)). *See also* Robert Stecker, *Art Interpretation*, 52 J. AESTHETICS & ART CRITICISM 193 (1994) (discussing attempts to avoid subjectivity in interpretation).

Legal analysts will undoubtedly recognize the correspondence between issues in aesthetic interpretation and the debate over how statutes, cases, and the Constitution should be interpreted. The correspondence is not accidental, as modern legal theorists have borrowed heavily from aesthetic theory, especially literary criticism, in their arguments over the importance of textual determinacy, legislative intent, and the role of judges. *See, e.g.*, (with apologies to the many scholars whose work is not cited here) STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES (1989); RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold Thought*, 85 NW. U. L. REV. 113 (1990); Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134 (1990); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145 (1985); James Boyd White, *What Can a Lawyer Learn From Literature?*, 102 HARV. L. REV. 2014 (1989).

79. Throughout this section, the term "text" is used to denote the broad category of "works of art." This is done in order to conform to the use of the term "text" in many of the works under discussion. Those works were generally written in the context of debates about how literary texts should be interpreted, but the arguments have now been generalized to all forms of art. *See* EATON, *supra* note 16, *passim* (discussing theories about the interpretation of written texts and applying them to all art).

work has a single, objective meaning and "correct" statements about art can therefore be made.[80]

Like formalist definitions of art, formalist theories of interpretation bear a rough resemblance to the interpretive approach that many laypersons might take. The work causes ideas, thoughts, and feelings to arise in the viewer's mind. Object-oriented theorists, however, take this approach one step further by holding that the viewer ought to bring nothing to the interpretation of art. Knowledge of the author's intention, history, or personal experience is not only irrelevant, it is positively harmful to an objective understanding of the work.[81] As Clive Bell stated in *Art*:

> For, to appreciate a work of art we need bring with us nothing from life, no knowledge of its ideas and affairs, no familiarity with its emotions. Art transports us from the world of man's activity to a world of aesthetic exultation. For a moment we are shut off from human interests; our anticipations and memories are arrested; we are lifted above the stream of life. The pure mathematician rapt in his studies knows a state of mind which I take to be similar, if not identical. . . . In this world the emotions of life find no place. It is a world with emotions of its own.[82]

Formalism superficially solves the problem of subjectivity in interpretation. If meaning is contained in an object or text, then the viewer or reader simply discovers meaning. Interpretation becomes an objective empirical inquiry devoid of personal views. Of course, sophisticated viewers of art know that the search for meaning seldom works out this way. To take a crude example used by William Tolhurst, consider the sentence "Nixon is the best President since Lincoln." Is this a serious statement of fact, or is it a humorous statement? According to critics of formalism, problems like this demonstrate that texts do not have meanings that can be discovered by formalist methods, and that other interpretive theories are better.[83]

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80. *See* W.K. Wimsatt, Jr. & Monroe C. Beardsley, *The Intentional Fallacy*, *in* THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY 4-5 (1954) ("A poem can *be* only through its *meaning*—since its medium is words—yet it *is*, simply *is*, in the sense that we have no excuse for inquiring what part is intended or meant."). *See also* MONROE C. BEARDSLEY, THE POSSIBILITY OF CRITICISM 9, 16 (1970) ("[L]iterary works are self-sufficient entities, whose properties are decisive in checking interpretations and judgments. This is sometimes called the Principle of Autonomy, and it is of course the subject of much dispute."); NORTHROP FRYE, ANATOMY OF CRITICISM: FOUR ESSAYS 3, 134 (1957) ("[T]he real structural principles of painting are to be derived, not from an external analogy with something else, but from the internal analogy of the art itself.").

81. *See* Wimsatt & Beardsley, *supra* note 80, at 18 (criticizing reference to author's intentions by stating, "[c]ritical inquiries are not settled by consulting the oracle.")

82. BELL, *supra* note 4, at 27-28.

83. *See* William E. Tolhurst, *On What a Text Is and How it Means*, 19 BRIT. J. AESTHETICS 3 (1979).

2. *Intentionalist Theories of Interpretation*

The most obvious "solution"[84] to the problems of formalism is intentionalism. If one does not know the meaning of "Nixon is the best President since Lincoln," it makes sense to ask what the person who made the statement intended.[85] Intentionalists contend that this method of interpretation is correct for two reasons. First, art is the product of deliberate behavior, so it must be understood that way. As P.D. Juhl states:

> Our concept of the meaning of a literary work created by a person differs from our concept of the meaning of a text produced by chance, such as by a monkey or a computer. That is, our concept of the meaning of a literary work appears to involve the notion of an author's intentional activity, of his actual use of the words in questions to express or convey something.[86]

Second, reference to a creator's intention realizes the formalist dream of making interpretation objective because the creator's state of mind is a real thing that can be discovered, at least in theory.[87]

Intentionalism is certainly a valuable interpretive strategy. However, it is not as comprehensive or objective as its proponents claim. First, as formalists have been quick to point out, meaning and intention are not always linked.[88] Texts sometimes have unintended meanings.[89] All meanings of "Nixon is the best President since Lincoln" are worth studying, even if unintended.[90] Even typographical errors can have meaning.[91]

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84. The term "solution" is given quotation marks because intentionalism is not truly a solution to the problems of formalism because it too yields no objective results in the search for textual meaning. *See infra* notes 88-93 and accompanying text.

85. *See* P.D. JUHL, INTERPRETATION: AN ESSAY IN THE PHILOSOPHY OF LITERARY CRITICISM 45, 47 (1980) ("[T]o understand [the meaning of] a literary work is . . . to understand what the author intended to convey or express.").

86. *Id.* at 48. *See also* Carroll, *supra* note 43, at 246-49 (supporting the idea that art is the product of "intentional activity of rational agents" and must be understood that way).

87. *See generally* E.D. HIRSCH, JR., THE AIMS OF INTERPRETATION (1976) (defending intentionalism because it avoids relativism); Gary Iseminger, *An Intentional Demonstration, in* INTENTION AND INTERPRETATION 76 (Gary Iseminger ed., 1992).

88. *See* Wimsatt & Beardsley, *supra* note 80, at 4 ("How is [the critic] to find out what the poet tried to do? If the poet succeeded in doing it, then the poem itself shows what he was trying to do. And if the poet did not succeed, then the poem is not adequate evidence, and the critic must go outside the poem—for evidence of an intention that did not become effective in the poem.").

89. *See* Tolhurst, *supra* note 83, at 4-5.

90. *See* Frank Cioffi, *Intention and Interpretation in Criticism, reprinted in* ON LITERARY INTENTION 55, 61 (David Newton-DeMolina ed., 1976).

91. The author notes with some irony a typographical error that occurs in his article *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990). On page 521 of the article, the following sentence appears: "The Article will show that copyright has somehow developed along lines suggested by neutral law despite the economic focus of modern copyright jurispru-

Furthermore, how can intentionalists explain the fact that words themselves apparently change meaning over time?[92] Second, even if one concedes that intention is worth considering, evidence of an author's intention is often missing or unclear.[93] In those situations, personal biases again creep into the process of interpretation.

3. *Reader-Oriented Theories of Interpretation*

The above described problems with formalism and intentionalism have led some theorists to state that meaning exists only in the mind of a reader, and not in a text or the mind of an author.[94] At its most radical, this intellectual maneuver represents the abandonment of any attempt to articulate a comprehensively objective, correct method of interpreting art. A text can have no universally correct meaning because there is no way to prove that any particular reader's idiosyncratic interpretation of a work is wrong. Interpretation becomes a function of the reader's identity.[95] Unless two people happen to share intersubjectively agreed upon assumptions and interpretive practices, disagreements are simply matters of personal opinion.[96]

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dence." The author intended the word "neutral" be "natural." Nevertheless, the sentence does have meaning.

92. *See* BEARDSLEY, *supra* note 80, at 19-20. *See also* Stecker, *supra* note 78, at 202-03 (discussing problems with intentionalism).

93. *See* JONATHAN CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS, AND THE STUDY OF LITERATURE 118 (1975) ("To ask of what an author is conscious and of what unconscious is as fruitless as to ask which rules of English are consciously employed by speakers and which are followed unconsciously.").

94. *See* Peter Jaszi, *Who Cares Who Wrote "Shakespeare?"*, 37 AM. U. L. REV. 617, 619-20 (1988) ("What the text 'does' to us, however, is actually a matter of what we do to it, a question of interpretation; the object of critical attention is the structure of the reader's experience, not any 'objective' structure to be found in the work itself.") (quoting TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 85 (1983)); READER-RESPONSE CRITICISM, *supra* note 78, at ix ("In the context of Anglo-American criticism, the reader-response movement arises in direct opposition to the New Critical dictum issued by Wimsatt and Beardsley in 'The Affective Fallacy' (1949).... Reader-response critics would argue that a poem cannot be understood apart from its results. Its 'effects,' psychological and otherwise, are essential to any accurate description of its meaning, since that meaning has no effective existence outside of its realization in the mind of a reader."). *See also* MICHAEL FOUCAULT, *What is an Author?*, *in* TEXTUAL STRATEGIES 141 (Josue V. Harari ed., 1979).

95. *See* READER-RESPONSE CRITICISM, *supra* note 78, at xix-xx (referring to theories of Norman Holland and David Bleich).

96. *See* Stanley E. Fish, *Interpreting the Variorum*, 2 CRITICAL INQUIRY 465 (1976) (describing how interpretive communities that share interpretive strategies make principled discussion of meaning possible); READER-RESPONSE CRITICISM, *supra* note 78, at x ("The objectivity of the text is the concept that [reader-response] essays, whether they intended it or not, eventually destroy."). *See also* DAVID BLEICH, SUBJECTIVE CRITICISM 97-133 (1978).

The radical version of reader-response interpretation sketched above is profoundly unsettling because it embraces the very sort of relativism that aesthetic criticism so frequently tries to avoid.[97] However, some reader-response theorists believe that the location of meaning within readers does not necessarily lead to unbounded subjectivity. For them, the identification of the reader's importance simply confirms that interpretation is largely a matter of perspective. The trick to a correct interpretation then becomes the selection of a particular reader whose perspective is elevated above others.[98] Interestingly, the methods suggested for accomplishing this task come close to converting reader-response criticism back into formalism and intentionalism.

Consider how Jonathan Culler uses the concept of "the ideal reader" to limit the effects of reader-response theory.[99] If meaning arises from the reader's application of cultural conventions, then surely there are readers who know more about existing cultural conventions than others. The ideal reader would therefore be a person who knows everything about social conventions of interpretation and applies them correctly when reading a text. Culler specifies the ideal reader's interpretation of a work as correct because that reader's perspective correctly applies a given culture's interpretive practices.[100] This comes close to turning reader-response interpretation back into formalism because critics can endow the ideal reader with the same views formalists would have. After all, a well-informed literary critic makes a good formalist evaluator because she knows a lot about Bell's mysterious laws of art. An ideal reader knows the same things, except those things are now labeled cultural conventions, and not laws of art. To be sure, there is a fine distinction between laws of art that naturally determine aesthetic meaning and cultural conventions that do likewise because of intersubjective agreement. However, once a critic accepts the proposition that meaning resides in the minds of readers, the formalist laws simply become cultural conventions.

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97. *See supra* notes 78-79 and accompanying text.

98. *See* Stecker, *supra* note 78, at 203 (noting how Hypothetical Intentionalism and Conventionalism try to specify meaning).

99. CULLER, *supra* note 93, at 123-24.

100. *See id.* ("The question is not what actual readers happen to do but what an ideal reader must know implicitly in order to read and interpret works in ways which we consider acceptable . . . ."). *See also* READER-RESPONSE CRITICISM, *supra* note 78, at xviii (discussing Culler's ideal reader); Gerald Prince, *Introduction to the Study of the Narratee*, *in* READER-RESPONSE CRITICISM, *supra* note 78, at 7-25 (discussing, among other things, real, virtual, and ideal readers).

A similar analysis may be performed on William E. Tolhurst's embrace of "the intended audience."[101] According to Tolhurst, authors try to communicate with particular people when creating texts.[102] The correct meaning of a text is therefore the "intention which a member of the intended audience would be most justified in attributing to the author based on the knowledge and attitudes which he possesses by virtue of being a member of the intended audience."[103] This moves reader-response criticism very close to intentionalism because an author's intended audience is very likely to interpret her works as she desires.[104]

III. COPYRIGHT OPINIONS AND AESTHETIC THEORY

This Section analyzes lines of cases from three major areas of copyright law—originality, the useful article doctrine, and substantial similarity. A conventional reading of these cases supports the notion that aesthetics are irrelevant to copyright. Judges apparently recognize that copyright adjudication can easily slip into the subjectivity of aesthetic taste, and the opinions considered here appear to interpret copyright law so that courts can make objective legal determinations instead of subjective aesthetic ones. However, familiarity with aesthetic theory leads to the conclusion that these legal interpretations amount to the judicial adoption of formalist, intentionalist, institutionalist, or reader-response aesthetic theories.

A. ORIGINALITY

Originality provides the basic definition of copyrightable subject matter. Section 102(a) of the Copyright Code extends copyright protection to all "original works of authorship,"[105] and the Supreme Court has stated that originality is a constitutional prerequisite to copyright protection.[106] The legislative history of section 102(a) indicates that Congress used the term "original works of authorship" to codify the standard of copyrightability developed by the courts in a line of cases stretching back to the nineteenth century.[107]

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101. Tolhurst, *supra* note 83, at 3-14. *See also* Jerrold Levinson, *Intention and Interpretation: A Last Look*, *in* INTENTION AND INTERPRETATION, *supra* note 87, at 221-56 (supporting intended-audience-type approach).

102. *See* Tolhurst, *supra* note 83, at 12.

103. *Id.* at 11.

104. *See id.* at 9-10 (distinguishing "utterer's meaning" from "utterance meaning" and distinguishing the intended audience approach from pure intentionalist interpretations of works).

105. 17 U.S.C. § 102(a) (1994).

106. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346-47 (1991).

107. H.R. Rep. No. 94-1476, at 51-52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664-65.

One of the first major cases to address the issue of originality was *Burrow-Giles Lithographic Company v. Sarony*.[108] In that case, the plaintiff Sarony claimed copyright in a photograph entitled "Oscar Wilde No. 18."[109] The defendant Burrow-Giles, which had made 85,000 copies of the photograph for sale,[110] defended by arguing that Congress did not have the power to protect photographs under copyright because the Constitution grants Congress only the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[111] According to Burrow-Giles, a photograph is not a literal writing and therefore falls outside the constitutional scope of copyright.[112] Furthermore, even if the term "writing" includes more than written texts, the term could never include photographs because photographs are fundamentally different from other potentially copyrightable nonliteral writings. For example, a painting is not literally a "writing," but it does "embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the Constitution."[113] By contrast, photographs simply reproduce existing objects that the photographer did not create, and no "novelty, invention, [or] originality" is possible.[114] The Supreme Court unanimously rejected these arguments and held that the photograph was copyrightable.[115]

First, the Court refused to interpret the term "writings" in a narrow, literal manner, noting that the first United States copyright statute protected "any map, chart, book or books," and that subsequent amendments broadened the scope of copyrightable subject matter to include prints and cuts.[116] According to the Court, Congress would never have broadened copyright beyond literal writing unless it thought that it had the power to do so. The Court considered this authoritative because many early congressmen and senators were framers of the Constitution who presumably had personal knowledge of what the term "writings" meant.[117] The Court then defined "author" as "he to whom anything owes its origin; originator;

108. 111 U.S. 53 (1884).
109. *Id.* at 54.
110. *See id.*
111. U.S. CONST. art. I, § 8, cl. 8.
112. *See Burrow-Giles*, 111 U.S. at 54, 56.
113. *Id.* at 58-59.
114. *Id.* at 59.
115. *See id.* at 60.
116. *See id.* at 56.
117. *See id.*

maker; one who completes a work of science or literature."[118] "Writings" of "authors" were the "literary productions" of authors. "Writings," therefore, properly included "all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."[119] Indeed, the only reason that Congress did not include photographs in its 1802 amendment to the Copyright Code was the fact that photographs were not yet known.[120]

Second, the Court rejected the distinction between photographs and paintings as too blunt. While Burrow-Giles' argument might be correct as to "the ordinary production of a photograph,"[121] Sarony's photograph was different. The Court wrote:

> The third finding of facts says, in regard to the photograph in question, that it is a "useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.[122]

These characteristics made Sarony's photograph original and, therefore, copyrightable.[123]

Sarony is important because the findings on which the Court relied establish two different perspectives from which to analyze originality. First, calling the photograph "useful, new, harmonious, characteristic and graceful" is basically an elaborate statement of the work's beauty. This implies that originality depends on whether the work's intrinsic form has aesthetic merit. Second, the Court's reference to the plaintiff's selection and arrangement of the photograph's features implies that originality depends on the operation of a putative author's mind, and not the features of the work itself. However, this interpretation of originality is not the only one that courts have adopted.

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118. *Id.* at 57-58.
119. *Id.* at 58.
120. *See id.*
121. *Id.* at 59.
122. *Id.* at 60.
123. *See id.*

In *Bleistein v. Donaldson Lithographing Co.*,[124] the Supreme Court moved away from the interpretation of originality laid down in *Sarony*. At issue was the plaintiff Bleistein's claim to copyright in three chromolithographs that he had prepared to advertise a circus. Each chromolithograph depicted scenes and people from the circus.[125] Bleistein argued that the defendant Donaldson had infringed copyright in the chromolithographs by making reduced size reproductions. Donaldson argued that the chromolithographs were not copyrightable.[126] Both the trial and appellate courts agreed with Donaldson, and Bleistein appealed to the Supreme Court.[127]

Although the copyrightability of Bleistein's works might seem obvious to someone familiar with current practice,[128] there was very plausible statutory and constitutional support for the Sixth Circuit's conclusion that the nature and purpose of the works defeated copyright.[129] At that time section 4952 of the Copyright Code limited copyright to "any engraving, cut, print . . . [or] chromo . . . connected with the fine arts."[130] Since advertisements are not generally considered fine art, the purpose behind the works' creation could easily defeat copyright. Moreover, *Sarony*'s requirement of originality suggested two separate bases for ruling against Bleistein on constitutional grounds. First, the Court could have denied copyright because—like ordinary photographs—the chromolithographs were mere reproductions of circus scenes.[131] Second, the Court could have denied copyright because the chromolithographs lacked sufficient aesthetic merit.[132]

However, the Supreme Court reversed the Sixth Circuit and remanded for a new trial.[133] According to the now famous majority opinion written by Justice Holmes, the fact that the chromolithographs reproduced circus scenes was irrelevant to the issue of copyrightability. In fact, the reproductions in question embodied the originality which supports all copyright. The Court wrote:

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124. 188 U.S. 239 (1903).

125. *See id.* at 248.

126. *See id.*

127. *See id.*

128. *See* Canfield v. Ponchatoula Times, 759 F.2d 493, 496 (5th Cir. 1985); Johnson v. Automotive Ventures, Inc., 890 F. Supp. 507, 512 (W.D. Va. 1995); Raffoler, Ltd. v. Peabody & Wright, Ltd., 671 F. Supp. 947 (E.D.N.Y. 1987).

129. *See Bleistein* 188 U.S. at 249.

130. *Id.* at 250.

131. *See supra* notes 121-23 and accompanying text.

132. *See id.*

133. *See Bleistein,* 188 U.S. at 251.

> It is obvious also that the plaintiffs' case is not affected by the fact, if it be one, that the pictures represent actual groups—visible things. . . . The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.[134]

Next, the Court dealt with the possibility that the works were uncopyrightable because they lacked aesthetic merit or were not "connected with the fine arts." The Court found that Bleistein's works contained sufficient merit to meet any statutory or constitutional restrictions on copyrightable subject matter.[135] With respect to section 4952's restriction that works be "connected with the fine arts," the Court reached its conclusion by defining "fine arts" in a somewhat surprising way. Instead of analyzing Bleistein's works to show their connection to fine art, Justice Holmes simply defined the problem away, stating that "[t]he antithesis to 'illustrations or works connected with the fine arts' is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is 'prints or labels designed to be used for any other articles of manufacture.'"[136] Of course, Bleistein's chromolithographs were not "prints or labels," and this meant that their use as advertisements no longer affected copyrightability. Indeed, practically all works except prints or labels could be copyrightable. This left the possible lack of aesthetic merit as the final bar to Bleistein's case.

Here, too, the Court reached its conclusion by interpreting away the problem. In *Sarony*, the Court found aesthetic merit in the plaintiff's photograph by evaluating its physical form and deeming it "useful, new, harmonious, characteristic, and graceful."[137] This implied that future courts would have to make similar evaluations of new works if controversy over copyrightability should arise. However, the prospect of such an analysis made Justice Holmes uneasy. He therefore changed the test for aesthetic merit from an evaluation of a work's formal properties to a practically tautological observation about public reaction to a work. In one of the most widely cited passages in all of copyright law, Holmes stated:

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134. *Id.* at 249.
135. *See id.* at 248-52.
136. *Id.* at 251.
137. Burrow-Giles Lithographic Co. v Sarony, 111 U.S. 53, 60 (1884).

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights.[138]

Bleistein clarified the meaning of originality in one very important way. To the extent that *Sarony* left open the possibility that "ordinary photographs" might not be copyrightable, *Bleistein* clearly stated the Supreme Court's view that copyright protected even humble art. Originality is therefore an easily met standard that is not a serious bar to copyright for most works.[139] However, the fact that originality is a low standard does not necessarily make it any easier to identify the few works which still do not meet the test. For example, Holmes stated that "personal reactions upon nature" are copyrightable when embodied in a work. Those reactions would ordinarily be conscious and therefore purposely included in an author's work. However, in some cases a reaction might be unconscious. If that unconscious reaction found its way into a work, would it also be copyrightable?

The Second Circuit answered this question affirmatively in *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*[140] In that case, the plaintiff claimed copyright in reproductions of public domain paintings. The reproductions were made by hand-engraving the image of the public domain work onto a plate which was then used to print out the reproductions.[141] The defendant claimed that these reproductions could not support copyright because they

138. *Bleistein*, 188 U.S. at 251-52.

139. *See* CCC Info. Serv., Inc. v. MacLean Hunter Mkt. Reports, Inc., 44 F.3rd 61, 65 (2d Cir. 1994); West Publ'g Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1226-27 (8th Cir. 1986); Financial Control Assocs., Inc. v. Equity Builders, Inc., 799 F. Supp. 1103, 1116 (D. Kan. 1992).

140. 191 F.2d 99 (2d Cir. 1951).

141. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 74 F. Supp. 973, 975 (S.D.N.Y. 1947).

were copies of other works, and hence not original.[142] This assertion made a fair amount of sense because the plaintiff was trying to reproduce already existing works. How then could there be the sort of purposeful selection and arrangement of shapes and objects that supported copyright in *Sarony* and *Bleistein*?

The Second Circuit acknowledged these problems, but still found that the plaintiff's works were original.[143] This conclusion rested on three analytical steps. First, the court adopted the *Bleistein* view that very modest contributions support copyright.[144] Second, the court noted that the reproductions were not identical to the public domain works.[145] Third, the court made it clear that small departures from the public domain originals would support copyright[146] even if the engraver did not intend to create the departures.[147] The court wrote: "A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the 'author' may adopt it as his and copyright it."[148]

Catalda's method for analyzing originality is easily distinguished from *Bleistein*'s. If it had wanted to, the *Catalda* court could have decided in the plaintiff's favor while following the *Bleistein* analysis. When a conventional artist tries to paint an entirely faithful representation of a tree, that depiction surely receives copyright protection.[149] In *Catalda*, the engraver was simply trying to faithfully represent an existing painting. If, as *Bleistein* suggests, the personal reaction inherent in depicting an existing object supports copyright, it should not matter whether the object depicted is natural or man-made. In either case, the mental process of creating the work would be the same. Copyright would therefore protect both the painting of a tree and the engravings of Catalda.

The problem, of course, is that many people distinguish "copying" a tree from copying an existing painting. The former is generally considered "real art" while the latter carries a stigma related to plagiarism.[150] Accord-

142. *See Alfred Bell*, 191 F.2d at 102.

143. *See id.* at 104-05.

144. *See id.* at 102-03.

145. *See id.* at 104-05.

146. *See id.* at 103 (noting that a copy of a public domain original will support copyright as long as it is a "distinguishable variation").

147. *See id.* at 105.

148. *Id.*

149. *See* Franklin Mint Corp. v. National Wildlife Art Exch., 575 F.2d 62, 65 (3rd Cir. 1978) (proceeding on the conclusion that copyright protects paintings of photographic clarity).

150. *See* Danto, *supra* note 34, at 7 ("Copies (in general) lack the properties of the originals they denote and resemble. A copy of a cow is not a cow, a copy of an artwork is not an artwork.").

ingly, the *Catalda* court could not use the *Bleistein* analysis to support the plaintiff without entering a controversy about what it means to create a work of art—the very sort of aesthetic determination that *Bleistein* admonished courts to avoid. It therefore made sense for the Second Circuit to fashion a less obviously controversial analysis to support its conclusion. The court did this by ignoring the intent of the alleged author in favor of the physical form of the plaintiff's work. According to the Second Circuit, copyright existed simply because the plaintiff's works were physically distinguishable from other works. To the extent that *Sarony* and *Bleistein* required human intent to support copyright, *Catalda* reduced that requirement to one of mere human agency. No longer must an author intentionally create a distinguishable work. The author need only intend to create any work, even a work identical to an existing one. If that effort creates any distinguishable variation, copyright follows.[151]

For purposes of this Article, *Sarony*, *Bleistein*, and *Catalda* are important because they illustrate how subtle changes in legal interpretation initially appear to keep aesthetics out of copyright law. As noted earlier, *Sarony* based originality on two findings. First, the physical form of the plaintiff's photograph had aesthetic merit.[152] Second, the plaintiff created the work by purposefully selecting and arranging the objects and shapes represented in the photograph.[153] By contrast, *Bleistein* rested originality almost entirely on the fact that the plaintiff created the work.[154] To be sure, *Bleistein* did address the issue of aesthetic merit.[155] However, *Bleistein* abandoned any effort to follow *Sarony*'s aesthetic evaluation of the formal properties of the plaintiff's work because Holmes considered it inappropriate for judges to make aesthetic determinations. Instead, *Bleistein*

151. *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983), offers another excellent example of the intellectual maneuver used in *Catalda*. In *Gracen*, the plaintiff entered a contest in which she painted (with permission) an image of Dorothy from *The Wizard of Oz* by looking at preexisting photographs. Despite winning, the plaintiff refused to allow her painting to be used by the contest organizers. When new paintings were commissioned to replace the plaintiff's images, she sued in copyright. The Seventh Circuit ruled against the plaintiff on the ground that her painting lacked sufficient originality to be copyrightable.

Interestingly, the Seventh Circuit's opinion conceded that the plaintiff's works had artistic merit. *See id.* at 304. According to the court, however, copyright did not apply an aesthetic standard of originality. *See id.* Instead, the appropriate standard was a mere physical measurement of the physical differences between the plaintiff's work and other similar works. Here, the differences identifiable in the plaintiff's work were not large enough, so copyright could not protect it. *See id.* at 305. For discussions of this case and its many fascinating links to aesthetic theory, see Jaszi, *supra* note 14, at 462-63; Rotstein, *supra* note 14, at 747-48.

152. *See supra* notes 122-23 and accompanying text.

153. *See id.*

154. *See supra* note 134 and accompanying text.

155. *See supra* notes 137-38 and accompanying text.

analyzed the way that others, including the defendant, reacted to the plaintiff's work. If others found the work meritorious, the Court would simply agree.[156]

Like *Bleistein*, *Catalda* also reinterpreted the originality standard to keep ambiguous, controversial, and ultimately aesthetic judgments out of copyright. *Catalda*'s emphasis on the form of a work avoided problematic assertions about whether judgments made by the plaintiff's engravers were equivalent to those of someone painting a tree. Indeed, the distinguishable variation standard itself appears to make originality an easy issue to analyze. If a court can identify a variation between the plaintiff's work and any others, a distinguishable variation must exist. No qualitative assessment about the aesthetic significance of the variation is necessary.

Of course, familiarity with aesthetic theory shows that neither *Bleistein* nor *Catalda* actually kept aesthetic issues out of copyright. Instead, courts resolved each of the cases analyzed here by adopting interpretations of copyright that correspond to major aesthetic theories about the definition of art. *Sarony*'s emphasis on the "useful, new, harmonious, characteristic and graceful"[157] nature of the photograph is simply a formalist interpretation of originality, and its attention to the photographer's purposeful selection and arrangement is intentionalist.

In *Bleistein*, the Court considered the plaintiff's circus posters copyrightable, but *Sarony* arguably supported the opposite result because the posters were aesthetically pedestrian reproductions of circus scenes.[158] If the Court decided for the plaintiff, it might appear as if the Court were imposing its own aesthetic tastes on the case. The Court avoided this problem by avoiding formalist aesthetics in favor of intentionalism and institutionalism.[159] The Court declared aesthetic evaluation of the work's form irrelevant,[160] and instead relied primarily on analysis of the creator's behavior.[161] To the extent that copyright still required a showing of aesthetic merit, the Court adopted an institutionalist stance, stating that the public's appetite for the plaintiff's works was sufficient.[162]

The effort to avoid aesthetic controversy took a somewhat different turn in *Catalda*. In that case, the Second Circuit believed that copyright

156. *See supra* note 138 and accompanying text.
157. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).
158. *See supra* note 131 and accompanying text.
159. *See supra* notes 84-104 and accompanying text.
160. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251-52 (1903).
161. *See supra* note 134 and accompanying text.
162. *See supra* note 138 and accompanying text.

protected the plaintiff's reproductions of public domain paintings.[163] However, the court would have had great difficulty supporting its conclusion with a *Bleistein* or *Sarony* type analysis of the creator's behavior because the plaintiff's works were made for the express purpose of faithfully reproducing already existing paintings. This made it difficult for the court to conclude that the engraver had either engaged in creative selection and arrangement or expressed personal reactions upon nature. The Second Circuit solved this problem by directing its analysis away from the creator's mental processes[164] to the very thing that *Bleistein* ignored—the form of the work. In fact, the Second Circuit concentrated on the same things as formalists do when they confront forgeries of great works—the minute differences between the authentic work and the reproduction.[165] This emphasis allowed the court to find "distinguishable variations" between the plaintiff's reproductions and the originals, differences that the court considered significant because of copyright's low standard of originality.[166]

B. THE USEFUL ARTICLE DOCTRINE

The useful article doctrine is another major doctrine that defines the scope of copyrightable subject matter. It is the result of administrative, legislative, and judicial decisions to deny copyright protection to works of industrial design even if they are aesthetically valuable.[167] Section 101 of the present Copyright Code codifies this policy, providing that the design of a useful article[168] is copyrightable "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[169]

The seminal case of *Mazer v. Stein*[170] illustrates the analytical problems associated with the useful article doctrine quite nicely. In *Mazer*, the plaintiff Stein made and sold electric lamps.[171] Some of these lamps had bases made of semivitreous china in the shape of dancing figures.[172] Stein

163. *See supra* note 143 and accompanying text.

164. *See supra* notes 147-48 and accompanying text.

165. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-03 (2d Cir. 1951).

166. *See supra* note 151 and accompanying text.

167. *See* Keith Aoki, *Contradiction and Context in American Copyright Law*, 9 CARDOZO ARTS & ENT. L.J. 303, 305-38 (1991) (setting forth the history of the useful article doctrine).

168. A "useful article" is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." 17 U.S.C. § 101 (1994).

169. *Id.*

170. 347 U.S. 201 (1954).

171. *See id.* at 202.

172. *See id.*

sent these figures, without lamp components, for registration as "works of art" and received certificates of registration.[173] The defendant copied the statuettes, used them as lamp bases, and sold them without Stein's approval.[174]

On appeal, the sole issue before the Court was the copyrightability of the statuettes. The defendant first argued that copyright does not protect statuettes if the creator intends to use them as lamp bases.[175] The defendant also contended that lamp bases could not be copyrighted because design patent was the only way to protect artistic objects used in utilitarian goods as intellectual property.[176]

The Court rejected both arguments. According to Justice Reed's majority opinion, the only issue for the Court to decide was whether the statuettes met the standard of originality required for copyright protection. Their intended use as lamp bases was irrelevant.[177] The limits of design patent law also did not matter because copyright protects art, while design patent protects the invention of ornamental design.[178] Since copyright and design patent protect different types of creativity, there was no logical basis for mixing the two together.[179] The Court then went on to hold that the plaintiff's statuettes were original and, therefore, copyrightable.[180]

Mazer's facts make the distinction between copyrightable art and industrial design look relatively simple. The plaintiff's lamp bases are instantly recognizable as the sort of art ordinarily protected by copyright. The dancing figurine shape exists separately from its function as a lamp base. It is therefore easy to state that the plaintiff's statuettes are art and that copyright protects them.

Consider, however, what would have happened if the plaintiff's lamp bases had been distinctive metal tripods instead of statuettes shaped as dancing figurines. Would those bases have been copyrightable? It is easy to imagine a court answering this question affirmatively. The particular shape of the tripod arguably embodies the creative selection and arrangement of its designer. One could also call the tripod modern sculpture whose shape exists independently of any use as a tripod. However, if this

173. *See id.* at 202-03.
174. *See id.* at 203.
175. *See id.* at 204-05.
176. *See id.* at 205, 215.
177. *See id.* at 205.
178. *See id.* at 218.
179. *See id.*
180. *See id.* at 214.

conclusion is accepted, ordinary objects such as tables and chairs might become copyrightable because there is no clear way to distinguish ordinary objects from our hypothetical tripods without entangling judges in the very sort of aesthetic determinations that *Bleistein* warned against. Such a result would contradict the policy codified in section 101. Not surprisingly, courts have tried to manage this problem in a number of different ways, but none has proven successful. The result has been a series of decisions in which judges create new and sometimes contradictory methods of analysis in their efforts to put the useful article doctrine on a sound analytic footing.[181] Consider the following line of cases decided by the Second Circuit.

In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the plaintiff Kieselstein-Cord ("Kieselstein") claimed copyright in two belt buckles entitled "Winchester" and "Vaquero."[182] The defendant, who had copied the belt buckles for sale to others, argued that the belt buckles are not copyrightable because they are useful articles with no aesthetic features which can be separated from their utilitarian function.[183]

The *Kieselstein* defendant had a point. In *Mazer*, the plaintiff won because the court instantly recognized the lamp bases in question as traditional artistic sculpture. Presumably, a geometrically shaped lamp base would not have received copyright because such a decision would incorrectly make all lamp bases copyrightable.[184] Kieselstein's belt buckles had shapes of the sort that probably would not have supported copyright in *Mazer*. They had "'rounded corners, a sculpted surface . . . a rectangular cut-out at one end for the belt attachment," and "several surface levels.'"[185] It would therefore have been easy for the court to conclude that the attractive shapes of Kieselstein's belt buckles simply made them the type of industrial design that Congress intended to exclude from copyright protection.[186]

The Second Circuit, however, saw things differently. A two-judge majority stated that Kieselstein's works had aesthetic features which were

181. For analysis of the contradictions in useful article doctrine jurisprudence, see Aoki, *supra* note 167, at 338-57.

182. 632 F.2d 989, 990 (2d Cir. 1980).

183. *See id.* at 991-92.

184. *See* Esquire, Inc., v. Ringer, 591 F.2d 796, 801 (D.C. Cir. 1978).

185. *Kieselstein*, 632 F.2d at 990 (quoting the district court's description of the belt buckle).

186. Indeed, this is precisely what Judge Weinstein stated in dissent. He wrote: "The works sued on are, while admirable aesthetically pleasing examples of modern design, indubitably belt buckles and nothing else; their innovations of form are inseparable from the important function they serve—helping to keep the tops of trousers at waist level." *Id.* at 994.

separable from any utilitarian function.[187] Although Judge Oakes' opinion acknowledged that the decision was close,[188] the case finally turned on the specific type of analysis used by the Second Circuit to determine the existence and separability of the buckles' aesthetic appeal. Ordinarily, one might expect a court which found separable aesthetic appeal to explain itself by analyzing the shape of the buckles. For example, Stein's lamp bases had separable aesthetic appeal because their dancer's shape had nothing to do with the function of a lamp base. In *Kieselstein*, however, the Second Circuit spent practically no time analyzing the physical shape of the belt buckles. Instead, the court supported the existence and separability of the buckles' aesthetic appeal with evidence of Kieselstein's mental processes and the reactions of others.

For example, the court described how Kieselstein had hand carved the prototypes from which molds were made and how the art nouveau school, related architecture, and the butt of an antique Winchester rifle inspired the shape of the buckles.[189] The court also detailed the commercial success of the buckles, the varied uses made of the buckles, and the fact that the Metropolitan Museum of Art had accepted the buckles as part of its permanent collection.[190] These facts contributed relatively little to any analysis of the buckles' shape. They did, however, imply that Kieselstein was engaged in an aesthetic, not technical, design process and that both the public and "experts" considered his buckles aesthetically meritorious. Finally, the court based its finding of separability on the fact that purchasers of the belt buckle sometimes wore the buckles to decorate other parts of the body besides the waist.[191] In the court's mind, this showed that people found the buckles appealing for reasons other than their utilitarian function. This demonstrated conceptual separability of the buckles' aesthetic merit.[192]

If one accepts the result of *Kieselstein* as correct, the court's analysis of aesthetic merit and separability makes sense because it offers an easy, concrete explanation for the court's decision. If the court had explained its decision by analyzing the form of the belt buckles, the resulting opinion would have been inscrutable. Imagine an attempt to explain aesthetic appeal of the buckles' contours and their relationship (or lack thereof) to the fact that Kieselstein's works were belt buckles. Such an opinion would have been full of the aesthetic determinations that *Bleistein* warned

187. *See id.* at 993-94.
188. *See id.* at 990 ("This case is on a razor's edge of copyright law.").
189. *See id.* at 990-91.
190. *See id.* at 991.
191. *See id.* at 993
192. *See id.*

against. By contrast, it is easy to describe how and why the public finds the buckles beautiful. An opinion based on these descriptions seems relatively devoid of aesthetic determinations. This suggests that future courts would try to emulate *Kieselstein*'s use of public reaction to analyze separability whenever possible. However, the Second Circuit itself turned its back on *Kieselstein* in just five years.

In *Carol Barnhart Inc. v. Economy Cover Corp.*, the plaintiff Barnhart claimed copyright in four styrofoam mannequins.[193] Each mannequin was a life-size representation of a human torso without neck, arms, or back. Two of the mannequins had hollowed out spaces in their backs so that folds of clothing could be tucked away. The defendant Economy, which had copied the mannequins, claimed that the mannequins could not be copyrighted because they were useful articles.[194] The district court granted summary judgment to Economy, and Barnhart appealed.

On appeal, Barnhart made two arguments designed to take advantage *Kieselstein*, *Mazer*, and *Bleistein*. First, Barnhart emphasized that it had made the original molds for the mannequins by clay sculpting, and that purchasers of the mannequins sometimes displayed the mannequins without clothing attached to them.[195] These points closely follow the *Kieselstein* court's interest in the hand carving of Kieselstein's prototypes and the fact that purchasers of the buckles sometimes wore them as jewelry. Second, Barnhart argued that the mannequins should be copyrighted because they were representations of the human form, a traditional form of copyrightable art.[196] This clearly referred to *Bleistein* (which held that representations of reality always contain the special personal reaction that supports copyright)[197] and *Mazer* (which recognized Stein's lamp bases as sculpture and ignored their use as lamp bases).[198]

Unfortunately for Barnhart, these careful arguments persuaded only one of three judges. In a move that contradicted *Kieselstein*, the majority refused to measure conceptual separability by considering the reactions of others. The court stated that *Bleistein*'s admonition against aesthetic determinations required judges to ignore the decorative use of the forms.[199] The court conceded that Barnhart had demonstrated the aesthetic appeal of

193. 773 F.2d 411, 412 (2d Cir. 1985).
194. *See id.*
195. *See id.* at 418.
196. *See id.*
197. *See supra* note 134 and accompanying text.
198. *See supra* note 177 and accompanying text.
199. *See Barnhart*, 773 F.2d at 418.

its mannequins,[200] but it found the aesthetic appeal inseparable from the mannequins' utilitarian function when it studied the form and function of the works themselves. This was the very analysis that the *Kieselstein* court had avoided.[201] The *Barnhart* court wrote:

> What distinguishes [Kieselstein's] buckles from the Barnhart forms is that the ornamented surfaces of the buckles were not in any respect required by their utilitarian functions; the artistic and aesthetic features could thus be conceived of as having been added to, or superimposed upon, an otherwise utilitarian article. The unique artistic design was wholly unnecessary to performance of the utilitarian function. In the case of the Barnhart forms, on the other hand, the features claimed to be aesthetic or artistic, e.g., the life-size configuration of the breasts and the width of the shoulders, are inextricably intertwined with the utilitarian feature, the display of clothes. Whereas a model of a human torso, in order to serve its utilitarian function, must have some configuration of the chest and some width of shoulders, a belt buckle can serve its function satisfactorily without any ornamentation of the type that renders the Kieselstein-Cord buckles distinctive.[202]

More importantly, the *Barnhart* court apparently adopted this analysis because it considered other analyses too subjective. Consider how the *Barnhart* majority criticized the dissent's willingness to consider the fact that the mannequins might sometimes be seen without clothing attached:[203]

> Almost any utilitarian article may be viewed by some separately as art, depending on how it is displayed (e.g., a can of Campbell Soup or a pair of ornate scissors affixed to the wall of a museum of modern art.) *But it is the object, not the form of display, for which copyright protection is sought.*[204]

This passage recognizes the plausibility of other approaches for evaluating conceptual separability. However, if those methods are adopted, copyright will protect all useful articles because "almost any utilitarian article may be viewed by some separately as art." This result would obviously be wrong because the useful article doctrine contemplates denying copyright to many, if not most, useful articles.[205] Therefore, the

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200. *See id.*

201. *See supra* notes 187-92 and accompanying text.

202. *Barnhart*, 773 F.2d at 419 (footnotes omitted).

203. *See id.* at 423 (dissenting opinion) ("Thus, the fact that an object has been displayed or used apart from its utilitarian function, the extent of such display or use, and whether such display or use resulted from purchases would all be relevant in determining whether the design of the object engenders a separable concept of a work of art.").

204. *Id.* at 419 n.5 (italics added).

205. *See* Aoki, *supra* note 167, at 307-29.

correct interpretation of conceptual separability must limit the ways people can interpret a useful article.

Of course, neither *Barnhart* nor *Kieselstein* are nearly as objective as they might seem. If the reactions of others control the separability of a useful article's aesthetic features, what happens when people disagree? Similarly, how can a judge ensure that her appraisal of a useful article's form is not personally idiosyncratic? This sort of evaluation closely resembles the aesthetic evaluation *Bleistein* warned against. The Second Circuit soon came to realize this, and the result was yet a third method for analyzing conceptual separability.

In *Brandir International, Inc. v. Cascade Pacific Lumber Co.*, the Second Circuit considered a copyright claim in the "RIBBON Rack," a bicycle rack made from a single undulating metal pipe that curved up and down to form the slots into which bicycles could be placed.[206] According to David Levine, chief owner of Brandir, the shape originated from wire sculptures he had created at his home. The idea of using the sculptures did not arise until a friend suggested it to him. Levine then altered the design of the sculptures so that they could be used as bicycle racks. This included widening and straightening some of the sculpture's loops and changing the construction material from wire to galvanized steel.[207] The altered shape apparently still evoked aesthetic reactions from observers. Among other things, Brandir received requests to use the bicycle racks as environmental sculpture.[208] Expert witnesses testified that the bicycle racks could be valued solely for their artistic features.[209] Art galleries displayed the rack in exhibitions.[210]

Mazer, *Kieselstein*, and *Barnhart* all offered considerable support to Brandir's claim of copyright. In both *Mazer* and *Brandir*, the plaintiffs created sculpture that was modified for a utilitarian purpose.[211] In *Kieselstein*, the court found the belt buckles copyrightable after noting that others valued them for something besides buckling belts, while Brandir presented apparently uncontradicted evidence that others valued the bicycle racks for their aesthetic merit.[212] Finally, in *Barnhart*, the court denied copyright because it believed that the human shape of the mannequins was necessary

206. 834 F.2d 1142, 1143 (2d Cir. 1987).
207. *See id.* at 1146-47.
208. *See id.* at 1152.
209. *See id.*
210. *See id.* at 1146.
211. *See id.* at 1143; Mazer v. Stein, 347 U.S. 201, 202 (1954).
212. *See Kieselstein*, 632 F.2d at 993-94; *Brandir*, 834 F.2d at 1146.

to the utilitarian purpose of displaying clothes.[213] By contrast, the very fact that most bicycle racks had shapes different from Brandir's implied that Brandir's racks had conceptually separable aesthetic features.

None of these arguments persuaded the Second Circuit. In another 2-1 decision, the court dealt forthrightly with the conceptual separability standard, identifying ambiguity and aesthetic bias as major analytical problems.[214] The court tried to avoid these problems by turning away from the analyses endorsed in *Kieselstein* and *Barnhart*.[215] Instead of determining the reaction of others or studying the form of a work, the court analyzed the operation of the alleged author's mind. According to the court, industrial design is distinguishable from artistic expression because it reflects the influence of "nonaesthetic, utilitarian concerns."[216] If a person creates a work in response to these concerns, she no longer responds to uninhibited artistic judgment.[217] Copyright therefore does not extend to works whose design reflects a merger of aesthetic and functional considerations.[218] The court then held that the changes to the original sculptures rendered the bicycle racks works of industrial design with no conceptually separable aesthetic elements.[219]

Taken together, *Mazer*, *Kieselstein*, *Barnhart*, and *Brandir* show that courts have reinterpreted the useful article doctrine to avoid aesthetic controversy. However, as was the case with originality, aesthetics have not really been kept out of copyright. Indeed, each of these cases represents the adoption of perspectives that correspond to major theories about the definition of art.

In *Mazer v. Stein*, the defendant argued that copyright does not protect the plaintiff's statuettes because the plaintiff intended to use them as lamp bases.[220] One could label this assertion institutionalist or intentionalist because intentionalists are interested in why a person created an object and because institutionalists are interested in "what we do with certain objects."[221] Of course, the Supreme Court rejected the defendant's argu-

213. *See Barnhart*, 773 F.2d at 419.

214. *See Brandir*, 834 F.2d at 1144.

215. *See id.* at 1145 (noting that new analysis avoids discrimination against nonrepresentational art).

216. *Id.*

217. *See id.*

218. *See id.* The court's analysis was drawn from Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983).

219. *See Brandir*, 834 F.2d at 1146-47.

220. 347 U.S. 201, 204-05 (1954).

221. *See supra* note 62 and accompanying text.

ment because the statuettes were instantly recognizable as the sort of object copyright ordinarily protects.[222] *Mazer* therefore established formalism over intentionalism and institutionalism as the philosophy that governs the useful article doctrine.

However, in *Kieselstein-Cord v. Accessories by Pearl, Inc.*,[223] the Second Circuit avoided using formal analysis, apparently because it would be difficult to describe how the abstract shapes of the plaintiff's belt buckles had conceptually separable aesthetic features.[224] The court moved instead to an intentionalist and institutionalist analysis, emphasizing how Kieselstein had drawn inspiration from architecture and antique rifles and that the Metropolitan Museum of Art had accepted his buckles into its permanent collection.[225]

After *Kieselstein, Carol Barnhart Inc. v. Economy Cover Corp.*[226] took the Second Circuit from intentionalism and institutionalism back to formalism. As noted earlier, the facts of *Barnhart* could easily have supported a judgment for the plaintiff, especially in light of the plaintiff's argument that its mannequins were purposely designed as sculpture and used sometimes as decoration.[227] The Second Circuit, however, ignored these arguments despite the fact that they paralleled the court's analysis in *Kieselstein*.[228] Instead, the Second Circuit conducted an extensive formal analysis of the plaintiff's works and concluded that they were not copyrightable. Consider again the court's statement that "it is the object, not the form of display, for which copyright protection is sought."[229] In short, formalism is the correct analysis because it eliminates other opinions about the work: It is good because it is objective. This parallels the criticisms made by formalists and intentionalists against institutionalism.[230]

Finally, in *Brandir* the Second Circuit wanted to deny the plaintiff copyright, but it had problems because the plaintiff's bike rack was derived from sculpture and had been displayed in art galleries. *Mazer*'s formalism and *Kieselstein*'s institutionalism therefore supported the plaintiff's position.[231] The court dealt with this problem by acknowledging that

222. *See Mazer*, 347 U.S. at 215. *See also supra* note 180 and accompanying text.
223. 632 F.2d 989 (2d Cir. 1980).
224. *See supra* notes 189-92 and accompanying text.
225. *See supra* notes 189-90 and accompanying text.
226. 773 F.2d 411 (2d Cir. 1985).
227. *See supra* notes 195-98 and accompanying text.
228. *See supra* notes 198-205 and accompanying text.
229. *Barnhart*, 773 F.2d at 419 n.5.
230. *See supra* notes 74-77 and accompanying text (describing criticisms of institutionalism).
231. *See supra* notes 211-13 and accompanying text.

its previous analyses of the useful article doctrine were not objective, and that a new, more objective analysis was needed.[232] The court then adopted a new intentionalist test by studying the extent to which nonaesthetic, utilitarian concerns governed the creator's choice of features.[233] If the creator's motivations remained aesthetic, copyright would follow.[234] The court echoed the claims of intentionalist aestheticians by asserting that the new analysis was better than the previous analyses because it was more objective and had no ostensible bias against various types of nonrepresentational art.[235] The court then concluded that the plaintiff's choices were too controlled by functional considerations to support copyright.[236]

C. SUBSTANTIAL SIMILARITY

The term "substantial similarity" has more than one meaning in copyright law.[237] It is therefore prudent to conduct a brief review of how courts have used "substantial similarity" to make clear which meaning this Article analyzes.

A court deciding a copyright case must evaluate: 1) whether the defendant copied from the plaintiff's copyrighted work and 2) whether the defendant's borrowing is improper appropriation.[238] Courts use "substantial similarity" to help make both of these determinations, but this Article addresses only "substantial similarity" in the sense of improper appropriation.

Courts accept two methods for proving that a defendant has copied from a plaintiff's work. First, plaintiffs can provide direct evidence of copying (that is, a witness who saw the defendant copy). Second, plaintiffs may offer circumstantial proof. This means showing that the defendant had access to the plaintiff's work and that the two works are substantially similar.[239] Access implies that the defendant saw, and therefore had

232. *See supra* notes 214-18 and accompanying text.

233. *See Brandir*, 834 F.2d at 1145.

234. *See id.*

235. *See id.*

236. *See id.* at 1146-47.

237. *See* Stillman v. Leo Burnett Co., 720 F. Supp. 1353, 1358 (N.D. Ill. 1989) (referring to dual usages of term "substantial similarity"); Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1189-90 (1990).

238. *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d. Cir 1946) (requiring "(a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation"); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.01[B], at 13-8 to 13-9 (1997) [hereinafter NIMMER ON COPYRIGHT]; Latman, *supra* note 237, at 1188-89.

239. *See* NIMMER ON COPYRIGHT, *supra* note 238, § 13.01[B], at 13-10 to 13-15.

the opportunity to copy from, the plaintiff's work. However, an inference of copying does not follow unless the two works also share a number of common features. As the number of shared features rises, the likelihood of copying increases because coincidental independent creation of many similarities becomes less and less likely. In this context, the term "substantially similar" means the degree of similarity at which copying by the defendant becomes more likely than not.[240]

Once copying has been shown, a court's attention shifts to improper appropriation. Mere copying does not constitute infringement because copyright allows defendants to copy material which belongs in the public domain, even if that material comes from a copyrighted work.[241] Examples of such public domain material include things that the plaintiff did not create, ideas, and facts.[242] However, at some point, the copying of public domain material becomes copyright infringement because the selection and arrangement of unprotectable items forms the heart of original authorship.[243]

To take a crude example, a novel is simply a collection of words from the public domain. Copyright protects the novel because the selection and arrangement of words makes the novel an original work of authorship. A defendant accused of infringing a novel might defend on the ground that he had borrowed many individual words or short phrases, each of which is in the public domain. Although this defense might work if the defendant had copied only a few short phrases from the novel,[244] it would not work if the defendant borrowed a significant number of sentences. As the number of words borrowed grows into chapters, at some point the defendant's work would be so similar to the plaintiff's that copyright infringement would follow. In this context, "substantial similarity" means the degree of

240. *See Arnstein*, 154 F.2d at 468-69.

241. *See* Feist Publications, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 341 (1990); White v. Kimmel, 193 F.2d 744, 745 (9th Cir. 1952).

242. *See* 17 U.S.C. § 102 (1994). *See also Feist Publications*, 499 U.S. at 340 (facts are not protected by copyright); Baker v. Selden, 101 U.S. 99 (1879) (allowing borrowing of uncopyrightable system of bookkeeping).

243. *See supra* notes 122-23 and accompanying text. *See also Feist Publications*, 499 U.S. at 341.

244. *See* Norse v. Henry Holt & Co., 991 F.2d 563, 566 (9th Cir. 1993); Arica Inst., Inc. v. Palmer, 970 F.2d 1067, 1073 (2d Cir. 1992); Alberto-Culver Co. v. Andrea Dumon, Inc., 466 F.2d 705, 707-08 (7th Cir. 1972); Lowenfels v. Nathan, 2 F. Supp. 73, 74 (S.D.N.Y. 1932).

similarity at which the defendant crosses the line between copying public domain items and copying protected material.[245]

This Section analyzes this latter type of substantial similarity. As in previous Sections, the aim is to show how courts have interpreted substantial similarity in an effort to make copyright law objective. Courts have this problem in substantial similarity cases because defendants often copy only a portion of a plaintiff's work. The two works are therefore not exact duplicates, and the case becomes a question of how sensitive courts should be to differences between the two works. Plaintiffs want courts to ignore dissimilarities because that leads to a finding of substantial similarity. Defendants want courts to give the same dissimilarities great significance because this destroys substantial similarity.[246] Unfortunately, the word "substantial" gives relatively little guidance on exactly how the conflict should be resolved.

Consider first *Nichols v. Universal Pictures Corp.*,[247] one of the most widely cited of all copyright cases. In that case, Nichols claimed that Universal Pictures' movie *The Cohens and The Kellys* infringed her copyrighted play *Abie's Irish Rose*. Both works told the story of romance, marriage, and prejudice between Jewish and Irish families living in New York, but there were also differences between the works that the Second Circuit considered sufficiently large to make copyright infringement impossible.[248]

Judge Learned Hand started his opinion by assuming that Universal had borrowed material from *Abie's Irish Rose*.[249] He then conducted a detailed comparison of the plot and characters of both works, concluding that "[t]he only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren and a reconciliation."[250] According to Hand, these similarities could not form the basis for copyright infringement because they were too general and abstract, and hence ideas.[251]

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245. *See* Shaw v. Lindheim, 908 F.2d 531, 534 (9th Cir. 1990) (equating substantial similarity with the determination of whether defendant borrowed public domain ideas or copyrightable expression); *Arnstein*, 154 F.2d at 468-69.

246. *See* Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d Cir. 1980) ("numerous differences tend to undercut substantial similarity").

247. 45 F.2d 119 (2d Cir. 1930).

248. *See id.* at 120.

249. *See id.*

250. *Id.* at 122.

251. *See id.*

Hand's opinion in *Nichols* is fairly sensitive to differences between the two works. However, this interpretation of substantial similarity is surely debatable. Other courts have found infringement on the basis of very general similarity between two works,[252] and Hand himself appears to have taken a different approach in other cases.[253] More importantly, the *Nichols* plaintiff herself offered different analyses emphasizing general similarity between the works over the differences in detail. First, she showed how the emotions discovered by each character were the same.[254] Second, she offered expert testimony.[255]

Together, these alternate analyses presented Hand with a considerable challenge. If the plaintiff's analysis of substantial similarity was better than Hand's, then her desired conclusion of substantial similarity would presumably follow. Hand therefore had to explain why his analysis of substantial similarity was better than the plaintiff's, or risk exposing his ruling as the imposition of his subjective views on the plaintiff. Hand "solved" this problem by writing:

> It is unnecessary to go through the catalogue [of emotions] for emotions are too much colored by their causes to be a test when used so broadly. This is not the proper approach to a solution; it must be more ingenuous, more like that of a spectator, who would rely upon the complex of his impressions of each character.[256]

As to expert testimony, he wrote:

> [Expert testimony] ought not to be allowed at all; and while its admission is not a ground for reversal, it cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal.[257]

The foregoing passages may be superficially convincing, but Hand in fact did nothing more than make a blunt declaration of judicial authority.

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252. *See* Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1161, 1166-67 (9th Cir. 1977) (finding infringement on the basis of general similarities between defendant McDonald's characters and H.R. Pufnstuf); Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1109-10 (9th Cir. 1970) (finding infringement when two greeting cards shared the same general appearance).

253. See Sheldon v. Metro-Goldwyn Pictures Corp., 7 F. Supp. 837 (S.D.N.Y. 1934), in which Hand found that defendant Metro-Goldwyn's movie *Letty Lynton* infringed the plaintiff's play *Dishonored Lady* despite fairly concrete differences between the two works and the fact that many of the similarities resulted from the use of public domain material.

254. *See Nichols*, 45 F.2d at 122-23.

255. *See id.* at 123.

256. *Id.*

257. *Id.*

Hand clearly stated his preference for a "more ingenuous," "more naive" analysis, but he provided practically no explanation for why that analysis is correct. To be sure, Hand's rejection of expert testimony suggests that he considered the "ingenuous," "naive" analysis correct because it is "firmer" than the analysis offered by the plaintiff.[258] However, this justification can hardly be considered adequate. If determinacy alone were the measure of validity, a rule like "substantial similarity means complete, literal similarity" would be correct. Since Hand provided no additional support for his interpretation of substantial similarity, very little except judicial prerogative remains to explain the *Nichols* analysis and result.[259] Not surprisingly, courts have tried to interpret substantial similarity in a way that makes the personal views of judges less important. Unfortunately, they have only been successful at a superficial level. Other opinions may look more objective than the *Nichols* opinion, but at heart they, too, remain heavily dependent on judicial fiat.

1. *The Ordinary Observer Test*

The most common interpretation of the substantial similarity test is the so-called "ordinary observer test."[260] The judges who adopt this test recognize the problem faced by Hand and are uncomfortable using their own perspectives about similarity.[261] They use the ordinary observer test for two reasons. First, the perspective of the ordinary observer can be supported as correct because it is representative of the views held by the population at large, the very people whose opinions matter in the purchase

258. It is somewhat ironic for Judge Hand to have suggested that his analysis was more "ingenuous" and "naive" than the plaintiff's. Among other things, Judge Hand grew up in a prosperous, if not wealthy, family. He received a rigorous, traditional education emphasizing the classics, and he excelled at both Harvard College and Harvard Law School. He dreamed of pursuing graduate studies in philosophy, but was pressured by his family to become a lawyer. Although Hand was not a professional literary critic, it is hard to see how someone with his background could be a "naive" reader of texts. *See* GERALD GUNTHER, LEARNED HAND xv-xviii, 3-71 (1994).

259. Some commentators consider the language "more like that of a spectator" a reference to the ordinary observer test, which is discussed below. *See* CRAIG JOYCE, WILLIAM PATRY, MARSHALL LEAFFER & PETER JASZI, COPYRIGHT LAW 749 (1994). This is a plausible reading of Hand in light of the fact that he endorsed the ordinary observer test in other opinions. *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d. Cir. 1960); Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1926). However, the text of the *Nichols* opinion itself says nothing about an ordinary observer, nor does it provide any justification (either by way of analysis or citation to authority) for why the ordinary observer is the proper test to adopt. It is therefore fair to characterize Hand's opinion as a declaration of his personal analysis.

260. *See* Litchfield v. Spielberg, 736 F.2d 1352 (9th Cir. 1984).

261. *See e.g.*, Denker v. Uhry, 820 F. Supp. 722, 728 (S.D.N.Y. 1992) (noting that "courts have been reluctant to make subjective determinations regarding the similarity between two works"); Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706, 709 (S.D.N.Y. 1987).

and sale of most works.[262] Second, it makes the opinion of judges appear irrelevant. Instead of rendering a personal opinion about similarity, a judge can instead make an objective factual finding about the beliefs of the ordinary observer.

A case like *Warner Brothers, Inc. v. American Broadcasting Companies*[263] illustrates the advantages of the ordinary observer test quite well. In that case, the plaintiffs, Warner Brothers and DC Comics, contended that ABC's show *The Greatest American Hero* infringed the character Superman.[264] Both sides of the case had plausible arguments on the issue of substantial similarity. On the one hand, Ralph Hinkley, the hero of *The Greatest American Hero*, bore a number of obvious similarities to Superman, including special powers and a leotard costume with cape and insignia.[265] Furthermore, ABC had apparently based a number of plot twists on similar incidents found in Superman comics, shows, and movies.[266] On the other hand, the defendant's treatment of Superman's attributes and the plot twists was somewhat humorous. Hinkley had great difficulty controlling himself while flying. He crashed into objects regularly. Hinkley also exhibited great diffidence about his role and powers as a hero.[267] Together, the similarities and differences suggested a close, difficult decision. Both the district court and the Second Circuit, however, saw the case differently and decided for the defendant at summary judgment.[268]

The basis for the Second Circuit's opinion was its perception that the humorous treatment of the Superman attributes and plot twists changed ABC's work to the point that it was not substantially similar to the plaintiff's works.[269] The plaintiff challenged this perception with, among other things, two pieces of evidence that indicated how others disagreed with the court. First, the plaintiff offered an audience survey which indicated that Hinkley reminded members of the public of Superman.[270] Second, the

262. *See* Dymow v. Bolton, 11 F.2d 690, 692 (2d Cir. 1926) ("[T]he copyright, like all statutes, is made for plain people; and that copying which is infringement must be something 'which ordinary observation would cause to be recognized as having been taken from' the work of another." (quoting King Features Syndicate v. Fleischer, 299 F. 533, 535 (2d Cir. 1924))).

263. 720 F.2d 231 (2d Cir. 1983).

264. *See id.* at 235.

265. *See id.* at 237.

266. *See id.* at 237-38.

267. *See id.*

268. *See id.* at 239, 243.

269. *See id.* at 243-44.

270. *See id.* at 244.

plaintiff offered an expert who would have testified that some children would not perceive the differences between Hinkley and Superman.[271]

It is easy to imagine how these pieces of evidence could have established a triable issue of fact.[272] Since a triable issue of fact exists unless reasonable jurors could not disagree about the outcome, the fact that members of the public saw a connection between Superman and Hinkley implies that reasonable jurors might disagree on the issue of substantial similarity. Interestingly, both the district court and the appellate court did not even consider this evidence relevant.[273]

First, the court used the ordinary observer test to make expert testimony about the opinions of children inapposite. "[W]hen a work is presented to a general audience of evening television viewers, the possible misperception of some young viewers cannot prevent that audience from seeing a program that will readily be recognized by 'the average lay observer,' as poking fun at, rather than copying, a copyrighted work."[274] Second, the court argued that substantial similarity (presumably as seen through the eyes of the ordinary observer) created objective limits to the scope of copyright that survey evidence could not change, even if the survey represented the views of the actual public:

> Courts have an important responsibility in copyright cases to monitor the outer limits within which juries may determine reasonably disputed issues of fact. If a case lies beyond those limits, the contrary view of a properly drawn sample of the population, or even of a particular jury, cannot be permitted to enlarge (or diminish) the scope of statutory protection enjoyed by a copyright proprietor.[275]

The *Warner* court's rhetorical maneuvers demonstrate the apparent advantages of the ordinary observer test. The ordinary observer test appears correct because it represents the general public's view. It creates an objective standard which courts can use without fear of arbitrarily disregarding opposing, but possibly valid, points of view. Opinions such as *Warner* therefore represent an apparent improvement over the blunt declaration of authority found in *Nichols*. Unfortunately, these advantages disappear under closer scrutiny.

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271. *See id.*

272. *See* FED. R. CIV. P. 56.

273. *See Warner Bros.*, 720 F.2d at 239, 244-45.

274. *Id.* at 244 (citation omitted). *See also* Davis v. United Artists, Inc., 547 F. Supp. 722 (S.D.N.Y. 1982) (granting summary judgment for defendant on the issue of substantial similarity and ignoring expert testimony).

275. *Warner Bros.*, 720 F.2d. at 245.

First, difficulties arise because the ordinary observer is not a real person whose views may be discovered. Judicial pronouncements about the ordinary observer cannot possibly represent factual determinations about an actual person's beliefs. Second, the ordinary observer frequently offers little assistance to courts because ordinary people often have very different perceptions about art. Both of these problems make a judge's personal views very important to the outcome of any ordinary observer case because judges have no clear objective method for determining the views of the ordinary observer.[276]

The case of *Steinberg v. Columbia Pictures Industries*[277] shows how easily a judge's views slip into an ordinary observer opinion. In that case, the plaintiff Steinberg held copyright in a *New Yorker* magazine cover described as "a parochial New Yorker's view of the world."[278] The defendants were the producers, promoters, distributors, and advertisers of the movie *Moscow on the Hudson*.[279] Steinberg accused the defendants of infringement because one of the advertisements for *Moscow on the Hudson* depicted a Manhattan landscape in a manner similar, but not identical, to Steinberg's work.[280] Both Steinberg and the defendants moved for summary judgment.

The outcome of the substantial similarity determination in *Steinberg* was by no means certain. Although there were undeniable similarities between the two works, there were clear differences as well. Steinberg's work depicted a Manhattan landscape looking east, while the defendants' work looked west. The two works depicted different buildings. The lettering on the two works looked slightly different. The defendants' work contained images of the movie's actors, as well as credits for the movie, none of which were in Steinberg's work. In the context of summary judgment, the similarities and dissimilarities should have canceled each other out because reasonable jurors might disagree over how an ordinary observer would perceive the two works.

Despite these conflicting possibilities, the court used the ordinary observer test to grant summary judgment in favor of Steinberg.[281] The court's initial reference to the ordinary observer test was actually the only

276. *See* Michael Ferdinand Sitzer, Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 393 (1981).

277. 663 F. Supp. 706 (S.D.N.Y. 1987).

278. *Id.* at 709.

279. *See id.* at 708.

280. *See id.* at 709-11.

281. *See id.* at 711.

time that the court ever discussed the ordinary observer or her views. Instead, the court used a long and detailed analysis of the works' formal properties to reach its conclusion.[282]

The *Steinberg* court's failure to discuss the ordinary observer collapsed any distinction between a blunt declaration of judicial authority and the ordinary observer test. As noted earlier, the ordinary observer test is valuable because it forces courts to think about a specific perspective when analyzing substantial similarity. A court that truly understood this would refer explicitly to the values of the ordinary observer in its opinions. The *Steinberg* court's failure to do so suggests that the judge merely substituted his appraisal of the two works for the ordinary observer's.[283] Either way, the court's idiosyncratic perspective played a determinative role in the outcome of a copyright case despite the apparent objectivity of the ordinary observer test.[284]

2. *Refinement of the Ordinary Observer Test*

Not surprisingly, some courts have refined the ordinary observer test in an effort to better avoid the problem of subjectivity. The leading case of *Arnstein v. Porter*[285] offers a glimpse of how these refinements might work. In that case, the plaintiff Arnstein sued the renowned songwriter Cole Porter for copyright infringement, alleging that a number of Porter's hit songs were taken from songs written by Arnstein.[286] Porter obtained summary judgment in the district court, and Arnstein appealed.[287] The

282. *See id.* at 711-14.

283. Of course, if the *Steinberg* court was thinking about the ordinary observer during its analysis of substantial similarity, then its opinion is merely poorly drafted.

284. The judicial treatment of child audiences provides another good example of how judges impose their own beliefs on the supposedly objective beliefs of an audience. Courts sometimes substitute the views of children for the views of adults when the objects under consideration concern children. For example, toys are often analyzed from a child's, and not adult's, perspective. In making this analysis, some courts consider children less discerning than adults, while others consider children more discerning. Moreover, the particular attributes given to children are always assumed to be obvious when the very existence of this conflict suggests that the opposite is true. *Compare* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 619 (7th Cir. 1982) ("Video games, unlike an artist's painting or even other audiovisual works, appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression."), *and* Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1166-67 (9th Cir. 1977), *with* CK Co. v. Burger King Corp., No. 92 Civ. 1488, 1994 WL 533253, at *3-*8 (S.D.N.Y. Sept. 30, 1994) (court adopts children's perspective, but with a great deal of discernment), *and* Ideal Toy Corp. v. Fab-Lu Ltd., 261 F. Supp. 238, 241-42 (S.D.N.Y. 1966).

285. 154 F.2d 464 (2d Cir. 1946).

286. *See id.* at 467.

287. *See id.*

Second Circuit reversed.[288] On the issue of substantial similarity, the court wrote:

> The proper criterion on that issue is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians. The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether the defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.[289]

The court went on to state that judges who try copyright cases should consider impaneling an advisory jury (presumably composed of lay observers), and it specifically allowed plaintiffs to introduce testimony, including expert opinion, to establish the reaction of lay audiences.[290]

Notice how *Arnstein* purportedly solves the problems associated with the ordinary observer. Instead of pretending that the ordinary observer is a person whose beliefs can be empirically determined by a court, *Arnstein* directs the judge to consider the views of real people. If a judge were to follow this aspect of *Arnstein* faithfully, she would never have to state her subjective opinion of substantial similarity. The only relevant reactions would be those of the lay audience. *Arnstein* also suggests how a court should select the people whose views should be measured. According to the Second Circuit, lay listeners are those "who comprise the audience for whom such popular music is composed."[291] This implies that the relevant opinions about substantial similarity are those held by the people at whom the works in question are aimed.

Arnstein's reputation as a leading case is well deserved. However, its proposed solutions do not truly remove subjectivity from substantial similarity. Explicit reference to the attitudes of actual people does direct a judge's attention away from her own subjective appraisal of works, but answers will rarely be found because actual people will likely disagree over the interpretation of works. Once this happens, a judge must choose between differing interpretations, and the problem of subjectivity arises anew. Of course, courts could use a rule like "the majority view prevails,"

288. *See id.* at 475.
289. *Id.* at 473 (citations omitted).
290. *See id.*
291. *Id.*

but such a rule would clearly be nothing more than another blunt statement of authority in the absence of an explanation as to why an opinion about two works of art is correct simply because a majority prefers it. Indeed, courts generally refuse to consider evidence of how actual people appraise the similarity between two works precisely because those appraisals may not be appropriate for copyright law.[292]

Similarly, the intended audience test appears to tell a judge which views to prefer,[293] but at least basic three problems arise. First, authors may not have specific audiences in mind when they create a work. Second, the audience that forms the market for a work may not be the audience the author intended. For example, stuffed animals may be designed with children in mind, but adults often buy them for themselves or as gifts

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292. *See* Walker v. Time Life Films, Inc., 784 F.2d 44, 52 (2d Cir. 1986) ("Courts customarily decide infringement cases, once access is denied, primarily through detailed viewing or reading of the works themselves."); Novelty Textile Mills v. Joan Fabrics Corp., 558 F.2d 1090 (2d Cir. 1977) (ignoring lower court findings about views of prospective purchasers); Mihalek Corp. v. Michigan, 630 F. Supp. 9 (E.D. Mich. 1985) (rejecting affidavits from lay observers in part because they may not have applied the legal standard). Cases that follow the *Arnstein* approach include: MCA, Inc. v. Wilson, 677 F.2d 180 (2d Cir. 1981) (considering reaction of performers to establish substantial similarity between plaintiff's and defendant's songs); Original Appalachian Artworks, Inc. v. Blue Box Factory (USA) Ltd., 577 F. Supp. 625 (S.D.N.Y. 1983) (considering expert testimony and survey evidence when determining substantial similarity); Ideal Toy Corp. v. Kenner Prods., 443 F. Supp. 291 (S.D.N.Y. 1977) (considering survey results but finding them insufficient to support substantial similarity); S.C. Johnson & Son, Inc. v. Drop Dead Co., 210 F. Supp. 816 (S.D. Cal. 1962) (considering testimony of housewives who purchased competing products with similar labels).

293. For example, in *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165-67 (9th Cir. 1977), the defendant McDonald's appealed from a verdict against it on the ground that the jury had failed to take account of numerous differences between its McDonaldland characters and the plaintiff's H.R. Pufnstuf characters. The Ninth Circuit rejected this argument, stating that detailed comparison of the two works was inappropriate. *See id.* at 1165-66. The court then applied a version of the ordinary observer test that consciously ignored most of the differences between the works because both works were directed towards children, who "certainly are not bent upon 'detecting disparities' or even readily observing upon inspection such fine details . . . ." *Id.* at 1166 (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 261 F. Supp. 238, 241-42 (S.D.N.Y. 1966)).

This modification of the ordinary observer test was important because it allowed the court to state its intuitive conclusion more forcefully than it otherwise could have. Consider the defendant's comparison of the two main characters:

> "Pufnstuf" wears what can only be described as a yellow and green dragon suit with a blue cummerbund from which hangs a medal which says "mayor". "McCheese" wears a version of pink formal dress—"tails"—with knicker trousers. He has a typical diplomat's sash on which is written "mayor", the "M" consisting of the McDonald's trademark of an "M" made of golden arches.

Id. at 1166-67. An adult ordinary observer might well have considered differences like these enough to defeat a finding of substantial similarity. The court therefore could not "prove" that the works were substantially similar except by bluntly asserting its conclusions about the adult ordinary observer. However, by transforming the relevant ordinary observer into a child and plausibly assuming that children are not as perceptive as adults, the court made its ordinary observer analysis appear far more objective than it otherwise would have.

to other adults.[294] Third, and perhaps most importantly, the people for whom an author intends his work are still prone to disagree over the proper interpretation of the work. Accordingly, courts have not consistently applied the intended audience test, and the resulting pattern of precedent makes it almost impossible for a judge to tell when, if ever, the test should be applied.[295]

The foregoing shows that courts recognize the possibility that personally idiosyncratic aesthetic interpretations of works can influence the outcome of any substantial similarity determination. Accordingly, they have tried hard to make determinations of substantial similarity doctrine less subjective. As with originality and the useful article doctrine, it seems as if legal reasoning makes copyright more objective by using analytical devices like the ordinary observer, actual observer, or intended audience. However, it is again easy to see that legal reasoning has taken copyright towards, and not away from, questions of aesthetics.

In *Nichols v. Universal Pictures Corp.*,[296] Judge Hand conducted a formalist tour de force, analyzing the features of the two works and telling us that they are not substantially similar. His blithe dismissal of the interpretations offered by the plaintiff and expert witnesses shows how confident Hand was that he, and not others, correctly understood the two works in question.[297] However, like formalism itself, it is easy to see how Hand's analytical method rests heavily on the subjective perception of the fact finder.[298]

The ordinary observer test bears striking resemblance to the ideal reader described by Jonathan Culler.[299] Just as the ordinary observer developed in response to the shortcomings of analyses like Hand's, the ideal

294. *See All Things Considered* (National Public Radio broadcast, March 14, 1997, transcript #97031409-212) (describing how stuffed animals known as "Beanie Babies" appeal to both adults and children).

295. For cases adopting an intended audience test, see Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 735-37 (4th Cir. 1990); Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982); *Sid & Marty Krofft*, 562 F.2d 1157; Ideal Corp. v. Fab-Lu Ltd., 261 F. Supp. 238 (S.D.N.Y. 1966). For cases that do not adopt an intended audience test, see Fisher Price v. Well-Made Toy Mfg. Corp., 25 F.3d 1133 (2d Cir. 1994) (no child perspective test, although children's toys were analyzed); Saban Entertainment, Inc. v. 222 World Corp, 865 F. Supp. 1047 (S.D.N.Y. 1994) (involving children's toys, Mighty Morphin Power Rangers, but no child perspective test); Worlds of Wonder, Inc. v. Vector Intercontinental, Inc., 653 F. Supp. 135 (N.D. Ohio 1986) (no consideration of child's perspective despite the fact that the claim concerned toys).

296. 45 F.2d 119 (2d Cir. 1930).

297. *See supra* notes 256-59 and accompanying text.

298. *See supra* notes 80-82 and accompanying text.

299. *See supra* notes 99-100 and accompanying text (describing Culler's use of the ideal reader).

reader developed because interpretive formalism seemed incapable of producing a single correct interpretation of a work. The ideal reader solved this problem by directing critical attention to the interpretations used by a person who knew all of a culture's interpretive conventions and applied them correctly. A critic can therefore theoretically avoid interpretive controversy by carefully studying and sorting the interpretive tastes of the general public.[300]

Of course, the ordinary observer test eventually falters because it refers to a fictional person. It is therefore too easy for personal aesthetic sensibilities to govern the determination of substantial similarity because a court's views about interpretation are likely to affect its views about what is "ordinary." Indeed, courts often claim that their views are ordinary.[301] For this reason, the ordinary observer easily becomes a cover for formal analysis, just as the ideal reader seems to be literary formalism warmed over.[302] This has led to changes in the ordinary observer test that bear close resemblance to other aesthetic theories of interpretation.

Consider how *Arnstein v. Porter*[303] shares the same intellectual premises as radical reader-response theory and intended audience theory. As noted earlier, *Arnstein* did two things. First, it directed judges to determine substantial similarity by referring to opinions held by real people, and not the fictional ordinary observer.[304] Second, it suggested that the relevant opinions would be held by people at whom the works in question were directed.[305]

The aesthetic premises of radical reader-response theory motivate *Arnstein*'s preference for the opinions of real people. There is no single "objective" interpretation of a work. A work's meaning can therefore be determined only by consulting the minds of people who actually view the work.[306] This belief makes the fictional perspective of the ordinary observer no more defensible than any other comparative interpretation of two works. Since courts should not pick and choose between competing inter-

300. *See supra* note 100 and accompanying text.

301. *See* Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir. 1987) ("This Court's 'ear' is as lay as they come.").

302. *See supra* notes 98-100 and accompanying text (describing how the ideal reader can dissolve into formalism).

303. 154 F.2d 464 (2d Cir. 1946).

304. *See id.* at 473.

305. *See id.*

306. *See supra* notes 94-96 and accompanying text (describing premises of reader-oriented interpretation).

pretations,[307] judges should simply determine what real people actually think.[308]

Not surprisingly, the problem with the actual audience test is the same as the one that nags radical reader-response theory. If people disagree over the interpretation of a work, how can there ever be a principled way of deciding who is right? Truly radical reader-response theorists can solve this problem by simply embracing relativism in interpretation. If people happen to agree about enough things to persuade each other that a given interpretation is correct, that is fine. If they continue to disagree, that is fine too. However, judges sitting in copyright cases do not have the luxury of embracing relativism, at least not so radically. Courts have to pick winners and losers. Even a decision not to decide a case is tantamount to letting the defendant win. If real people disagree over whether two works are substantially similar, the court will have no way of deciding the case.

This problem further explains *Arnstein*'s suggestion that the relevant opinions for study should be those at whom a work is aimed. It seems that the *Arnstein* court had to come up with some way of reducing the relativism inherent in a genuine audience test. The court did this by turning to ideas associated with intentionalist criticism, stating that an author is entitled to have his work interpreted by those people he intends to address.[309] This, however, is precisely the same intellectual maneuver made by theorists like William E. Tolhurst who advocated use of the intended audience perspective.[310]

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307. *See supra* note 3 and accompanying text.

308. *See supra* notes 290-92 and accompanying text.

309. *See Arnstein*, 154 F.2d at 473. *See also supra* notes 290-92 and accompanying text. The correspondence between various tests for substantial similarity and aesthetic theory becomes even more striking upon reading Jane Tompkins' description of Gerald Prince's *The Zero Degree Narratee*:

> [Prince] posits first a series of distinctions among the kinds of readers to whom a text can be addressed: the real reader (the person who holds the book in hand), the virtual reader (the kind of reader the author thinks he is writing for, whom he endows with certain qualities, capacities, and tastes), and the ideal reader (one who understands the text perfectly and approves its every nuance).

READER-RESPONSE CRITICISM, *supra* note 78, at xii. The readers described here correspond closely to the actual audience, intended audience, and ordinary observer from substantial similarity.

310. *See supra* note 101 and accompanying text. It is no accident that courts sometimes turn towards intentionalism as an antidote to subjectivity perceived in the audience test. As noted earlier, all reader-response theories destabilize the notion of fixed meaning in a text. Legal interpretation of texts, however, is supposedly devoid of subjectivity. It is therefore no surprise to find courts uncomfortable with a pure audience test in copyright. Consider the following comments by Richard Posner, a leading legal theorist who apparently believes that recognition of reader-oriented theory would lead to a breakdown in the rule of law:

> The thread that connects the various schools of poststructuralism is their determination to reverse the traditional primacy of author over reader in the interpretation of texts. From such a reversal the advocates of free interpretation of legal texts draw aid and comfort, while believers in the objectivity of law are discomfited. A related feature of poststructuralism is

IV. CONCLUSION

This Article has shown that judicial application of legal reasoning has not kept aesthetic determinations out of copyright law. Leading cases adopt analytical perspectives that are equivalent to major branches of aesthetic theory. In fact, the very effort to avoid aesthetics has led courts to adopt these varying perspectives because the facts of individual cases often make one analytical perspective seem more or less subjective and aesthetically controversial than others. To those not familiar with aesthetic theory, it looks as if copyright is being refined through the process of legal reasoning. Courts seemingly recognize the pitfalls of aesthetic reasoning, and then adopt legal interpretations of copyright designed to avoid those pitfalls. However, familiarity with aesthetic theory shows that courts are essentially swapping one set of aesthetic premises for others in response to the facts of particular cases. Copyright opinions therefore amount to the judicial declaration of preference for one aesthetic perspective over others. Indeed, copyright opinions rendered today *necessarily require* the judicial declaration of such preference.

Consider how the cases considered above affect copyright law. In one sense, each case ostensibly clarifies copyright by installing a particular set of analytical perspectives as the latest interpretation of the law. However, none of these cases actually overrules prior inconsistent precedent. In fact, many of the opinions do not even hint at inconsistency with prior precedent. When courts look for guidance in new cases, they will find analytically inconsistent cases that are still good law. Selecting precedent to govern new cases therefore requires a judge to choose one set of premises over others. Courts have to declare their preference of aesthetic per-

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> that most of its practitioners are political radicals, who see their attack on objective interpretation as part of a broader campaign against bourgeois thought, one element of which is belief in the rule of law.

POSNER, *supra* note 81, at 216. Posner's attitude towards reader-oriented theories of interpretation actually strengthens this Article's contention that, at least in copyright, legal and aesthetic reasoning are essentially the same.

According to Posner, reader-oriented theories of interpretation are undesirable because meaning would become indeterminate. Law's ability to prescribe results would disappear in a fog of conflicting textual interpretations. Ironically, judges in copyright resort to reader-oriented interpretations precisely because other methods of interpretation do not adequately settle the meaning of texts.

The inconsistent embrace of the intended audience test shows that courts sometimes find a pure audience test more helpful than the interpretive methods Posner believes would support the rule of law. The alleged dichotomy between "objective" legal reasoning (based on "objective" methods of interpretation) and "subjective" aesthetic reasoning (based on "subjective" methods of interpretation) disappears as "subjective" audience tests replace "objective" formalist or intentionalist tests for the very purpose of eliminating subjectivity. The supposed "enemy" of the rule of law actually gets used to support it.

spective when they decide copyright cases. This raises interesting questions about the state of copyright jurisprudence and the fair treatment of varying artistic practices.

As noted earlier, aesthetics are supposed to be largely irrelevant to copyright for two reasons. First, aesthetic determinations are inherently subjective. Second, even if judges could make aesthetic determinations objectively, it would still be bad public policy for them to do so because official pronouncements about aesthetic matters run perilously close to censorship.[311] However, if judges necessarily declare their aesthetic preferences when deciding copyright cases, objectivity or neutrality in copyright decisionmaking cannot be achieved because the crucial distinction between aesthetic reasoning and legal reasoning has collapsed.

One possible response to this challenge might be the creation of new doctrines that have nothing to do with aesthetics. However, such efforts make little sense because the aesthetic premises in question are so deeply ingrained in our culture that we cannot help but think about art in these ways. New copyright doctrines and concepts would almost certainly reincorporate aesthetics into copyright law. Even if successful, these efforts would prove undesirable because copyright doctrines that differ greatly from cultural intuitions about art will be unintelligible to artists, audiences, judges, or juries. Imagine the chaos that would ensue if the existence of copyright or its scope of protection depended on thoughts that no serious observer of art had ever entertained.

Another possible response would be a reduction in the number of aesthetic choices judges make. For example, the Supreme Court could explicitly consider all of the existing interpretations of originality, the useful article doctrine, or substantial similarity and eliminate the ones that result in analytic confusion. Future courts would not have to choose among aesthetic theories because binding precedent would control. This might sound appealing, but it would actually defeat the very purpose for avoiding aesthetic determinations in the first place, namely, the accommodation and promotion of diverse philosophies about art.

The declaration of binding precedent would reduce aesthetic diversity because it implies the adoption of a single set of aesthetic perspectives. If courts always use the same aesthetic premises, then there really would be an officially sponsored and enforced authoritative perspective on art. By contrast, if copyright law is left in its presently ambiguous state, different judges will continue to make different aesthetic choices in different cases.

311. *See supra* note 6 and accompanying text.

Uniformity and objectivity in copyright law might suffer, but diversity in legal thinking about art would be preserved. It is better for many small subjective decisions to be made than for a few extremely significant ones to control the outcome of all future cases.[312]

If this is the case, however, what is to become of the principle of aesthetic neutrality? Are we truly subject to copyright law that simply imposes numerous acts of judicial fiat? At a certain level, the answer is yes. Judges have and will continue to have the power and ability to decide copyright cases on the basis of their personal aesthetic sensibilities.

At another level, however, judges can take steps that will diminish (but not eliminate) the importance of their personal aesthetic biases. A judge must realize that he is not an objective, disinterested observer of the works under consideration. His initial intuitions inevitably come from the peculiar set of circumstances that make up his life. These intuitions may fortuitously be "ordinary" or similar to those held by other people. However, a judge must realize that this fortuity does not make, and cannot make, his intuitions correct in the strongest sense of the word. At best, his intuitions can be correct in a culturally relative way. In short, a judge must know that his intuition which "seems right" probably stands on highly contestable intellectual premises. Reflexive rejection of other possibilities represents the very sort of subjective censorship that Holmes warned against.[313]

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312. The authoritarian implications of a single perspective on aesthetics can be seen in the words of Owen Fiss' response to the possibility that the interpretation of texts is not objective. "There can be many schools of literary interpretation, but . . . in legal interpretation there is only one school and attendance is mandatory." Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746 (1982). Fiss' words highlight the lawyer's preoccupation with objectivity and the idea that such objectivity exists only through discipline that restricts other supposedly less objective methods of interpretation. A somewhat different take on the connection between copyright and authoritarianism appears in the work of Rosemary J. Coombe, who describes how intellectual property laws give those who hold intellectual property rights control over the meanings of texts and thereby suppress unapproved meanings created by certain readers and users of texts. *See* Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1864-77 (1991).

313. Perhaps the most outstanding example of reflexive decisionmaking in a recent copyright case is Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182 (S.D.N.Y. 1991). The opinion in that case begins with the words "Thou shalt not steal," and it continues with no meaningful analysis of the defendant's fair use claim. Regardless of whether the case was correctly decided, the structure and rhetoric of the court's opinion suggests a judge who had simply made up his mind that the defendant's behavior was theft in some extralegal sense. This allowed the court to admonish the defendant with the biblical quotation while ignoring the legal merits of the defendant's position. Indeed, if the defendant's use of the plaintiff's work were fair use, it is hard to imagine how the defendant's behavior could be called "theft" unless the label "theft" referred to something from outside copyright law.

A judge who is conscious of this problem can guard against it by being particularly open-minded to alternate aesthetic sensibilities. For example, a dedicated formalist should listen particularly carefully to arguments based in intentionalism or reader-response theory. Traditionally oriented judges should listen carefully to avant-garde arguments. By doing this, a judge will gain perspective on works that she would never have realized by simply rejecting alternate interpretations as "mistaken" or "wrong." In some cases, these alternate arguments will convince the judge to change her mind and decide a case differently than she initially had thought she might. In other cases, the alternate arguments will prove unpersuasive and the judge's initial intuition will stand. The net result is that courts will wind up embracing a broader set of aesthetic conventions by openly thinking about aesthetics than they would by simply applying doctrine that embodies existing dogma.

Of course, some may complain that the solution to aesthetic bias proposed here is in fact no solution at all. In each case, a judge eventually makes a subjective decision about which argument she finds more persuasive. Judicial subjectivity and aesthetic bias remain completely unconstrained. These critics have a point.[314] The solution proposed here expects and permits a large degree of subjective judicial decisionmaking. However, if this Article's analysis is correct, that objection must be considered a weak one because aesthetically subjective decisionmaking is the only possible approach in copyright cases. The point here is not to eliminate aesthetic subjectivity. Rather, the goal is to manage it so that subjectivity is exercised under relatively desirable conditions. The proposal simply states that it is better for judges to make subjective decisions about the persuasiveness of competing arguments when they consciously recognize their aesthetic biases and therefore take opposing arguments a bit more seriously than they otherwise might.

Whether we like it or not, the existence of copyright makes subjective judicial pronouncements of aesthetic taste necessary. It will therefore always be possible that copyright selectively chokes off certain types of artistic expression because they do not conform to culturally popular aesthetic sensibilities. Nothing we do can ensure that all forms of art flourish or even survive under copyright. The challenge, then, is to decide how to

314. Similar points have been made in criticizing legal pragmatism. *See* Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1705-1721 (1991) (criticizing pragmatism as placing all the pressure of decisionmaking on the identity of the decisionmaker); Steven Walt, *Some Problems of Pragmatic Jurisprudence*, 70 TEX. L. REV. 317, 327 (1991) (reviewing RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE (1990) (criticizing pragmatism for providing no method for selecting among conflicting beliefs)).

make sure that as many types of art flourish as is possible. Hopefully, this Article's suggestions represent a step in that direction. Our culture and the judges who live in it will always have biases. However, as long as all concerned remain open-minded, anything remains possible, and that is precisely what our society should desire in art.