The Aesthetics of Copyright Adjudication

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The American legal system is unable to continue avoiding the question of art versus non-art. In particular, questions of copyright-ability often hinge on art-status. Yet art is a constantly evolving, reflexive field in which artists and philosophers continually challenge the status quo. Judges would benefit from analyzing claims to art-status under the objectivity provided by well-developed aesthetic theories, aided by expert testimony when needed. After reviewing several major philosophies of art, this Article proposes a framework for adjudicating art-status based on an aesthetic theory known as the Historical Definition of Art. Furthermore, to balance copyright law's purpose of protecting innovation with its need to promote public availability of copyrighted works, this Article proposes the creation of a new statutory exception to provide a defense for "utilitarian adaptations" of copyrighted three-dimensional works. This statutory defense would serve to encourage innovation and stimulate production of novel goods.

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> To see something as art requires something the eye cannot descry—an atmosphere of artistic theory, a knowledge of the history of art: an artworld.
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> —Arthur Danto[1]

I. INTRODUCTION

All original artworks should be copyrightable. Yet in the Art-

[1] Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 580 (1964) [hereinafter Danto, *The Artworld*].

world,[2] as in the "real" world, newcomers and minorities face disparate treatment. By failing to protect important advances in recent art, current copyright law discourages innovation and frustrates copyright law's goal of "promot[ing] the creation and publication of free expression."[3] Copyright law should therefore seek to extend equal protection to all categories of art.[4]

Much recent art, especially recent forms of painting and sculpture, presents unique difficulties for copyright law where the artworks blur the classical distinctions between "artworks" and "mere objects." For example, Yves Klein's *Blue Monochrome*,[5] an abstract painting, consists of a 195.1 x 140 cm canvas whose surface is entirely covered in one shade of blue.[6] "Readymade" or "Found Art" includes works such as Marcel Duchamp's *In Advance of the Broken Arm*,[7] a three-dimensional work consisting of an ordinary, unmodified snow shovel that Duchamp purchased from a utility store and hung from a wire in his studio.[8] It bears the following description in the Museum of Modern Art: "Wood and galvanized-iron snow shovel, 52" (132 cm) high."[9] Current copyright doctrine, with its requirements of originality and nonfunctionality, has considerable difficulty affording copyright

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[2] *See generally id.* at 580 (first describing the concept of the "Artworld").

[3] *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (emphasis removed).

[4] By affording equal protection to all artists regardless of genre or philosophical affiliation, advances in copyright law can help further the goals of civil rights law, which seeks to prevent discrimination and extend equal protection to all people regardless of race, gender, sexual orientation, religious affiliation, or disability. *Cf.* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 et seq.).

[5] Yves Klein, *Blue Monochrome* (1961), *available at* http://www.moma.org/collection/object.php?object_id=80103 (last visited Feb. 4, 2012).

[6] *Blue Monochrome*, MUSEUM OF MODERN ART, http://www.moma.org/collection/object.php?object_id=80103 (last visited Feb. 4, 2012).

[7] Marcel Duchamp, In Advance of the Broken Arm (1915), *available at* http://www.moma.org/modernteachers/ref_pages/set_scene_pics/mai8_img2.html (last visited Nov 4, 2011).

[8] *See* DENNIS DUTTON, THE ART INSTINCT: BEAUTY, PLEASURE, & HUMAN EVOLUTION 193–97 (2009) (noting that Duchamp's sister threw out the artwork); *but cf.* Rhonda Roland Shearer, *Marcel Duchamp: A Readymade Case for Collecting Objects of Our Cultural Heritage Along With Works of Art*, 1 TOUT-FAIT: THE MARCEL DUCHAMP STUDIES ONLINE JOURNAL (2000), http://www.toutfait.com/issues/issue_3/Collections/rrs/shearer.htm (last visited Feb. 4, 2012) (questioning whether Duchamp in fact constructed his readymades himself, rather than simply purchasing them from retailers as he claimed, since many of the readymades "cannot be found in duplicate forms as objects or in commercial catalogues of the period").

[9] *In Advance of the Broken Arm*, MUSEUM OF MODERN ART, http://www.moma.org/modernteachers/ref_pages/set_scene_pics/mai8_img2.html (last visited Nov 4, 2011).

protection to these works.

Though some might refuse to call certain recent works "art," this is an increasingly untenable position given such works' widely accepted art-status. In 2004, Duchamp's readymade work, *Fountain*,[10] was voted "Most Influential Piece of Modern Art" by five hundred British artists, art critics, curators, and dealers.[11] Duchamp, Klein, and other important artists in the mid-twentieth century have brought about a "Copernican revolution in aesthetics"[12] that copyright law has thus far failed to comprehend.[13]

The American legal system is unable to continue avoiding the question of art versus non-art. Scholars have lamented "missed opportunities to . . . encourage a healthy debate about art"[14] by courts that avoid explaining decisions that hinge on an object's art-status.[15] "[M]any areas of American law require the law to make visual aesthetic determinations, such as the doctrine of useful articles, moral rights in copyright, customs, arts funding, and urban planning, as well as First Amendment jurisprudence,"[16] obscenity law,[17] and tax law.[18] Moreover, because the standards governing the copyrightability of various art forms differ significantly,[19] there is a rising need for courts

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[10] Marcel Duchamp, *Fountain* (1917).

[11] DUTTON, *supra* note 8, at 193–94 (noting that the survey was commissioned "in order to identify key art pieces to help the public understand more about the inspiration and creative process").

[12] YAKOV RABINOVICH, *DUCHAMP: TO SAY THE LEAST*, THE CALIGULA OF TASTE, http://www.invisiblebooks.com/Duchamp.htm (last visited Feb. 4, 2012).

[13] *Cf.* FRIEDRICH NIETZSCHE, THE GAY SCIENCE 181–82 (1882) (Walter Kaufmann trans., Vintage Books, 1974) ("[T]his tremendous event is still on its way, still wandering; it has not yet reached the ears of [judges]."); NOEL CARROLL, PHILOSOPHY OF ART: A CONTEMPORARY INTRODUCTION 41 (1999) ("When Picasso made a portrait of Gertrude Stein, she noted that it did not look like her. Picasso told her not to worry because it would—that is, once his style became familiar, it would pass for realism.").

[14] Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 810 (2005).

[15] *See* Genevieve Blake, Comment, *Expressive Merchandise and the First Amendment in Public Fora*, 34 FORDHAM URB. L.J. 1049, 1060–61 (2007) (noting that "courts are loathe to engage in aesthetic scholarship" and that "there is no substantial judicial discourse on why art ought to be protected").

[16] *Id.*

[17] *See* Farley, *supra* note 14, at 831.

[18] *Id.* at 806 ("[I]f an art collector wants to depreciate her Joseph Beuys' *Fat Corner* (1968) because the now thirty-eight-year-old Irish butter, of which it is entirely comprised, is decaying, a legal question arises under tax law of whether this investment is 'art' and therefore nondepreciable.").

[19] *See* Stéphanie Giry, *An Odd Bird*, LEGAL AFF. (Sept. 2002), http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp ("Customs law favors fine arts over industrial or mechanical arts; copyright law favors original works over derivative works.").

to be guided by a coherent theory of art. U.S. common law, which emphasizes law's changing and even aesthetic nature through the evolution of judicial precedent,[20] is categorically amenable to judicial engagement in art theory.

The current copyright scheme must be modified to provide equal protection to postmodern artists. In exploring the limits of copyrightable subject matter, this Article argues that the statutory framework of copyright is broad enough to warrant inclusion of recent categories of art. However, current judicial precedent needs modification to encompass this shift. Furthermore, Congress should pass a statutory defense for functional uses of copyrighted artworks to preserve innovation and equitably limit the scope of protection afforded by copyright.

Part II of this Article examines the legal basis for copyrightability of artistic works. Part III argues that a new standard is needed to provide equal protection under the law to all artworks. Part IV explores several major philosophies of art, and proposes that to provide parity in copyright protection judges should analyze originality of artworks under the Historical Definition of Art. Part IV further explains that the copyright protection afforded to works in certain categories of recent art is necessarily a weaker form of protection known as "Thin Copyright." After addressing concerns that according copyright protection to certain categories of recent art might stifle innovation or free speech, Part V proposes the creation of a new statutory defense for "utilitarian adaptation" of copyrighted three-dimensional works of art, in order to encourage innovation and production of novel goods for the benefit of society.

II. THE CURRENT STANDARD OF COPYRIGHTABILITY

A. *Constitutional Basis*

Congress has the power under the Constitution "[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

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[20] *See generally* Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV 1049 (2002) (explaining that "[l]aw is an aesthetic enterprise" and describing the different aesthetic forms that American law can take and be viewed through). Philosophy too is an aesthetic enterprise, the line separating art from philosophy of art "having all but vanished." *See* Arthur C. Danto, *The Transfiguration of the Commonplace*, 33 J. AESTHETICS & ART CRITICISM 139, 148 (1974) [hereinafter Danto, *Transfiguration Article*]; Rabinovich, *supra* note 12.

and Discoveries."[21] Copyright protection hinges on the terms "Writings" and "Authors," which are interpreted broadly under "constitutional principles."[22] An "Author" is understood to mean an "originator," "he to whom anything owes its origin."[23] Similarly, "Writings" is interpreted as "any physical rendering of the fruits of creative intellectual or aesthetic labor."[24] The Supreme Court has noted that "the primary objective of copyright" is "to promote the Progress of Science."[25]

B. *Statutory Scheme*

The Copyright Act of 1976[26] (the 1976 Act) grants copyright protection to "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . ."[27] By purposely leaving the phrase "original works of authorship" undefined, Congress intended to allow the courts to establish the standard for copyrightable subject matter.[28]

Both the original Copyright Act of 1909 (the 1909 Act)[29] and its 1976 updated version designated broad categories of copyrightable subject matter. The 1909 Act granted copyright protection to "works of art,"[30] "musical compositions,"[31] and after amendments in 1971, "sound recordings."[32] The 1976 Act makes copyrightable "works of authorship" such as, but not limited to,[33] "pictorial, graphic, and sculptural works,"[34] "musical works,"[35] "sound recordings,"[36] and after

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[21] U.S. CONST. art. I, § 8, cl. 8.

[22] *See* Goldstein v. California, 412 U.S. 546, 561 (1973).

[23] *Id.* (citing Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).

[24] *See Goldstein*, 412 U.S. at 561–62 (citing *Burrow-Giles*, 111 U.S. at 58; Trade-Mark Cases, 100 U.S. 82, 94 (1879)).

[25] *See* Eldred v. Ashcroft, 537 U.S. 186, 212 (2003) (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991)) (noting that patents protect the "useful arts").

[26] Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101–810 (1976)).

[27] 17 U.S.C. § 102(a) (2006).

[28] *See* H.R. REP. NO. 94-1476, at 51 (1976) [hereinafter HOUSE REPORT].

[29] Copyright Act of 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1976).

[30] § 5(g) (repealed 1976).

[31] § 5(e) (repealed 1976).

[32] Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (repealed 1976)).

[33] HOUSE REPORT, *supra* note 28, at 51.

[34] 17 U.S.C. § 102(a)(5) (2006).

[35] 17 U.S.C. § 102(a)(2).

[36] 17 U.S.C. § 102(a)(7).

amendments in 1990, "architectural works."[37] "Pictorial graphic and sculptural works" include both "two-dimensional and three-dimensional works of fine, graphic, and applied art."[38]

The 1976 Act importantly limits copyright protection to works expressed in a "tangible medium"[39] and the non-"utilitarian" aspects of works.[40] Copyright may extend to a visual work's "form," but not to its "mechanical or utilitarian aspects."[41]

The "tangible medium" requirement differentiates between conception and expression of artwork. Thus the 1976 Act excludes from protection "any idea, procedure, process, system, method of operation, concept, principle, or discovery."[42] To be copyrightable, the work must be "sufficiently permanent or stable . . . to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[43] Unfixed ideas may be protected under state law idea misappropriation theories;[44] processes and methods can be covered by method patents.[45]

C. *Judicial Precedent*

Copyright owners have exclusive statutory rights over their works, including the rights "to reproduce the copyrighted work in copies,"[46] "to distribute copies,"[47] "to perform the copyrighted work publicly,"[48]

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[37] Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 703, 104 Stat. 5133, 5133 (1990) (codified at 17 U.S.C. § 102(a)(8)).

[38] 17 U.S.C. § 101 (2006).

[39] 17 U.S.C. § 102(a).

[40] 17 U.S.C. § 101.

[41] *See id.*

[42] 17 U.S.C. § 102(b).

[43] HOUSE REPORT, *supra* note 28, at 53.

[44] Idea misappropriation theories do not provide protection for a tangible product or object, but rather safeguard a creator's ideas from being stolen and converted into a final product without attribution to the original creator. *See, e.g.*, Nadel v. Play-by-Play Toys & Novelties, Inc., 208 F.3d 368 (2d Cir. 2000) (allowing a claim for idea misappropriation for an allegedly stolen new toy idea).

[45] *See infra* Part III.B. Unlike copyright protection, which attaches automatically upon fixation of the work in tangible medium, in order for inventions to be patent-protected, the patent must be applied for and granted by the United States Patent and Trademark Office.

[46] 17 U.S.C. § 106(1) (2006).

[47] 17 U.S.C. § 106(3).

[48] *See* 17 U.S.C. § 106(4); § 106(6) (granting the copyright holder the exclusive right, "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission").

to "display the copyrighted work publicly,"[49] and, importantly, "to prepare derivative works based upon the copyrighted work."[50]

1. Originality Versus Novelty

"The *sine qua non* of copyright is originality."[51] The term "original" means "only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity."[52] The Supreme Court declared that "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."[53]

The requirement of a "modicum of creativity," however, is not powerless.[54] Originality requires something different from technical traits such as "'physical skill' or 'special training.'"[55] Instead, to establish originality, "[a] considerably *higher* degree of skill is required, true artistic skill."[56] Thus, in *Feist*, the Supreme Court denied copyright protection to a telephone directory because the publisher's selection of listings—"names, towns, and telephone numbers"—was obvious, and coordination and arrangement of names alphabetically included "nothing remotely creative."[57]

Originality in copyright law is different from novelty, which is a term of art that seeks to measure the newness of inventions in patent law.[58] As Judge Learned Hand declared, copyright only requires origi-

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[49] 17 U.S.C. § 106(5).

[50] 17 U.S.C. § 106(2). A major exception to the exclusive rights of copyright holders is the "fair use" doctrine, which allows for the free use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." § 107.

[51] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[52] *Id.* (citing 1 MELVILLE NIMMER & DAVID Nimmer, NIMMER ON Copyright §§ 2.01[A], [B] (1990)).

[53] *Feist*, 499 U.S. at 345.

[54] *Id.* at 346.

[55] *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976), *cert. denied*, 429 U.S. 857 (1976).

[56] *See id.*

[57] *Feist,* 499 U.S. at 363; *cf.* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) ("The least pretentious picture has more originality in it than directories and the like, which may be copyrighted.").

[58] *See* Sheldon v Metro-Goldwyn Pictures Corp., 81 F.2d 49, 53–54 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936); HOUSE REPORT, *supra* note 28, at 51 (Copyright "does not include requirements of novelty, ingenuity, or esthetic merit").

nality to the author,[59] whereas novelty under patent law can be characterized as requiring originality to the public.[60] Originality to the author means, in Judge Hand's example, that "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn [*sic*], he would be an 'author,'" with full rights to copyright his work.[61] Congress purposely selected the lower standard of originality for copyright in order to extend protection to "the broadest class of works possible."[62] However, copyright's wide breadth of protection is in proportion to its limited grant of exclusivity. As with other forms of intellectual property, copyright does not afford protection to ideas or expressions already in the public domain.[63] And because copyright does not examine novelty, copyright grants no protection to inventions or methods of operation described in copyrighted works.[64] Of course, an author remains free to apply separately for patent protection on those inventions or methods.

2. Higher Standard of Originality for Derivative Works

Copyright holders have the exclusive right to prepare and to authorize preparation of "derivative works based upon the copyrighted work."[65] The 1976 Act defines "derivative works" as works "based upon one or more preexisting works such as [an] . . . art reproduction . . . or any other form in which a work may be recast, transformed, or adapted."[66] A derivative work based on a copyrighted artwork must meet "substantial originality,"[67] a higher standard of

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[59] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[60] This is why prior inventorship or prior public sale of an invention destroys novelty, and therefore patentability, of the invention. *See* 35 U.S.C. §§ 102(a), 102(b) (2006).

[61] *See Sheldon*, 81 F.2d at 54.

[62] Lori Petruzelli, Comment, *Copyright Problems in Post-Modern Art*, 5 DEPAUL-LCA J. ART & ENT. L. 115, 121 (1995); *see* FRANÇOIS DESSEMONTET & H. W. CLARKE, THE LEGAL PROTECTION OF KNOW-HOW IN THE UNITED STATES OF AMERICA 195–96 (2d ed. 1976).

[63] Thus, if the man who independently composed Keats's poem obtained a copyright on his work, "others might not copy that poem, though they might of course copy Keats's." *Sheldon*, 81 F.2d at 54.

[64] Baker v. Selden, 101 U.S. 99, 102 (1880) ("To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of [patents], not of copyright.").

[65] 17 U.S.C. § 106(2) (2006).

[66] 17 U.S.C. § 101.

[67] *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976), *cert. denied*, 429 U.S. 857 (1976) (translation of an artwork to a different medium, without more, does not constitute the "substantial variation" required for separate copyright as a derivate work).

originality than that applicable to non-derivative works. Though copyright law has no requirement of novelty,[68] the original work serves as a form of prior art[69] with respect to the derivative work. Thus, the higher standard of originality for derivative works requires that the derivative work have at least a "substantial variation" from the original to be separately copyrightable.[70] Indeed, if derivative art were too easily copyrightable, copyright would be extended into perpetuity through endless minor variations on the original work.[71] Moreover, copyright protection does not extend to any part of derivative works that employ material from previously copyrighted works.[72]

The two *A.R.T. Co.* cases, which deal with the copyrightability of simple adaptations of previously copyrighted artworks, illustrate the nuances of the originality standard for derivative works. In *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*,[73] Mirage sued A.R.T. for copyright infringement after A.R.T. bought Mirage's book, "removed selected pages from the book, mounted them individually onto ceramic tiles and sold the tiles at retail."[74] Mirage argued that A.R.T. was using this process to create unauthorized derivative works of Mirage's books.[75] The Ninth Circuit held that A.R.T. had "recast or transformed the individual images" by pasting them onto the tiles, and was therefore liable for copyright infringement.[76]

Nine years later, *Lee v. A.R.T. Co.*[77] came before the Seventh Circuit. A.R.T. similarly purchased Lee's notecards, "mounted the works on ceramic tiles (covering the art with transparent epoxy resin in the process) and resold the tiles."[78] The court found that "the framing process does not create a derivative work," and that the tile simply

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[68] *See supra* notes 56–59 and accompanying text.

[69] "Prior art" is a term of art in patent law that refers to the already-existing inventions in the same technical field as the invention seeking patent protection.

[70] *See, e.g.*, Gracen v. The Bradford Exch., Inc., 698 F.2d 300, 305 (7th Cir. 1983) (denying copyright protection to a drawing of Dorothy from *The Wizard of Oz* that was too similar to the original); *Batlin*, 536 F.2d at 489, 492 (denying copyright protection to a "'knock-off' reproduction of [a] cast iron Uncle Sam bank" that was "extremely similar . . . in size and material" to the original).

[71] *Cf.* Lee v. A.R.T. Co., 125 F.3d 580, 582 (7th Cir. 1997) (*see* defendant's argument).

[72] 17. U.S.C. § 103(a) (2006); *see Gracen*, 698 F.2d at 302.

[73] Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341 (9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989).

[74] *Id.* at 1342.

[75] *See id.* at 1343.

[76] *Id.* at 1344.

[77] Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997).

[78] *Id.* at 580.

served as a "flush frame" for the art.[79] The court disagreed with the Ninth Circuit's conclusion that A.R.T.'s method of mounting art on ceramic tile was more transformational than traditional means of framing art.[80] The court accordingly found no copyright infringe-ment.[81]

In *Lee*, the court noted that A.R.T.'s card-on-a-tile could not have been copyrighted because it was not sufficiently original compared to the original card.[82] In fact, after the Mirage case, A.R.T. tried to obtain a copyright on one of its card-on-a-tile works, but was rejected by the Register of Copyrights because the card that it incorporated had already been copyrighted.[83] This was the correct result because the card-on-a-tile was held to the higher standard of copyrightability for derivative works.[84]

Photographs pose a special problem for determinations of whether a work is derivative. Photographs are copyrightable in the same manner as artworks produced by paint or pencil,[85] but they are devoid of the typical individualized brush and pencil strokes found in classical paintings. Thus, infringement determinations between two photographs of the same subject or scene depend highly on factors such as "pose, light, and shade."[86]

The law on derivative works is also implicated where authors compose visual art in prose. Søren Kierkegaard once imagined a painting consisting of a square canvas covered entirely in red paint, with the explanation "The Israelites had already crossed over, and the Egyptians were drowned."[87] Because the subsequent physical creation of this

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[79] *Id.* at 581.

[80] *See id.*

[81] The court noted that if Lee were able to prevent A.R.T.'s mounting of art based on a theory of derivative work, that this would "establish through the back door an extraordinarily broad version of authors' moral rights, under which artists may block any modification of their works of which they disapprove." *See id.* at 582.

[82] *Id.*

[83] *Id.*

[84] One author notes that much of "appropriation art," which involves the naked appropriation of works in the public domain, would fail the higher standard of copyrightability for derivative works. *See* Petruzelli, *supra* note 62, at 126–27.

[85] Gross v. Seligman, 212 F. 930, 931 (1914); *see also* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57–60 (1884) (noting that photographs are "writings" protectable under the intellectual property clause of the Constitution).

[86] *See, e.g.*, *Gross*, 212 F. at 931–32 (denying copyright protection for a photographer's later photograph modeled on one of his earlier photographs because though the photographer added some minor variations in pose and lighting, the pictures were insufficiently distinct).

[87] *See* ARTHUR C. DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART 1 (1981); *see also* Mark Rothko, *Untitled (Red)* (1958) (square canvas painting consisting

work would involve little aesthetic judgment or interpretation, it would likely be barred from separate copyrightability by the higher standard for derivative works. However, other instructive works may well require sufficient exercise of personal judgment in the creation of the visual work to merit separate copyrightability.[88] Sol LeWitt fancied himself a "composer" of visual art, writing instructions to guide others in making his artworks.[89] In this analogy, the person painting the artwork would be the instrumentalist performing the piece. While LeWitt's instructions are copyrightable as writings, the creation of the visual artwork could be separately copyrightable for its interpretive creativity.[90] A further example is the book *Transfiguration of the Commonplace*, whose title Arthur Danto took from the title of a nonexistent book said to have been written by Sister Helena of the Transfiguration, a character in Muriel Spark's 1961 novel, *The Prime of Miss Jean Brodie*.[91] In this case, Danto supplied the entire substance of the nonexistent work. Notwithstanding the permission Ms. Spark gave to Danto to create his work, Danto would have faced no difficulty in an infringement suit.

3. Copyright Restrictions on Useful Articles

As noted above, copyright only extends to the non-"utilitarian" functions of works.[92] Determining utility versus aesthetic value of industrial objects is perhaps the most difficult area of copyright law,[93] and the standard in this area has been continually evolving. In 1959, the Copyright Office promulgated the necessary condition that if "the sole intrinsic function of an article is its utility, the fact that the work is unique and attractively shaped will not qualify it as a work of art."[94] However, this failed to provide much guidance, since even rudimentary useful articles are intended to be decorative as well as useful.[95]

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of several proportionate rectangles of subtly-different hues of bright red).

[88] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903).

[89] Sol LeWitt, *Wall Drawing #260* (1975), *available at* http://www.moma.org/visit/calendar/exhibitions/305 (last visited Feb. 5, 2012) (stating that LeWitt's Wall Drawings are comprised of "linear systems, determined by LeWitt in advance, [and] carried out by others, be they artists, trained assistants, or novice volunteers, based upon his instructions.").

[90] *Cf.* Baker v. Selden, 101 U.S. 99, 102–03 (1880) (noting the centrality of personal expression in determining copyrightability of claimed works).

[91] DANTO, TRANSFIGURATION OF THE COMMONPLACE, *supra* note 87, at i.

[92] *See supra* notes 38–40 and accompanying discussion.

[93] *See* PAUL GOLDSTEIN, COPYRIGHT § 2.5.3 (2d ed. 1998).

[94] 37 C.F.R. § 202.10(c) (2010).

[95] *See* Esquire v. Ringer, 591 F.2d 796, 804 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

Because literal application of the regulation would render it useless, the word "sole" was omitted in The 1976 Act.[96]

Courts have been forced to make fine distinctions between "copyrightable works of applied art and uncopyrightable works of industrial design."[97] *Mazer v. Stein*[98] is the foundational case regarding copyrightability of functional works. In *Mazer*, the issue was whether statuettes used as bases for table lamps were copyrightable.[99] The Supreme Court held that the statuettes were copyrightable notwithstanding their intended functional use.[100] The availability of design patent protection did not diminish the statuettes' claim to copyright.[101]

In the 1976 Act, Congress adopted *Mazer*'s extension of copyright to works of "applied art," which "encompass[es] all original pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles."[102] A "useful article" is one "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[103] Congress intended for "useful articles" to be copyrighted only if their "shape . . . contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article."[104] Moreover, copyright protection extends only to copyrightable elements, not the "over-all configuration," of the article.[105] The extent to which an article is manufactured or used for commercial purposes can negatively impact its copyrightability.[106] However, The 1976 Act does not preclude an owner of copyright from seeking simultaneous design patent protection for copyrighted works.[107]

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[96] *See id.*

[97] *See* HOUSE REPORT, *supra* note 28, at 9.

[98] 347 U.S. 201 (1954).

[99] *Id.* at 202.

[100] *Id.* at 218.

[101] *Id.* at 217 (stating that "patentability . . . does not bar copyright as works of art").

[102] HOUSE REPORT, *supra* note 28, at 54.

[103] 17 U.S.C. § 101 (2006).

[104] HOUSE REPORT, *supra* note 28, at 55; *see* 17 U.S.C. § 101.

[105] HOUSE REPORT, *supra* note 28, at 55.

[106] *See id.*

[107] 37 C.F.R. § 202.10(a) (2010) ("The availability of protection or grant of protection under the law for a utility or design patent will not affect the registrability of a claim in an original work of pictorial, graphic, or sculptural authorship."); *see* Mazer v. Stein, 347 U.S. 201, 217 (1954); Rosenthal v. Stein, 205 F.2d 633, 635 (9th Cir. 1953); 37 C.F.R. § 202.10(a) (2010) ("grant of protection under the law for a utility or design patent will not affect the registrability of a [copyright] claim"). On the other hand, because utility patents imply functionality, a person seeking trade dress protection on an object previously protected by a utility patent will

The Second Circuit, the most active court in the field of copyright law, subsequently developed the "conceptual separability test" enunciated in The 1976 Act through a series of notable cases. In *Kieselstein-Cord v. Accessories by Pearl*,[108] the copyrightability of sculptured belt buckles, cast in precious metals and titled "Winchester" and "Vaquero," was at stake.[109] Noting that the belt buckles were being "used for ornamentation for parts of the body other than the waist," the court analogized the belt buckles to jewelry, which was previously held copyrightable.[110] After hearing expert testimony, the court further found that the buckles "[rose] to the level of creative art."[111] Finding "conceptually separable sculptural elements" in the buckles, the court accorded copyright protection to those elements.[112]

In *Brandir International v. Cascade Pacific Lumber Co.*,[113] the issue was whether "a bicycle rack made of bent tubing that is said to have originated from a wire sculpture" was protectable by copyright or as trade dress despite the rack's functionality in holding bicycles.[114] The Second Circuit adopted a test for conceptual separability that required an examination whether design elements reflect "a merger of aesthetic and functional considerations," or whether they reveal "the designer's artistic judgment exercised independently of functional influences."[115] If the aesthetic and functional considerations are merged, or the aesthetic design "is dictated by the functions to be performed," copyright is denied.[116] The court found several instances where the bike rack, purporting to be based on a copyrightable sculpture, changed the original sculpture's design to allow higher functionality as a bike rack.[117] Finding that the style of bicycle rack

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have a heavy burden of proof to show lack of function. *See* TrafFix Devices v. Mktg. Displays, 532 U.S. 23, 29–30 (2001).

[108] 632 F.2d 989 (2d Cir. 1980).

[109] *Id.* at 990.

[110] *Id.* at 993.

[111] *Id.* at 994.

[112] *Id.* at 993–94.

[113] 834 F.2d 1142 (2d Cir. 1987).

[114] *See id.* at 1143.

[115] *See id.* at 1145 (citing Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707, 741–42 (1983)).

[116] *See id.* at 1148 (quoting Warner Bros. v. Gay Toys, Inc., 724 F. 2d 327, 331 (2d Cir. 1983)).

[117] Such changes included the "widening [of] the upper loops to permit parking under as well as over the rack's curves," "straightened vertical elements that allow in- and above-ground installation," and "the heavy-gauged tubular construction of rustproof galvanized steel." *Id.* at 1147.

was "influenced in significant measure by utilitarian concerns,"[118] the court denied copyright protection.[119]

In *Hart v. Dan Chase Taxidermy Supply Co.*,[120] the Second Circuit held that a fish mannequin designed to display taxidermists' fish skins was copyrightable.[121] Distinguishing precedent holding uncopyrightable a human torso mannequin designed to display clothes,[122] the court focused on the intent of the viewers of the taxidermist mannequins to see "a complete 'fish.'"[123] The mannequin dictated the active form in which the fish would be displayed, including the "shape, volume, and movement of the animal." The mannequin was held copyrightable because its intended function was to "portray its own appearance,"[124] rather than to portray an incidental item such as clothing.[125]

III. THE NEED FOR A REFORMULATED STANDARD OF ORIGINALITY

A. *The Current Statutory Scheme Fails to Provide Parity for Postmodern Artists*

Every artwork, as an equal denizen of the Artworld,[126] deserves equal treatment under the law. Yet the current copyright scheme cannot accommodate important recent contributions to the Artworld. The prohibition on copyrighting utilitarian aspects of useful articles is a significant bar to readymade artworks. Taking Duchamp's *In Advance of the Broken Arm* (hereinafter Duchamp's shovel) as a test case, it is readily apparent that the current copyright scheme's requirement of nonfunctionality bars the work. The only conceptually separable elements in *In Advance of the Broken Arm* are those outside the physical bounds of the shovel: the way in which it is positioned in the

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[118] *See id.* at 1147.

[119] *See id.* at 1146–47. Noting the difference in functionality between the standards for determining functionality in trademark and copyright law, the court remanded for a determination of whether the bike rack could be protected as trade dress. *Id.* at 1148–49; *compare supra* Part I.C.3 (describing standard for determining functionality for copyright protection) and *infra* notes 142–151 and accompanying discussion (describing standard for determining functionality for trade dress protection).

[120] 86 F.3d 320 (2d Cir. 1996).

[121] *Id.* at 321.

[122] *See id.* at 323 (distinguishing Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411, 418–19 (2d Cir. 1985)).

[123] *See id.*

[124] *See* definition of "useful article" in 17 U.S.C. § 101 (2006).

[125] *See id.*

[126] *See* Danto, *The Artworld, supra* note 1, at 580.

gallery and its mode of attachment to the wall or a display fixture. Considering the simple manner in which Duchamp's shovel was laid against the wall in the Modern Museum of Art,[127] this hardly suffices as an "original" positioning. More fanciful arguments can be made for the originality of Duchamp's shovel: that the gallery room is part of the work, such that the shovel is "a work of visual art . . . made part of a building"[128] or that it is an "architectural work."[129] An "architectural work" "includes the overall form as well as the arrangement and composition of spaces and elements in the design."[130] However, Duchamp's work would not be considered an "architectural work" since neither Duchamp nor the museum intended the museum to be part of his work.[131]

The prohibition on copyrighting ideas poses a similar problem for works of abstract art such as Kazimir Malevich's *White on White*.[132] Malevich's work, in the Suprematist conceptualist tradition, consists of a white square subtly imposed within a white 31 ¼" x 31 ¼" square canvas.[133] One author argues that this imposed white square is so similar in shade and shape to the original white canvas upon which the artist began work that the "originality" of the work consists mainly of an uncopyrightable idea.[134]

The Copyright Office has deemed names, titles, and slogans not copyrightable.[135] Thus, the titles to Duchamp's readymades, *Fountain* and *In Advance of the Broken Arm*, though creative, would not help Duchamp obtain copyright protection for his works. Yet, to add to the confusion, phrases or slogans included within the bounds of the visual work can be protected.[136] Certain categories of recent art challenge

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[127] *See supra* notes 6–8 and accompanying discussion.

[128] *See* 17 U.S.C. § 113.

[129] 17 U.S.C. § 102(a)(8).

[130] 17 U.S.C. § 101.

[131] Duchamp did, however, once try to claim the Woolworth Building as a readymade artwork. *See* Stephen Jay Gould, *Duchamp and September 11*, 2 TOUT-FAIT (2002).

[132] Kazimir Malevich, *White on White* (1918), *available at* http://www.moma.org/collection/object.php?object_id=80385 (last visited Feb. 5, 2012).

[133] *See* Museum of Modern Art, Kazimir Malevich. Suprematist Composition: White on White. 1918, http://www.moma.org/collection/object.php?object_id=80385 (last visited Feb. 5, 2012).

[134] *See* Petruzelli, *supra* note 62, at 121–24.

[135] 37 C.F.R. § 202.1(a) (2010) ("The following are examples of works not subject to copyright . . . Words and short phrases such as names, titles, and slogans."). Note that the 1976 Act is silent on this.

[136] *See, e.g.*, Andreas v. Volkswagen of Am., Inc., 336 F.3d 789 (8th Cir. 2003) (artist who paired his drawing *Angels of Mercy* with accompanying text—"Most people don't know that there are angels whose only job is to make sure you don't get too comfortable & fall asleep &

these classical distinctions.

One artist destroys the traditional notion that the title of a work must be separate from the work itself. His artworks, termed "Mind Prints," are "mental flash cards" consisting of short phrases designed to evoke mental images of the event described.[137] The entire visual consists of the phrase printed in standard typewriter font, on fine art paper, and framed. Examples of his works include *When Obama Knew* and *When Bill Told Hillary*.[138] These works dissolve the classical distinction between the idea behind the artwork and the visual aspects of the work itself, since the actual art in these cases consists of the suggested images in the minds of the viewers.[139]

The absolute bars on utilitarian and conceptual artwork in the current copyright scheme are at odds with copyright's "primary objective" to promote "the creation and publication of free expression."[140] Moreover, "[p]ersonality always contains something unique. . . . [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*."[141]

Professor Nimmer argues that "[i]f a work might arguably be regarded as a work of art by any meaningful segment of the population . . . then the work must be considered a work of art for copyright purposes."[142] The Supreme Court has consistently warned against discrimination against works of art that do not comport with narrow-minded aesthetic tastes. As Justice Holmes noted, "if [artworks] 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

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miss your life"—awarded damages after defendant used part of the copyrighted text in an advertisement).

[137] *See* Frank Meo, *Captured in the Mind*, FRANKMEO.COM, http://frankmeo.com/ (last visited Dec. 30, 2011).

[138] *Id.*

[139] In light of judicial recognition that phrases or slogans included within the bounds of a visual work can be copyrighted, Meo's "Mind Prints" obviates the Copyright Office's artificial restriction on copyrighting titles of artworks. Fortunately, in the case of Meo's work, the title of each "Mind Print" is contained within the work itself and is therefore saved from automatic preclusion from copyright protection.

[140] *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[141] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903) (emphasis added). The statutory language of The 1976 Act is easily broad enough to encompass the inclusion of recent categories of art. *See supra* notes 25–37 and accompanying discussion.

[142] NIMMER & NIMMER, *supra* note 52, at § 2.08[B][1]; *accord* Gustave v. Zuppiger, 540 P.2d 176, 178 (Ariz. Ct. App. 1975).

contempt."[143] An artwork is none the less an artwork "and none the less a subject of copyright" if it is used for a commercial purpose.[144]

B. *The Need for Greater Protection of Postmodern Artists' Rights*

As noted above, the twin prohibitions on utilitarian and conceptual artwork in the current copyright scheme bar copyrightability of Duchamp's shovel. And obviously, Duchamp could not avail himself of patent protection for his shovel, as his work would be unable to pass patent law's basic test of novelty.[145] This section analyzes whether other forms of intellectual property protection, such as trademark or state law idea protection, would be able to afford protection to postmodern artists' works.

Some consolation in the form of trademark[146] or trade dress[147] protection might be afforded to the rare uncopyrightable work that becomes sufficiently famous that it acquires secondary meaning as a "mark" of sorts signifying its maker. However, readymade artworks are virtually by definition incapable of being inherently distinctive, and therefore would have to acquire secondary meaning to be protected under trademark law. Because color can be trademarked if it "come[s] to indicate a product's origin,"[148] Malevich's *White on White*[149] could be trademarked if its two subtly different shades of white became famous enough to be his signature of sorts. Yves Klein's *Blue*

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[143] *Bleistein*, 188 U.S. at 252.

[144] *See id.* at 251 (extending copyright protection to commercial advertisements); *cf.* Rushton v. Vitale, 218 F.2d 434, 435 (2d Cir. 1955) ("Copyright protection extends to any production of some originality and novelty, regardless of its commercial exploitation or lack of artistic merit.").

[145] *See* 35 U.S.C. § 102(a) (2006) ("A person shall be entitled to a patent unless the invention was known or used by others in this country . . .").

[146] *See generally* The Trademark Act of 1946, 15 U.S.C. § 1125 (2010); Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851, n.11 (1982) (stating that secondary meaning is acquired when, "in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself").

[147] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (allowing trade dress protection for a Mexican fast-food restaurant because the restaurant's motif was inherently distinctive and thus did not need proof of secondary meaning). However, more recently courts have distinguished between product-design and product-packaging, requiring proof of secondary meaning for the former but not the latter. *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000) (disallowing trade dress protection for stylized one-piece seersucker outfits, since such styles were product design had not acquired secondary meaning).

[148] *See* Qualitex Co. v. Jacobson Prods. Co., Inc., 514 U.S. 159, 162–63 (1995) (affording trademark protection to "a special shade of green-gold color" on manufacturer's dry cleaning pads). However, colors can never be inherently distinctive, and thus always require a showing of secondary meaning to acquire trademark protection. *Wal-Mart*, 529 U.S. at 211.

[149] *See supra* notes 132–33.

Monochrome[150] is perhaps the best example of this, having achieved fame as International Klein Blue.[151] Because multiple colors are more distinctive than single colors, a multicolored work such as Mark Rothko's *No. 5/No. 22*,[152] a painting consisting of rectangles of different shades of yellow and red, would be more likely to be trademarkable than a work utilizing only a single color.[153] Nonetheless, functionality is a bar to trademarkability.[154] Thus, Duchamp's shovel, though famous, would unequivocally be denied trademark protection.

A major motivation behind Duchamp's work was his belief that "art [could] be a form of expression purely for the mind, rather than the eye."[155] This raises the question of whether certain types of recent art are not better suited to protection under state law idea protection than copyright, since the latter only extends to fixed, tangible objects.[156] Yet state law idea protection to artists varies from state to state and is typically very limited. First, idea protection only extends to "novel" ideas, which is similar to the standard of novelty in patent law.[157]

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[150] *See supra* note 5.

[151] *International Klein Blue*, WIKIPEDIA (Dec. 19, 2011, 9:27 PM), http://en.wikipedia.org/wiki/International_Klein_Blue. Klein was even able to obtain a chemical composition patent on his famous color from the French Patent Office. Yves Klein, International Klein Blue, French Patent. No. 63471 (issued May 19, 1960).

[152] Mark Rothko, *No.5/No.22* (1950), *available at* http://www.moma.org/collection/object.php?object_id=80566 (last visited Feb. 5, 2012).

[153] Of course, most, if not all, Rothko works would already be copyrightable under existing standards of originality due to their sufficiently complex mixtures of color and form. *See, e.g.*, Mark Rothko, *No.3/No.13* (1949) (consisting of rectangular blocks of green, black, white, purple, and yellow "hovering in a column against a [red] colored ground"), *available at* http://www.moma.org/collection/browse_results.php?criteria=O%3AAD%3AE%3A5047&page_number=10&template_id=1&sort_order=1 (last visited Feb. 5, 2012).

[154] 15 U.S.C. § 1115(b)(8) (2006); Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 n.10 (1982) ("[A] product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article."); *accord* TrafFix Devices, Inc. v. Mktg Displays, Inc., 532 U.S. 23, 32 (2001) (denying trademark protection to a wind-resistant sign protected by utility patents).

[155] DUTTON, *supra* note 8, at 194.

[156] *See* 17 U.S.C. § 102 (2006).

[157] For example, New York state contract law permits recovery for "misappropriation of an idea or theory" if "(1) the idea is novel; (2) the idea is in a concrete form; and (3) the defendant makes use of the idea." Sellers v. Am. Broad. Co., 668 F.2d 1207, 1210 (11th Cir. 1982) (denying protection of plaintiff's theory that Elvis Presley died of an adverse reaction induced by a mixture of prescription drugs); *see also* Lueddecke v. Chevrolet Motor Co., 70 F.2d 345 (8th Cir. 1934) (rejecting claim for idea misappropriation where the allegedly misappropriated idea lacked novelty). In New York, one may state a claim for idea misappropriation if the idea transmitted was novel to the recipient alone, even though the idea may have been previously known to others. Nadel v. Play-by-Play Toys & Novelties, Inc., 208 F.3d 368, 374–77 (2d Cir. 2000).

Second, state law idea protection is typically conditioned on contract law and thus requires privity of contract between the artist and the alleged infringer.[158] To prevail on a theory of idea misappropriation, a plaintiff must satisfy a markedly higher burden of proof than that of copyright law.[159] The requirements of novelty and contract privity in state law idea protection reflect the rationale that such protection was designed primarily to protect new ideas that were in the process of being developed, not the ideas behind already-finished artworks.

Other forms of intellectual property are thus unlikely to afford much protection to important categories of recent art. Ultimately, the principal mode of protection for "works of art" has historically been, and continues to be, copyright.[160] Accordingly, the standard of copyrightability in the current copyright scheme must be updated to afford protection to prominent works of recent art that are presently denied equal protection to other artworks.[161]

C. *The Need for Art Theory to Guide Adjudication*

The need for a principled basis for extending copyright to recent artworks can be seen in the *A.R.T. Co.* cases.[162] Because both *A.R.T.* cases involved the appropriation and framing of previously copyrighted work, they implicated the higher standard of copyrightability applicable to derivative works. Now imagine that the *A.R.T.* cases had involved the appropriation of a "mere object" not subject to copyright, such as Duchamp's shovel. Duchamp's shovel would be unlikely to be held to the higher standard for derivative works because shovels sold in hardware stores contain very few, if any, copyrightable elements.[163] Both circuits' discussions of whether the work was "sufficiently transformative" focused solely on mere physical traits of the work at issue. Neither court's rationale would have been able to accord protection to Duchamp's work because they failed to use a theory of art

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[158] State law idea protection is thus dependent on the applicable contract law of each state. For example, essential elements of a contract that are "vague, indefinite or incomplete" cannot be enforced under New York law. *Sellers*, 668 F.2d at 210.

[159] *See* Harry R. Olsson, Jr., *Dreams for Sale: Some Observations on the Law of Idea Submissions and Problems Arising Therefrom*, 23 LAW & CONTEMP. PROBS. 34–35, 54–55 (1958).

[160] *Cf.* 17 U.S.C. § 5(g).

[161] *See* Denicola, *supra* note 115, at 745 (lamenting the "de facto discrimination against nonrepresentational art that has regrettably accompanied much of the current analysis"); *accord* Brandir Int'l Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145 (2d Cir. 1987).

[162] *See* discussion *supra* Part II.C.2.

[163] *See supra* notes 97–102 (discussing Mazer v. Stein, 347 U.S. 201 (1954)).

in their analysis of the work's "transformational" qualities.[164]

Fortunately, the *Feist* "sweat of the brow doctrine" is no longer good law.[165] This paves the way for a standard of originality based on "artistic skill,"[166] independent of physical labor or manual precision. Because the new standard of originality would incorporate an understanding of art theory, it would be able to comprehend the aesthetic talent that birthed readymade art and abstract art.[167]

Brancusi v. United States,[168] a rare case that required a court to explicitly decide whether or not an object was an artwork,[169] demonstrates that courts are willing to engage aesthetic theories to distinguish art from non-art.[170] In *Brancusi*, the customs court was required to explicitly declare whether a claimed sculpture was mere industrial pipe, on which a customs tax was due, or whether it was a work of art, free from customs taxes.[171] Because the metal three-dimensional work, titled "Bird in Flight," did not look like a bird, the court had considerable difficulty dealing with the question of whether it was art.[172] To assist its decision, the court considered expert testimony on the nature of postmodern art and the art-status of Brancusi's work.[173] The court finally held the object to be an artwork

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[164] Note that in *Mirage Editions, Inc. v. Albuquerque A.R.T. Company*, the Ninth Circuit recognized that unique methods of framing an object could sufficiently "recast[] or transform[]" the object to generate a separately copyrightable artwork. *See* 856 F.2d 1341, 1344 (9th Cir. 1988). Under a figurative interpretation of the *Mirage* rule, Duchamp's shovel can be seen as a brilliant means of "framing" an ordinary artwork to allow others to see it as art. *Id.*

[165] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352–53 (1991). Also known as the "industrious collection" doctrine, some circuit courts had used this doctrine prior to *Feist* to afford copyright protection to certain works where sufficient labor and technical skill had been exerted in their creation, even if such works lacked originality. *See, e.g.*, Jeweler's Circular Pub. Co. v. Keystone Pub. Co., 281 F. 83, 88 (2d Cir. 1922), *overruled in part by Feist*, 499 U.S. at 352–53 ("The right to copyright a book upon which one has expended labor in its preparation does not depend upon . . . originality, either in thought or in language, or anything more than industrious collection.").

[166] *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976).

[167] *Cf.* Danto, *The Artworld*, *supra* note 1, at 581 ("What in the end makes the difference between a Brillo box and a work of art consisting of a Brillo Box is a certain theory of art.").

[168] Brancusi v. United States, 54 Treas. Dec. 428 (Ct. Cust. 1928).

[169] *Brancusi* is the United States case that perhaps came "closest to an open discourse with aesthetics." *See* Farley, *supra* note 14, at 849–50.

[170] *See id.* at 850 (lauding the *Brancusi* Court for being "explicit about its intuition, and [openly engaging] with competing ideas.").

[171] *See Brancusi*, 54 Treas. Dec. at 428–29.

[172] *See id.* at 429.

[173] *See id.* at 429–30.

and declared it free of customs duty.[174] In emphasizing Brancusi's profession as a sculptor and the testimony of the art critics to reach its holding, the customs court implicitly adopted Institutional Theory to reach its holding that the object constituted an artwork.[175]

Courts should reformulate a standard of originality that, consistent with copyright law's goals of promoting creativity and innovation, does not discriminate against recent forms of art.[176] Congress expressly reserved the standard of originality for judicial formulation,[177] noting that "[a]uthors are continually finding new ways of expressing themselves" and that "it is impossible to foresee the forms that these new expressive methods will take."[178] Congress specifically warned that the category of "pictorial, graphic, and sculptural works" not be limited by "artistic taste, aesthetic value, or intrinsic quality."[179] If art-status were dependent on judicial whims, "works of genius would be sure to miss appreciation," and works that by virtue of their modesty failed to catch a judge's fancy would likewise be ignored.[180]

Many forms of recent art, and the philosophies they have engendered, give us eyes to see the hidden splendor of "the lilies of the field,"[181] simple objects that otherwise go unnoticed in our daily routines. Readymade art possesses a singular ability to call our attention to the sublimity of ordinary objects.[182] Accordingly, the philosopher Arthur Danto calls such art "transfigurations of the

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[174] *Id.*

[175] *See* Farley, *supra* note 14, at 849–50; *see also* discussion of Institutional Theory, *infra* Part IV.A.6.

[176] *See* Gary Horowitz, *The Case for the Designer Belt Buckle: The Problem of Copyrighting Utilitarian Objects*, 6 ART & L. 59, 63 (1981) (arguing that copyrightability should extend to artistically designed functional works); *but see, e.g.*, Petruzzelli, *supra* note 62, at 129–34 (arguing that the originality standard should not be expanded to accommodate modern art because "the whole point of post-modernism is to question the meaning of art . . . [p]ost-modernists do not need the economic incentives of [copyright]").

[177] *See supra* text accompanying note 28.

[178] HOUSE REPORT, *supra* note 28, at 51.

[179] *Id.* at 54.

[180] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903).

[181] *Cf. Matthew* 6:28 (New International Version).

[182] In the words of Ch'ing-yüan:

> Before I had studied Zen for thirty years, I saw mountains as mountains and waters as waters. When I arrived at a more intimate knowledge, I came to the point where I saw that mountains are not mountains, and waters are not waters. But now that I have got the very substance I am at rest. For it is just that I see mountains once again as mountains, and waters once again as waters.

Danto, *The Artworld*, *supra* note 1, at 579 (quoting Ch'ing-yüan Wei-hsin).

commonplace."[183] By elevating to art-status neglected objects, these works satisfy the "noble instinct for giving the right touch of beauty to common and necessary things."[184] Equity demands that Duchamp, who originated the class of readymade artworks, and other postmodern artists, should not be denied the benefit of copyright protection.

Every new style of artwork enriches the Artwork with its inclusion.[185] Copyright law has the opportunity to encourage the proliferation of artistic creativity by affording equal protection to postmodern artists. The copyright paradigm must actively comprehend "the evolving standards of [aesthetics] that mark the progress of a maturing [Artworld]."[186] Ensuring that recent forms of art qualify for such protection is consistent with the history of copyright law, which has involved "gradual expansion in the types of work accorded protection," and which has accommodated "forms of expression, which . . . have only gradually come to be recognized as creative and worthy of protection."[187] The current state of the originality doctrine neither effectively excludes from copyright commonplace mass-produced objects,[188] nor effectively includes within copyright many recent forms of art.

IV. TOWARDS AN ART-THEORETICAL BASIS FOR COPYRIGHT LAW

Art often requires explanation to be perceived as art. A title often

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[183] *See* DANTO, TRANSFIGURATION OF THE COMMONPLACE, *supra* note 87, at v.

[184] G.K. CHESTERTON, SIMPLICITY AND TOLSTOY 61 (1912); *accord* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 170 (1995).

[185] *See* Danto, *The Artworld*, *supra* note 1, at 583–84 (explaining that the first artwork in a new style *H* doubles the available style opportunities in the Artworld, and enriches the entire community of artworks by granting to each previous work the style non-*H* in addition to the work's other style predicates).

[186] *Cf.* Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that the Eighth Amendment must be interpreted according to evolving standards of decency in modern society); *see* Farley, *supra* note 14, at 808–09 (stating that "law should acknowledge aesthetics . . . and its approaches for assistance in resolving cases in which the determination of an object's art-status is necessary"); *see also* ARTHUR C. DANTO, AFTER THE END OF ART 47 (1997) ("[A]t first only mimesis [imitation] was art, then several things were art but each tried to extinguish its competitors, and then, finally, it became apparent that there were no stylistic or philosophical constraints. There is no special way works of art have to be. And that is the present and, I should say, the final moment in the master narrative.").

[187] HOUSE REPORT, *supra* note 28, at 51.

[188] *See* Comment, *Copyright Protection for Mass-Produced, Commercial Products: A Review of the Developments Following* Mazer v. Stein, 38 U. CHI. L. REV. 807, 812 (1971) [hereinafter Comment on Mazer v. Stein]; *accord* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 489, 492 (2d Cir. 1976).

provides some interpretive guidance:[189] *In Advance of a Broken Arm* bestows upon an otherwise ordinary factory-made shovel the element of humor.[190] Unfamiliar works often require explanation by way of theory and history in order to be understood as art. The major focus of the philosophy of art for the past two centuries has just been to provide such a theory of art.[191] A major difficulty of this philosophical project has been the continual exploration of changing social norms and conventions by artists themselves.[192] While this Article in no way claims to have arrived at a comprehensive definition of art, it does argue that law should be informed by aesthetic theory in making determinations of art-status.[193] Accordingly, this section explores the major theories of art with a view to attract the most congruent theory to the counsel of copyright law. During the exploration, this section solicits help towards this goal from actual artworks of paint, pencil, sound, and sculpture.

A. *Theories of Art*

This section explores the major philosophical theories of Representationalism (including Imitation Theory), Expressionism, Formalism, Aesthetic Experience Theory, Neo-Wittgensteinism, Institutional Theory, and the Historical Definition of Art.[194]

1. Representationalism

The earliest known theories of art focused on imitation, or mimesis.[195] Both Plato and Aristotle maintained that the essence of art was imitation.[196] Imitation Theory was able to explain much of art

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[189] *See* DANTO, TRANSFIGURATION OF THE COMMONPLACE, *supra* note 87, at 3 ("A title is more than a name; frequently it is a direction for interpretation or reading.").

[190] *See* CARROLL, *supra* note 13, at 223. "Mere things" are unentitled to titles just because they do not warrant this mode of understanding.

[191] *See* PETER KIVY, PHILOSOPHIES OF ARTS ix–x (1997).

[192] *See* WALTER BENJAMIN, THE WORK OF ART IN AN AGE OF MECHANICAL REPRODUCTION (1955), *reprinted in* ILLUMINATIONS 217, 237 (Hannah Arendt ed., Harry Zohn trans., 1968). ("The history of every art form shows critical epochs in which a certain art form aspires to effects which could be fully obtained only with a changed technical standard, that is to say, in a new art form."); DARIO GAMBONI, THE DESTRUCTION OF ART 257 (1997) ("[T]o imagine a new art, one must break the ancient art.").

[193] *See* Farley, *supra* note 14, at 808–09.

[194] Note that these theories often have multiple variations. This section provides an overview of each theory's primary themes, strengths, and weaknesses.

[195] *See* KIVY, *supra* note 191, at 4–5.

[196] Danto, *Transfiguration Article*, *supra* note 20, at 144. Note that Plato and Aristotle's agreement about the essence of art led them to disagree about art's usefulness to society. Plato,

throughout history, and was accepted as the prevailing theory as late as the eighteenth century.[197] The theory has great explanatory power with regard to realistic sculptures like Michelangelo's *David*[198] and stylized paintings such as da Vinci's *The Last Supper*.[199]

Representationalism expanded imitation theory in embracing art that symbolized or stood for a subject, without requiring imitation *per se*.[200] Thus were the Celtic High Crosses of Muirdeach[201] and Moone[202] works of art, representing divinity crucified as a perfect circle superimposed on a cross. Nonetheless, classical representationalism's requirements of imitation or symbolism still excluded absolute music[203] such as Beethoven's Symphony No. 9[204] and abstract art such as Rothko's *No. 5/No. 22*[205] and Klein's *Blue Monochrome*,[206] which consist of pure color.

Neorepresentationalism responded to these abstract examples by reformulating the "representativeness" requirement more loosely as the condition of interpretability.[207] Under neorepresentationalism, a work can be an artwork if and only if it contains "semantic content": a subject about which it makes some comment or observation.[208] Artworks admit of interpretation just because they hold semantic

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in his Republic, asserted that art was dangerous insofar as it promoted imitation and appealed to emotions, and that artists should be excluded from the ideal state. Conversely, Aristotle believed that people could learn from imitations and drama, especially regarding human affairs. *See id.*

[197] CARROLL, *supra* note 13, at 19–26.

[198] Michelangelo di Lodovico Buonarroti Simoni, *David* (c. 1501-1504).

[199] Leonardo da Vinci, *The Last Supper* (c. 1495-1498).

[200] *See* Danto, *Transfiguration Article*, *supra* note 20, at 146.

[201] High Cross of Muirdeach, County Louth, Ireland (c. 900).

[202] High Cross of Moone, County Kildare, Ireland (c. 8th Century A.D.).

[203] *See* KIVY, *supra* note 191, at 41–43.

[204] Ludwig Van Beethoven, Symphony No. 9 in D minor, Op. 125 Choral, Finale (1824).

[205] *See* Rothko, *supra* note 152.

[206] *See* Klein, *supra* note 5.

[207] *See* Danto, *Transfiguration Article*, *supra* note 20, at 147.

[208] *See* CARROLL, *supra* note 13, at 26–27. Note that Carroll's description of neorepresentationalism supplies only the necessary condition "only if" without supplying a sufficient condition. Thus, the theory avoids overinclusion of insipid writings that are merely "about" something without offering any aesthetic experience to the reader. *See* discussion of Aesthetic Experience Theory, *infra* Part III.A.4. Danto alternatively formulated the neo-representationalist requirement that the artwork be "about something," or minimally, a work for which "the question of what they are about may legitimately arise." DANTO, TRANSFIGURATION OF THE COMMONPLACE, *supra* note 87, at 82. Thus, Danto sought to include works of visual art or absolute music that are not about anything, but for which it at least *makes sense* to ask what they are about. *See* KIVY, *supra* note 191, at 40–42.

content.[209] Danto argues that "a culture has a concept of art," an Artworld, only insofar as it has made this philosophical distinction between interpretable and noninterpretable works.[210] This theory came to explain a great many works, because most art is about a subject and therefore requires interpretation.[211] Neorepresentationalism can explain the art-status of the readymades: Duchamp's shovel is about something, if nothing other than the nature of art itself.[212] One might argue that neorepresentationalism would make every object into a work of art, since ordinary shovels are about shoveling snow and elevators are about moving objects vertically. However, this argument confuses an object's created purpose or function with its capacity for semantic commentary. An ordinary snow shovel is capable of being used to shovel snow; it does not comment on the difference between reality and the Artworld unless formally presented as an artistic commentary.[213]

Yet neorepresentationalism was still underinclusive because it failed to account for many artworks that did not have semantic content (are not about anything), and were therefore beneath interpretation. Certain non-representational architectural or decorative artworks, such as David Yurman earrings or non-symbolic Christmas tree ornaments, fall into this category. Such objects "are not *about* beauty; they are beautiful."[214] A work that possesses a property does not make the work about that property, in the same way that *The Bluebook*[215] is not about its blue cover.

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[209] A shovel that is not an artwork is not "about nothing," but merely "not about anything," for an object can only be about the subject "nothing" when it has the ontological status of an artwork. *See* Danto, *Transfiguration Article, supra* note 20, at 142.

[210] *Id.*

[211] *See* CARROLL, *supra* note 13, at 29.

[212] *See id.* at 28–29. Certain readymades in the "Dadaist" tradition may have been created in an attempt to deconstruct art by showing that there is no difference between art and real things. *See id.* at 30. Thus, a skeptical Dadaist may argue that his readymades are not about anything. Indeed it is difficult to say what Duchamp's shovel, as a mere physical object disconnected from art history, is "about." But once recognized as an artwork, the shovel will be interpreted, perhaps in precisely the deconstructionist manner the skeptic intended. Thus, the skeptic's argument is self-refuting. Readymades, as artworks expounding philosophies of art, reveal that philosophies of art are themselves artworks. *See* Danto, *Transfiguration Article*, *supra* note 20, at 148.

[213] *See* Danto, *Transfiguration Article, supra* note 20, at 148 ("[W]hat [readymades] are about is aboutness, and their content is the concept of art."). For a further explanation of why ordinary snow shovels are not artworks, see the discussion of Institutional Theory, *infra* Part III.A.6.

[214] CARROLL, *supra* note 13, at 32 (emphasis added).

[215] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

2. Expressionism

Expressionism regards the expression and communication of emotion as the *sine qua non* of art. Variations of expressionism were propounded from the beginning to middle of the mid-twentieth century.[216] The theory accorded art-status to a work if and only if the work was intended to transmit to an audience a refined expression of emotion or feeling.[217] This theory explained much of Romantic and Impressionist art, which emphasized individual experience and emotion. For example, Van Gogh's *The Starry Night*[218] and Munch's *The Scream*[219] are not primarily representational but rather emotive: they serve to display the artist's impression and perspective. Expressionism was also able to comprehend the art-status of absolute music, whose abstract nature posed significant difficulties for representationalism.[220] Many musical pieces evoke their intended emotions of sadness or wistfulness in their listeners in very compelling manner.

However, expressionism came into question because not all artworks were intended to be expressions of emotion. For example, it is difficult to argue that the White House's architectural columns, or Andy Warhol's *Campbell's Soup Cans*,[221] which consist of 32 identical paintings of Campbell's soup cans in an eight-by-four grid, were intended to express emotion.[222] Likewise, fractals and musical arpeggios, such as those contained in Chopin's *Black Key Etude*[223] are denied art-status under expressionism since, though beautiful, they are ultimately dictated by a mathematical equation and not by expressions

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[216] *See* CARROLL, *supra* note 13, at 61.

[217] *See id.* at 65.

[218] Vincent Van Gogh, *The Starry Night* (1889), *available at* http://www.moma.org/collection/object.php?object_id=79802 (last visited Feb. 5, 2012).

[219] Edvard Munch, *The Scream* (1895), *available at* http://www.moma.org/collection/browse_results.php?criteria=O%3AAD%3AE%3A4164&page_number=13&template_id=1&sort_order=1 (last visited Feb. 5, 2012).

[220] *See supra* note 203 and accompanying discussion.

[221] Andy Warhol, *Campbell's Soup Cans* (1962), *available at* http://www.moma.org/collection/browse_results.php?object_id=79809 (last visited Feb. 5, 2012).

[222] Even though the White House's architectural columns might evoke emotion in the beholder, the key question for determining art-status under expressionism is whether the artist intended the work to express emotion.

[223] Frédéric Chopin, Étude Op. 10, No. 5, in G-flat major (1833), *available at* http://www.cfeo.org.uk/apps/ (hyperlink "Etudes Op. 10"; then follow "Etude No. 5"; then follow "p. 20 bs 1-18") (last visited Nov. 26, 2011). Though Chopin's *Black Key Etude* is as a whole an emotive work, it contains many arpeggios that, in isolation, can be understood as simple harmonious mathematical relations.

of individualized emotion. Thus, while emotive expression helps to explain a large portion of art, it cannot be a necessary condition of a comprehensive definition of art.

3. Formalism

The theory of formalism was largely articulated in response to the increasing advance of recent art forms, evolving from impressionism to cubism to abstract art. Tracing its heritage to Kant's views on form and aesthetic value, Formalism was most influentially advanced by Clive Bell in the early-to-mid twentieth century.[224] The theory claims that an object is a work of art if and only if it is designed primarily in order to display significant form.[225] For visual art, form consists of the structure of the work, including arrangements of "lines, colors, shapes, spaces, [and] vectors."[226] With regard to musical works, form denotes the work's musical structure and arrangement of notes and sounds. This theory was able to contemplate abstract art that defied traditional representationalist and expressionist explanations, such as Frank Stella's *Memantra*,[227] a freestanding sculpture composed of a complex interposition of stainless steel tubing, carbon fiber and a carbon epoxy composite slab. At the same time, formalism retained explanatory power with regard to classical representational works, most of which possess significant form. Because the vast majority of musical works were composed to display their form, much of the music that was inscrutable under representationalism was amenable to explanation by formalism.

Significant counterexamples to formalism could be found in contemporary works such as Pollock's "drip paintings," and aleatoric musical pieces. For example, Pollock's *One: Number 31*,[228] consists of free-flowing paint lines of different colors liberally interposed on a roughly nine-by-seventeen foot rectangular canvas. The chaotic mixture of color and texture that resulted could not be captured under formalism because it lacked formal structure.[229] John Cage's *4' 33"*[230]

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[224] *See generally* CLIVE BELL, ART (1913).

[225] *See* CARROLL, *supra* note 13, at 114.

[226] *Id.* at 109.

[227] Frank Stella, *Memantra* (2005), *available at* http://www.artnet.com/artwork/426119746/425933466/frank-stella-memantra.html (last visited Nov. 26, 2011).

[228] Jackson Pollock, *One: Number 31* (1950), *available at* http://www.moma.org/explore/multimedia/audios/3/73 (last visited Feb. 5, 2012).

[229] *But see* Richard P. Taylor et al., *Fractal Analysis of Pollock's Drip Paintings*, 399 NATURE 422, 422–23 (1999) (applying physical fractal analysis to Pollock's works and asserting that the fractal dimensions of Pollock's patterns increased during Pollock's career).

instructs a pianist to sit at a piano but not to strike the keys, so as to merely allow any ambient sounds, such as pages flipping or vehicles passing by, to comprise the work for the next four minutes and thirty three seconds.[231] Because the piece consists entirely of "found sounds," there is no structured order. Formalism faced similar difficulty explaining "found art" such as Duchamp's shovel, for if that particular shovel was deemed to have significant form, it would be difficult to explain why any other shovel would be excluded from the Artworld. Classical formalism was especially criticized for its complete severance of form from content, as it instructed artists and philosophers alike to ignore content in their pursuit of pure form.[232]

Seeking to address the shortcomings of traditional formalism, Arthur Danto advanced the theory of neoformalism.[233] Neoformalism, which traced its roots to Hegel, offered a more comprehensive definition of art with its insight that form must be related to content.[234] Form is the mode of expression of the artwork, and content is its substance or meaning.[235] In other words, neoformalism added to neo-representationalism's necessary condition of "semantic content" a sufficient condition that a work is art if it weds such content with "significant form."[236] Neoformalism was powerful in explaining the categories of abstract art inexplicable under classical formalism. For example, neoformalism explained that readymade works, such as Duchamp's shovel, are artworks by virtue of their economy. They communicate visually what would otherwise take a philosophical tome to express.[237] And where Cage's work was meant to draw attention to the everyday sounds that go unnoticed, his work provides an ideal form to express this meaning.[238]

Nonetheless, neoformalism faced major difficulties in attempting to define "significant form."[239] Form could not be too broadly defined, for as Leibniz noted in his *Discourse on Metaphysics*, even the most

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[230] John Cage, *4' 33"* (1952), *available at* http://www.medienkunstnetz.de/works/4-33/ (last visited Nov. 26, 2011).

[231] CARROLL, *supra* note 13, at 119.

[232] *See* KIVY, *supra* note 191, at 24–27.

[233] *See generally* DANTO, AFTER THE END OF ART, *supra* note 186.

[234] *See* CARROLL, *supra* note 13, at 131.

[235] *Id.* at 126.

[236] *See id.* at 131, 153.

[237] *See* Danto, *The Artworld*, *supra* note 1, at 581 ("What in the end makes the difference between a Brillo box and a work of art consisting of a Brillo Box is a certain theory of art.").

[238] CARROLL, *supra* note 13, at 120.

[239] *Id.* at 120–21.

seemingly erratic design can be formally captured by a mathematical equation.[240] Form had to be analyzed according to properties of the artwork, components of the artwork smaller than the whole, to avoid attributing form to every physical object. So neoformalism included the requirement of "significant form." However, any such definition of "significant form" includes calculations of degree, which is impossible for any theory of art to define in a nonarbitrary manner. Art is a binary concept; something either is a work of art or it is not,[241] so percentage calculations of form are inherently flawed. By setting the requirement of significant form sufficiently high to prevent everyday objects such as white picket fences or cobblestone walkways from becoming artworks, neoformalism excluded from the Artworld minimalist art such as Kazimir Malevich's *Black Square*[242] or Ad Reinhardt's *Abstract Painting*,[243] which consist simply of black squares.

4. The Aesthetic Definition of Art

The Aesthetic Definition (AD) of Art focuses on the distinctly contemplative experience that art provides to its viewers or listeners. The theory asserts that what makes art unique is that artworks alone were created with the intent to transport their audiences into the state of sympathetic and meditative introspection known as the "aesthetic experience."[244] AD is comprehensive in that it claims that all art, and only art, is unified by the intention to enable this singular experience.[245] Like any good theory, AD allows for the existence of bad art, which is what results when the artist's intention to provide an aesthetic experience is not realized. It is important to recognize that intent can be inferred through circumstantial evidence. The aesthetic intent of an artist who exhibits precise calculations in her work's color, sound, structural arrangement, ornate decorativeness, and internal unity, is often facially obvious.[246] If an artist claims to be motivated by a desire to present an aesthetic experience through his artwork, but actually

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[240] *See* GOTTFRIED W. LEIBNIZ, DISCOURSE ON METAPHYSICS (1686), *reprinted in* DISCOURSE ON METAPHYSICS AND RELATED WRITINGS 39, 43–44 (R. N. D. Martin & Stuart Brown eds. trans., 1988).

[241] CARROLL, *supra* note 13, at 135.

[242] Kazimir Malevich, *Black Square* (1915), *available at* http://www.russianpaintings.net/articleimg/malevich/malevich_black.jpg (last visited Feb. 5, 2012).

[243] Ad Reinhardt, *Abstract Painting* (1963), *available at* http://www.moma.org/collection/object.php?object_id=78976 (last visited Feb. 5, 2012).

[244] *See* CARROLL, *supra* note 13, at 160.

[245] *Id.* at 160–64.

[246] *Id.*

produces a banality such as John Baldessari's *I Will Not Make Any More Boring Art*,[247] it will be difficult for a rational audience to believe the artist. This is because Baldessari's piece consists entirely of the words of its title, copied *ad nauseam* in horizontal lines down a 22" x 29" plain white sheet. No artist who satisfied the legal standard of competence could seriously have intended this artwork to engender a sympathetic, contemplative state in its viewers. A similar commentary could be made about Ligeti's *Poème Symphonique for 100 Metronomes*,[248] which consists solely of one hundred metronomes running down.[249]

There are two primary versions of AD, one of which defines aesthetic experience in terms of qualities inherent in the object, and the other which references the audience's response. The first version, the content-oriented AD, examines a work for the aesthetic properties of unity, diversity, and intensity.[250] These aesthetic properties necessarily draw their existence and quality from the work's nonaesthetic properties, such as shape, sound, structure, and symmetry.[251] The unity of a work is measured by its coherence, whether in terms of analogous properties such as complementary colors, repeated designs, or interrelated themes.[252] Diversity, which has an inversely proportional relationship with unity,[253] measures the variety of expressions such as words, sounds, and visual forms in a piece.[254] Intensity looks at the degree to which a work exhibits aesthetic properties,[255] such as the exuberance in Beethoven's Symphony No. 9's choral finale[256] or the elegance of Tchaikovsky's *Swan Lake*.[257] Because unity, diversity, and intensity are present in a great variety of artworks, even bad artworks,

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[247] John Baldessari, *I Will Not Make Any More Boring Art* (1971), *available at* http://www.moma.org/collection/browse_results.php?object_id=59546 (last visited Feb. 5, 2012).

[248] György Sándor Ligeti, *Poème Symphonique for 100 Metronomes* (1962).

[249] *See* CARROLL, *supra* note 13, at 165.

[250] *Id.* at 168–70. For a discussion of aesthetic versus nonaesthetic properties, see generally Frank Sibley, *Aesthetic and Nonaesthetic*, 74 PHIL. REV. 135 (1965).

[251] *See* Sibley, *supra* note 250, at 138.

[252] *See generally* Frank Sibley, *Aesthetic Concepts*, 68 PHIL. REV. 421 (1959) (discussing the nature and linguistic use of aesthetic concepts). Sibley appreciates that there is an inherently intuitive and "characteristically human" kind of awareness that informs aesthetic understanding. *Id.* at 450.

[253] *See* CARROLL, *supra* note 13, at 169.

[254] *Id.*

[255] *Id.*

[256] Ludwig van Beethoven, Symphony No. 9 in D minor, Op. 125, Choral, Finale (1824).

[257] Pyotr Ilyich Tchaikovsky, *Swan Lake* (1876).

the content-oriented AD is a very encompassing theory. For example, even Baldessari's work that promises not to make boring art[258] exhibits remarkable unity by virtue of its repeating motif. However, because AD requires that the art be designed with the intention of producing aesthetic experience, the banality would still be denied art-status.[259] The content-oriented version of AD also fails because some artworks are intended to be neither diverse nor intense, but simply interesting, as in Duchamp's *Paris Air*,[260] which is a vial of air bottled in Paris.[261]

The second version of the theory, the affect-oriented AD, focuses on the audience's response to an artwork as the critical factor that defines art. This version asserts that all art is created with the intention to produce the "disinterested" yet "sympathetic" response which art alone can provide.[262] In the Artworld, art is often valued and lauded for its ability to produce in its audience a "disinterested" response, characterized by an audience's contemplation of the work *as art*, unprejudiced by the viewer's prior moral or political biases.[263] A "sympathetic" response to an artwork is one where an audience is guided by the work to interpret it according to the artist's emphases, meanings, and purposes for the work.[264] Thus Enya's *May it Be*[265] soothes the listener and invites reflection; Yiruma's *Kiss the Rain*[266] provides an opportunity for philosophical contemplation.

For all its explanatory power, the affect-oriented AD has been criticized for being contradictory in its terms. It is not easy to see how

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[258] *See* Baldessari, *supra* note 247.

[259] To understand why Baldessari created *I Will Not Make Any More Boring Art*, it is helpful to discern Baldessari's artistic mindset at the time. Baldessari may have created the work as an exploratory foray into conceptual art. One art volume reports, "In July of 1970, disillusioned with the state of painting in the 1960s, John Baldessari burned many of his early landscapes and abstractions. By then he had abandoned the painterly conventions he found alienating and was making canvases using photographs and texts. Works like *I Will Not Make Any More Boring Art*, his first print, demonstrate his thinking at the time and his developing interest in Conceptual art." DEBORAH WYE, ARTISTS AND PRINTS: MASTERWORKS FROM THE MUSEUM OF MODERN ART 188 (2004).

[260] Marcel Duchamp, *Paris Air* (1919).

[261] The intention of the work was not to be unified, diverse, or intense, but rather to mock the bias of art critics and curators towards Parisian art and culture. *See* CARROLL, *supra* note 13, at 181.

[262] *See* CARROLL, *supra* note 13, at 170–73.

[263] The aesthetic qualities of a work provide the "something more" that allows the otherwise "simple objects of sense perception" to become "esoteric" works of transformative power. *See* Sibley, *Aesthetic Concepts*, *supra* note 247, at 438.

[264] *See* CARROLL, *supra* note 13 at 171.

[265] Enya, *May it Be*, *on* THE LORD OF THE RINGS: THE FELLOWSHIP OF THE RINGS (ORIGINAL MOTION PICTURE SOUNDTRACK) (Reprise/WEA 2001).

[266] Yiruma, *Kiss the Rain*, *on* FROM THE YELLOW ROOM (EMI 2003).

one can be both disinterested and sympathetic towards the same work, for the two states of mind seem mutually exclusive. This criticism especially rings true of works that seek to make a political or religious statement, such as Upton Sinclair's *The Jungle*[267] or the Picasso's *Guernica*,[268] which were intended to incite the viewer to action by presenting a moral injustice. It would be a gross mischaracterization to assert that these works were intended to produce a disinterested, idyllically contemplative stance in a viewer. A further criticism of the affect-oriented AD recognizes that a viewer's response to an object is often dependent upon the art-status of the work. For example, one could potentially regard Duchamp's shovel in a disinterested and sympathetic manner once he is informed that it is an artwork. But the fact that most people do not regard the shovels in their garages in a similar fashion demonstrates that definition conditions interpretation.[269]

5. Neo-Wittgensteinianism

Thus far all of the major theories of art, while having considerable explanatory power with regard to certain categories of art, have failed as comprehensive theories because they have excluded too many works from the Artworld. This failure caused philosophers in the mid-twentieth century to suspect that the concept of art could not be defined in terms of necessary and sufficient conditions.[270] Neo-Wittgensteinianism (NW) asserts that "'Art,' itself, is an open concept" that must be capable of embracing radical change.[271] Drawing from the linguistic philosophy of Ludwig Wittgenstein, philosophers in the mid-twentieth century began to rely on "family resemblances" to define art.[272] The family resemblance method classifies art according to the manner in which we naturally describe categories: "If one asks what a game is, we pick out sample games, describe these, and add, '[t]his and

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[267] UPTON SINCLAIR, THE JUNGLE (1906).

[268] Pablo Picasso, *Guernica* (1937).

[269] *See supra* notes 186–87 and accompanying discussion.

[270] *See* Danto, *Transfiguration Article*, *supra* note 20, at 141 (stating that "definition is incompatible with revolution, and it is analytical to the concept of art that the class of artworks may always be revolutionized by admission into it of objects different from all heretofore acknowledged artworks"); *cf.* Sibley, *Aesthetic Concepts*, *supra* note 252, at 435 (arguing that "taste concepts are not and cannot be condition- or rule-governed").

[271] Morris Weitz, *The Role of Theory in Aesthetics*, 15 J. AESTHETICS & ART CRITICISM 27, 32 (1956).

[272] *Id.* at 30–32.

similar things are called 'games.'"[273] Similarly, changes in art forms are accounted for by comparing resemblances between newly claimed artworks and firmly established artworks.[274] In dismissing the project of defining art according to conditions, however, NW does not declare all previous theories useless. Rather, it seeks to rehabilitate them as theories of art criticism.[275] Representationalism, for example, has great value as an art historical theory in that it aids critics in understanding the aims and judging the value of artworks from bygone eras.

Yet the family resemblance method, though perhaps initially convincing, results in too open a concept for art.[276] After declaring Duchamp's shovel to be a work of art, NW has no means of excluding any other snow shovel. By relying on "family" resemblances without meaningfully restricting the relevant resemblance criteria, NW finds itself declaring not only that any kind of thing *could be* an artwork, but that everything actually *is* an artwork.[277] Thus it was necessary for subsequent theories to return to a definitional, condition-based approach to art theory.[278]

6. The Institutional Theory of Art

In adopting a procedural approach to art definition, the Institutional Theory (IT) of Art makes a clean break from previous theories, which have focused on whether an object was intended to perform a specific function.[279] Instead, IT emphasizes the primacy of the role that "agents" of the Artworld—its artists, art audiences, critics, curators, and philosophers—play in defining art. IT holds that a work is art if and only if an agent acting on behalf of the Artworld puts forth the work for appreciation as art.[280] The act of nominating a work for appreciation creates a rebuttable presumption that it is an artwork, until and unless it is later rejected by the Artworld. Because agency action

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[273] *Id.* at 31. (italics omitted).

[274] *Id.*

[275] CARROLL, *supra* note 13, at 216.

[276] *See* Lewis K. Zerby, *A Reconsideration of the Role of Theory in Aesthetics—A Reply to Morris Weitz*, 16 J. AESTHETICS & ART CRITICISM, 253, 253-55 (1957).

[277] CARROLL, *supra* note 13, at 212–16.

[278] *See id.* at 215–16; Zerby, *supra* note 276, at 254–55.

[279] Generally speaking, the purported functions of art that prior theories advanced were that all art variously imitated or represented reality, expressed emotion, united form with content, or provided an aesthetic experience. *See* discussion *supra* Parts IV.A.1–IV.A.5.

[280] *See* GEORGE DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS 464 (1974). Professor Dickie first presented the Institutional Theory in his 1974 book, and later revised the theory in ART CIRCLE: A THEORY OF ART (1997).

is so central to IT, the theory takes considerable care to define its limits. An agent of the Artworld is someone who, by virtue of his knowledge, experience, and comprehension of the Artworld and its history, has authority to act on its behalf.[281] IT may thus seem elitist, but it expressly avoids discrimination against persons based on race, sex, or gender, instead focusing on aesthetic acculturation, an art-relevant attribute. Operating as a meritocracy, the Artworld accepts as its agents any and all persons who accumulate sufficient knowledge, experience, and understanding of art theory and history.

IT recognizes that all definitions of art involve considerable calculations of degree or aesthetic taste regarding their critical terms, and therefore invite substantial disagreement as to the works they deem to be art. This is perhaps most apparent in formalism's requirement of "significant form,"[282] but is inescapable in the other theories as well. For example, the content-oriented aesthetic definition requires one to determine degrees of unity, diversity, and intensity in order to recognize an artwork.[283] Expressionism involves determining the degree to which an emotion is refined and transmitted through the medium of the artwork.[284] Thus the principle advantage that IT provides is to make explicit the degree to which a work's art-status involves the exercise of aesthetic judgment by art critics and audiences. By allowing experts the freedom to welcome prophetic or *avant-garde* works into the Artworld, IT defeats the Neo-Wittgensteinian criticism that art-definitions necessarily preclude future innovation and experimentation. IT eagerly accepts the challenges presented by readymades, abstract art, found sounds, and other revolutionary pieces that proved difficult for many prior art theories.

Nevertheless, IT is not without significant difficulties as a comprehensive theory. To begin with, it has been questioned whether the description of the Artworld as a formal institution is a misuse of language.[285] This argument asserts that traditional institutions, such as the American Bar Association or the Anglican Church, have in place formal procedures and requirements that must be met before the institutions will bestow authority upon their agents. One needs a license to practice medicine, and admission to the patent bar to practice

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[281] *See* CARROLL, *supra* note 13, at 229-30.

[282] *See supra* notes 239–41 and accompanying text.

[283] *See supra* notes 250–61 and accompanying text.

[284] *See supra* Part IV.A.2.

[285] *See* Noel Carroll, *Art, Practice, and Narrative*, *in* BEYOND AESTHETICS 65 (Cambridge 2001).

before the US Patent and Trademark Office. A formal training regimen must be completed and an examination must be passed. On the other hand, artists are largely independent and self-elected. To date there are no universally required art examinations, nor are there formal restrictions on becoming an art historian, curator, or philosopher. Hence, in what sense are these agency roles defined, and how can one legitimately call the Artworld a formal institution? This argument can be answered in at least two ways. The first is to note that the question is increasingly answering itself: there is an increasing requirement in recent times for artists to undertake formal training or obtain a degree before practicing professionally. Art curators at the Metropolitan Museum of Art or the Museum of Modern Art uniformly have formal training in art history, and philosophers of art are universally required to have a graduate degree in philosophy before being granted a professorship. A second response is that the Artworld as an institution is self-governing, if not by formal requirements then at least by social conventions. A person who claims that he is acting on behalf of the Artworld institution in granting an *avant-garde* work art-status does so by defending his conclusion before the Artworld with reference to art history, theory, and analogy to similar artworks. If during his exposition he reveals a lack of sufficient art knowledge or understanding, his claim to be an agent of the Artworld is revealed to be vacuous, and will be ignored or rejected.

However, more serious criticisms have been leveled against IT. First, even well trained and knowledgeable experts (perhaps especially experts) disagree. If there are no formal requirements on aesthetic judgment to inform expert decisions, the results will ultimately be arbitrary. IT offers insufficient bounds to prevent art-judgments from becoming a popularity contest that confers art-status based solely on the number and social prestige of experts that vouch for it. Second, IT has no way to account for artworks created outside a social setting, such as solitary works. An example is offered wherein a Neolithic tribesman, who has never seen art before, arranges a series of stones in an artistic fashion.[286] IT cannot confer art-status on this work because neither the creator of the work nor his tribesmen had developed a sufficient concept of an Artworld to present the work as an object of appreciation.[287] This remote example demonstrates that art necessarily has historical context and origin. A successful theory of art, if it aims to be comprehensive, is well advised to take this into account.

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[286] *See* CARROLL, *supra* note 13, at 235.

[287] *See id.* at 237–39.

7. The Historical Definition of Art

The Historical Definition (HD) of Art is an extension of IT that seeks to answer IT's two major criticisms by placing formal, objective requirements on artworks and by connecting artworks to their historical lineage.[288] IT also borrows from NW's rehabilitative view of art theory, which views previous theories of art as useful explanatory guides in understanding art movements, even if such theories were not comprehensive in scope.[289] Therefore, HD seeks to synthesize the major theories of art discussed above by understanding art with reference to historical context.[290] Much like judicial precedent, the well-established theories of Representationalism, Expressionism, Formalism, and Aesthetic Experience Theory described above, termed *art regards*, serve as precedents to establish the art-status of a work of art.[291] The Historical Definition is capable of adopting new works of art through comparison to established works via the definitional method of family resemblance expounded by neo-Wittgensteinianism.[292] After a *prima facie* case of family resemblance between the proposed work and well-established art regards has been established, the new work is then presented for consideration by the Artworld. If the new work is subsequently accepted in a manner prescribed by Institutional Theory,[293] the work will have formally qualified for art-status under the Historical Definition.[294] HD thus has a strong practice argument in its favor, namely that it explains art in the same manner that we naturally evaluate art: through comparison and not definition according to necessary and sufficient terms. Moreover, HD seeks to bar entrance of non-artworks into the Art-world by requiring artists and curators, as in Institutional Theory, to explain how the new works closely resemble and incorporate elements in artworks of other art regards. HD is thus capable of excluding works that bear no resemblance to previous art

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[288] *See* Carroll, *supra* note 282, at 63 (stating that the question "'What is art?' predominantly concerns the nature and structures of the practices of art—things . . . that are generally best approached by means of historical narration").

[289] *See supra* note 275 and accompanying discussion.

[290] *See* Danto, *Transfiguration Article*, *supra* note 20, at 140 ("Something is an artwork, then, only relative to certain art-historical presuppositions").

[291] CARROLL, *supra* note 13, at 215.

[292] *See supra* Part IV.A.5.

[293] *See supra* Part IV.A.6.

[294] This section provides a formal analysis of the process for adopting new artworks. In practice, new works are not always conferred art-status in a formal manner, though satisfaction of the formal elements is cognizable after the fact.

regards or historical art movements, and therefore have no precedent to support their claim to art-status.

The Historical Definition has been criticized on two primary grounds. The first is that HD is inescapably overinclusive because it has no statute of limitations on art regards.[295] Art regards are capable of being added to the history of art, but, it seems, are never capable of being removed. Thus, for example, HD allows amateur photographers to claim their vacation photographs or their family keepsakes as art because Imitation Theory would grant them art-status. The critics' assumption is that such photographs are not art because verisimilitude is no longer as dispositive to the establishment of an artwork as it was in past ages.[296] However, representationalist portraits are routinely accepted as art even today. Thus, HD does not extend or withhold art-status to the photographs any more than does traditional Imitation Theory. Moreover, the criticism confuses the question what *is* art with the judgment of what makes *good* art. HD does not purport to be an evaluative theory of art, but rather a definitional theory. HD merely recognizes the photographs as art, while making no recommendation as to whether the pictures should be displayed in the Phillips Art Gallery. It is telling that current copyright law, in according copyright protection to such photographs,[297] is here congruent with HD.

A second criticism of the Historical Definition focuses on the fact that certain well-precedented art regards, such as aesthetic experience theories, grant art-status to "mere objects," even commercial objects, as long as the object was made with the explicit intention to create a visually pleasing object. For example, this critique laments the fact that under aesthetic experience theory a manufacturer of speedboats who genuinely intends to make his boats visually pleasing in order to boost sales would be able to claim art-status on his boats. However, this creates an artificial distinction between commercial use and aesthetic value that courts have specifically rejected.[298] Just so, the focus of the aesthetic experience theory is not on whether the work is used commercially, but rather on whether it was seriously intended to be visually pleasing. Here again the criticism of HD actually serves to

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[295] *See* CARROLL, *supra* note 13, at 246.

[296] *Id.*

[297] *See supra* notes 85–86 and accompanying discussion.

[298] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251–52 (1903) (holding that advertisements are copyrightable despite their primarily commercial nature); HOUSE REPORT, *supra* note 27, at 54 (explaining that "pictorial, graphic, and sculptural works" were "intended to comprise not only 'works of art' in the traditional sense but also works . . . intended for use in advertising and commerce, and works of 'applied art.'")

demonstrate its congruency with both copyright law and the Artworld. In fact, Congress specifically recognized the copyrightability of original boat hull designs in 1998.[299]

The most promising theory of art is that which synthesizes the explanatory power of other theories while insulating itself from their weaknesses. The Historical Definition seems to accomplish this task very naturally, by borrowing from the successes of earlier theories and enabling a continuing dialogue with emerging art-movements. HD is able to ground its determinations of art-status in historical precedent yet embrace innovative art via its open concept approach, all the while encouraging a dynamic discourse between artists, art critics and audiences. While the philosophy of art continues to evolve, as art continually reflects upon itself, HD may well be replaced by a more compelling theory yet to be announced. However, many in the Artworld would agree that at this time, the Historical Definition is perhaps the best approximation of a sufficiently inclusive and exclusive theory that we have.

B. *The Historical Definition of Art as an Adjudicative Guide*

Judges should be explicit in engaging art theory and open in disclosing their aesthetic intuitions while making determinations of art-status.[300] The Supreme Court has repeatedly warned judges not to act as art critics,[301] and to refrain from denying artworks copyright

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[299] *See* The Vessel Hull Design Protection Act, 17 U.S.C. § 1301, § 1301(a)(2) (2006) (allowing copyright for "[t]he design of a vessel hull, deck, or combination of a hull and deck"). This act, though overtly providing protection for boat hull designs, actually provides a statutory precedent through which Congress could extend copyrightability to all "original design[s] of useful article[s]." *Id.* § 1301(a)(1).

[300] *See* Farley, *supra* note 14, at 849–52.

[301] *See Bleistein*, 188 U.S. at 251 ("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."); Brandir Int'l Inc. v. Cascade Pac. Lumber Co., 834 F.2d 1142, 1145–46 n.3 (2d Cir. 1987) ("[W]e judges should not let our own view of styles of art interfere with the decisionmaking process in this area."); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 561 (1985) ("Courts should be chary of deciding what is and what is not news.") (citation omitted). Note that judging whether an object is art is a very different endeavor than judging whether it is beautiful. As one scholar argues, judgments about beauty are inherently intuitive: "aesthetic judgments . . . can neither *have* nor *lack* a rational basis in . . . that they can either be or fail to be the outcome of good or bad reasoning." *See* Sibley, *Aesthetic and Nonaesthetic, supra* note 250, at 143–46; *but see* Peter Kivy, *Aesthetics and Rationality*, 34 J. AESTHETICS & ART CRITICISM 51, 51–57 (arguing that aesthetic judgment necessarily includes some rational basis, and that our aesthetic nature and our rational nature are bound together).

protection according to narrow definitions of art.[302] Therefore, to ground their holdings in an objective and consistent theoretical framework, judges should analyze claims to art-status under the Historical Definition of Art. Certainly, a piece should not be granted art-status unless it is supported by substantial evidence establishing an art-theoretical basis for an artist's claim.

In appropriate cases where the art-status of an object is in question, expert testimony from art curators, historians, or philosophers should be welcomed.[303] The vast majority of artworks do not provoke the question of whether they are artworks.[304] But for works on the cutting edge of art, expert testimony will likely be necessary. The expert testimony would likely proceed in a historical manner: by first explaining the relevant well-precedented theories of defining art, and then noting the family resemblances of the new artwork to well-established artworks.[305] An example of such testimony regarding *In Advance of the Broken Arm* could begin as follows: Mr. Duchamp's shovel looks just like any of the other snow shovels in Home Depot. In order to understand its status as an artwork, it must be considered in its art-historical context. Many postmodern artists, such as Braque and Picasso, devoted many of their artworks to exploring the question of the nature of art. Duchamp's shovel was a contribution to this philosophical and introspective discussion between artworks reflecting on other artworks and even themselves as real-objects-turned art. Seen in this historical context, Duchamp's shovel is a very original contribution that enriches the Artworld with its piercing intuition that even everyday objects can be transformed into art if only we took the time to notice and interpret them.[306] An explanation in this vein asserting the

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[302] *See* Mazer v. Stein, 347 U.S. 201, 214 (1954) ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art."); *see Bleistein*, 188 U.S. at 251 (expressing doubt about whether Goya's or Manet's works would have been protected by copyright law when first presented).

[303] *Cf.* Sibley, *Aesthetic and Nonaesthetic, supra* note 250, at 141 ("[A] major occupation of critics is the task of bringing people to see things for what, aesthetically, they are, as well as why they are.").

[304] *See* DANTO, TRANSFIGURATION, *supra* note 87, at 140.

[305] *See supra* discussion Part IV.A.7.

[306] *Cf.* CARROLL, *supra* note 13, at 253 (providing a similar art-historical explanation for Andy Warhol's 1963 *Brillo Box*: "Warhol's *Brillo Box* thus addressed an antecedently acknowledged, ongoing artworld concern in a creative way by focusing the reflective artworld question 'What is art?' in a canny and strikingly perspicuous manner, reframing and redirecting it as the question: 'What makes artworks different from real things?'"). A similar defense of the art-status of Yves Klein's *Blue Monochrome* (1961) would begin by comparing the work to other works of abstract expressionism, including Kazimir Malevich's *White on White (*1918) and Ad Reinhardt's monochrome black paintings, such as *Painting* (1954) or *Abstract Painting* (1963). An expert would explain Reinhardt's *Abstract Painting*, a solid

Artworld status of a disputed work would accordingly shift the burden of proof to the party disclaiming the art-status of the work.

Some may be concerned that to base copyrightability on theories that involve artists' subjective intent would be to open the floodgates to the copyrighting of any object that an individual claims to be an artwork. In actuality, the regularity with which courts make criminal law determinations of *mens rea* reveals that courts are well equipped and experienced in finding intent. Intent can be inferred or established through credible testimony and supporting evidence.[307] This focus on intent is also consistent with current case law that examines intended function in order to distinguish copyrightable applied art from non-copyrightable useful articles.[308]

As *Brancusi* demonstrates, courts have already begun, albeit slowly, to analyze originality of recent forms of art under art-theoretical frameworks.[309] In fact, three circuit courts have applied a version of the Historical Definition of Art in determining the art-status of a disputed object. The Second Circuit in *Kieselstein-Cord*[310] implicitly relied on the Historical Definition for its holding.[311] The Ninth and D.C. Circuits more explicitly laid the framework for judicial recognition of the Historical Definition, holding that "[a] thing is a work of art if it appears to be within the historical and ordinary conception of the term art."[312]

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black square, in Reinhardt's own words as, "a pure, abstract, non–objective, timeless, spaceless, changeless, relationless, disinterested painting—an object that is self–conscious (no unconsciousness) ideal, transcendent, aware of no thing but art." *See Abstract Painting*, MUSEUM OF MODERN ART, http://www.moma.org/ collection/object.php?object_id=78976 (last visited Feb. 5, 2012). Just as Reinhardt sought to express dimensionlessness freedom through his experiments in pure form, so Klein carefully created a piercing hue of ultramarine for his work to express the elements of transcendence and immateriality. One can thus see that *Blue Monochrome*, understood as Klein's ardent invitation to transport the viewer into a realm of pure ideal, fits squarely within the brave tradition of expressionism.

[307] *See supra* notes 246–49 and accompanying discussion.

[308] *See* discussion of Hart v. Dan Chase Taxidermy Supply Co, *supra* notes 120–23.

[309] *See* discussion of Brancusi, *supra* notes 169–74 and accompanying discussion.

[310] *See* discussion of Kieselstein-Cord v. Accessories by Pearl, *supra* notes 108–12 and accompanying discussion.

[311] After hearing expert testimony, the court noted that "body ornamentation has been an art form since the earliest days" and referred the reader to the "Tutankhamen or Scythian gold exhibits at the Metropolitan Museum [of Art]." *Kieselstein-Cord*, 632 F.2d 989, 994 (2d Cir. 1980).

[312] Rosenthal v. Stein, 205 F.2d 633, 635 (9th Cir. 1953) (affirming copyright protectability of statuettes of "an Egyptian male dancer, an Egyptian female dancer, a curved ballet male dancer, and a curved ballet female dancer, each clothed in character and posed upon a substantial base"); *accord* Bailie v. Fischer, 258 F.2d 425 (D.C. Cir. 1958) (per curiam).

The Third Circuit, elucidating on the idea/expression dichotomy in copyright law, offered the following distinction: "the purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of that idea."[313] Though the *Whelan* court was considering whether to afford copyright protection to a utilitarian computer program, this framework is useful in an art-context as well. Applied to readymade artworks, the nonprotectable idea behind the works is that traditional representationalist or expressionist barriers between the Artworld and the real world have been dissolved; that anything *can be* art.[314] The protectable expression would then be the particular form that the artwork takes, whether of an industrial shovel, a Brillo box, or a vial of Parisian air.

The Historical Definition of Art can also provide an analytical framework for judges in future cases involving the art-status of works "self-created" by computer programs. The United Kingdom's Copyright, Designs, and Patents Act of 1988[315] extends copyright protection to works, including drawings and songs, that are generated by a programmed computer.[316] In such cases, "the person by whom the arrangements necessary for the creation of the work are undertaken" is the author and owner of copyright in the work.[317] While the U.S. has no statutory guidance directly on point, the Historical Definition can provide courts with a more objective theoretical framework to ground adjudication of art-claims for such works.

1. Using the Historical Definition of Art to Adjudicate Infringement Claims

Use of the Historical Definition of Art does not modify the infringement doctrine currently available to protect the economic interests of copyright owners. Statutory damages[318] and awards of

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[313] Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1236 (3d Cir. 1986) (italics omitted); *but cf.* Computer Assocs. Int'l, Inc. v Altai, Inc., 982 F.2d 693, 706 (2d Cir. 1992) ("*Whelan*'s approach . . . relies too heavily on metaphysical distinctions and does not place enough emphasis on practical considerations.").

[314] This does not mean that everything *is* art. *Cf.* CARROLL, *supra* note 13, at 222–23 (noting Neo-Wittgensteinianism's lack of limitations in excluding objects from the Artworld).

[315] 1988, c. 48 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1988/48/contents.

[316] *Id.* § 9(3), *available at* http://www.legislation.gov.uk/ukpga/1988/48/section/9.

[317] *Id.* Theoretically, both the creator of the art-creating program and the person who directs the program to create art, could be creating joint works of art. In such cases, perhaps both artists would be considered owners of the copyright in the work.

[318] 17 U.S.C. § 504(c) (2006) ("[W]here . . . the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to

attorney fees[319] remain available in cases of willful infringement. In *Rogers v. Koons*,[320] the sculptor Jeff Koons was held liable for copyright infringement after Koons commissioned artisans to create a sculpture to be "copied faithfully" from a photograph Koons knew was copyrighted.[321] Koons meticulously communicated to his artisans that all of the figures' postures and features were to be identical to the photograph.[322] The court found that Koons' "willful and egregious behavior" made him liable for statutory damages."[323]

This section analyzes the impact of adopting the Historical Definition of Art to assist adjudication of infringement suits involving derivative works.[324] Adoption of the Historical Definition to determine the existence of a "work of art" for copyright purposes does not modify current copyright doctrine concerning derivative works. Works of art derived from an original artwork are subject to the higher standard of originality applicable to derivative works.[325] Accordingly, derivative works that are substantially similar to original copyrighted works would be unlikely to be separately copyrightable and could face liability for infringement damages.[326] Meanwhile, works that are independently derived from existing non-artwork objects could well claim copyright protection under the default standard of originality applicable to independently-derived worked.[327] The test for copyright infringement rests on the existence of "substantial similarity" between the copyrighted work and the allegedly infringing work.[328] Because

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a sum of not more than $150,000.").

[319] 17 U.S.C. § 505.

[320] Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

[321] *Id.* at 305.

[322] *Id.* at 305.

[323] *Id.* at 313.

[324] Recall that unauthorized creation of derivative works can potentially subject the creator of the derivative work to infringement damages. *See supra* notes 65–76 and accompanying discussion.

[325] *See* discussion of *Gracen*, *Batlin*, and *Lee*, *supra* Part II.C.2.

[326] While it seems that such derivative works would be considered artworks under the "family resemblance" method of Neo-Wittgensteinianism, this method cannot be extended without limit. *See* discussion *supra* Part IV.A.5 (noting that to extend "family resemblances" ad infinitum would mean to abolish the concept of art itself).

[327] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249–50 (1903) ("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.").

[328] "'Substantial similarity' is an elusive concept." Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706, 711 (S.D.N.Y. 1987). The test for infringement in the Second Circuit is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021,

infringement is analyzed on a case-by-case basis, this section proposes several fictitious artworks and analyzes them to determine whether the third-party creators of these fictitious works would be liable for infringement.

Suppose an admirer of Yves Klein wants to commemorate the great artist by creating a square painting consisting entirely of a darker shade of blue than International Klein Blue (IKB),[329] labeling his work "The World has Become Bluer after Klein's Passing." Whether the creator of this work would be liable for damages would depend on the difference in shape (rectangle versus square) and the difference in shade between the second work's darker hue of blue, and the original IKB. Owing to their significant differences in color, technique, and style, other examples of minimalist art such as Kazimir Malevich's *Black Square*[330] or Ad Reinhardt's *Abstract Painting*,[331] which consist of black squares, would not be liable for infringing Klein's *Blue Monochrome*.[332] Copyright protection affords significantly different protection than does the patent regime.[333] The owner of IKB could not prevent other artists from using Klein's shade of blue in other works not substantially similar to IKB. Thus, circles painted in solid blue, sculptures that incorporate small squares of Klein's blue, and houses painted blue would not be considered to be infringing Klein's work.

The next thought experiment involves an artist who brings the unmodified shovel in his garage to an art gallery, perhaps titling his work "Homage to Duchamp," proclaiming that his work destroys the artistic distinction between an original artwork and a copy. Would this work be copyrightable? Because the artist based his work on the original Duchamp work, "Homage to Duchamp" is analyzed under derivative copyright doctrine. Under current law, substantially similar works presented in the same manner as the original work are *prima facie* liable for infringement. Therefore, the higher standard of origi-

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1022 (2d Cir. 1966). In *Steinberg*, District Judge Stanton found infringement of Steinberg's picture published on the front cover of the March 29, 1976 issue of *The New Yorker* magazine. The court held that there was substantial similarity between the works based on the similarity between the ornaments, facades, and details of the buildings; the anomalies of the shadows cast from the streetlights; and the font used in the title of the infringing work. *See Steinberg*, 663 F. Supp. at 712–16.

[329] *See supra* note 148.

[330] Kazimir Malevich, *Black Square* (1915), *available at* http://www.russianpaintings.net/articleimg/malevich/malevich_black.jpg (last visited Feb. 5, 2012).

[331] Ad Reinhardt, *Abstract Painting* (1963), *available at* http://www.moma.org/collection/object.php?object_id=78976 (last visited Feb. 5, 2012).

[332] Klein, *supra* note 5.

[333] *See supra* note 62 and accompanying discussion.

nality applicable to derivative works[334] would prevent the copyist from obtaining copyright protection for his unmodified shovel, and could well make him liable for infringement damages. As noted above, the fact that the derivative work has a different title than the original, "Homage to Duchamp" versus *In Advance of the Broken Arm*, would not help the copy to obtain copyright protection.[335] Perhaps the admirer of Duchamp would then argue that just as the artistic value of Duchamp's shovel derived from its ability to question the difference between an "artwork" and a "mere object," so "Homage to Duchamp" should be recognized as questioning the difference between an "original" and a "copy." Duchamp's admirer must be reminded in this case that copyright does not protect pure ideas, only the expression of those ideas.[336] Because "Homage to Duchamp" is physically identical in substance and manner of presentation to the original Duchamp shovel, the expression of the idea behind "Homage to Duchamp" is therefore no different than the original work. Therefore, Duchamp's admirer in this case must still be liable for infringing on Duchamp's mode of expressing his idea. "Homage to Duchamp" would fare no better under an adjudicative analysis using the Historical Definition of Art. Since the Artworld would be unlikely to acclaim the copy of Duchamp's shovel as an artwork, the results in copyright law and the Artworld would here be congruous.

On the other hand, if another Duchamp admirer sought to paint a self-styled portrait of Duchamp on the blade of a shovel, titling his work "Duchamp in Spades," this artist's personal touch would very likely be independently copyrightable. Similarly, an example wherein an artist places an ordinary snow shovel on top of a wooden chair and titles it "Duchamp at Rest" could be saved from infringement damages under a theory that the artist was merely "framing" Duchamp's work.[337] Indeed, such a work could possibly be sufficiently original to qualify for independent copyright, when considered in light of Rauschenberg's *Pilgrim*.[338] Rauschenberg's *Pilgrim* consists of a rectangular painting sitting atop a simple wooden chair, wherein the paint flows outside the frame of the painting and onto the chair. "Duchamp

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[334] *See supra* discussion Part II.C.2.

[335] *See supra* notes 131–32 and accompanying discussion.

[336] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

[337] *See* discussion in *Lee v. A.R.T. Co.*, *supra* note 71, wherein the court analyzed the defendant's claim that mere framing does not incur liability for creating a derivative work.

[338] Robert Rauschenberg, *Pilgrim* (1960), *available at* http//www.artnet.com/magazineus/features/saltz/saltz1-11-06_detail.asp?picnum=7 (last visited Dec. 25, 2011).

at Rest" could likewise be seen as an expansion of the original readymade work into the real life spaces that the shovel touches. The work could be understood as proclaiming the importance of relations, for not only is Duchamp's shovel unique by virtue of being an artwork, it also passes its art-quality on to the chair-setting in which it is framed.

Now consider the case of an artist who, desiring to honor Duchamp, fashions from hand five-inch tall replicas of Duchamp's shovel, labeling them "Your Very Own Duchamp." The artist in this case would be able to point to several significant differences in style and manner of production between his work and the original Duchamp shovel. Where Duchamp's original is suitable for actual use in shoveling snow, the replicas have no practical functionality (other than use as a paperweight). Where Duchamp took his shovel off the shelf of a hardware store, these replicas were meticulously handmade, signed and serially numbered. Because the new works were fashioned from hand for commemorative art-purposes, and not mass-produced copies of Duchamp's original shovel, the artist who created the replicas would be able to claim artistic license in their production. If the artist were to subsequently seek independent copyright protection for his replica, the court would look at factors such as the degree of transformation between the original and the replica, including any differences in size, shape, color, or texture. In any event, it is unlikely that the creator of the replicas would be liable for infringement of Duchamp's shovel. Just as Warhol would not be liable to The Campbell Soup Company for crafting his handmade *Campbell's Soup Cans*[339] even though Warhol's cans look nearly identical to the ones on the shelf of the local supermarket, our Duchamp admirer should be free from liability for artistically rendering Duchamp's shovel. This is because any copyright protection that extends to Duchamp's readymade work is necessary a weaker form of copyright, which is, as the next section explains, congruent to the idea of "Thin Copyright."

2. Limiting Certain Artworks to "Thin Copyright" Protection

Readymade artworks, by virtue of their unmitigated focus on realism, are less likely to chill innovation than traditional artworks. This is because copyrights on simple, unflourished items are considered by courts to be "weaker" than copyrights on finer, more creative objects.[340] The Third Circuit in *Franklin Mint* noted that

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[339] Andy Warhol, *Campbell's Soup Cans* (1962), *available at* http://www.moma.org/collection/browse_results.php?object_id=79809 (last visited Feb. 5, 2012).

[340] Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir. 1978),

> [I]n the world of fine art, the ease with which a copyright may be delineated may depend on the artist's style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique.[341]

These observations foreshadowed the Supreme Court's introduction in *Feist* of the notion of "thin copyright," a weaker form of copyright protection that applies to "factual compilations."[342] The Court noted that their decision in *Feist*, finding a particular telephone directory to be uncopyrightable, "inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement."[343] A comment on a 2002 proposed Copyright Office rule recommended creating a formal category of "Thin Copyright works" that includes "works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection."[344] The comment urged that "Copyright owners should not be able to preclude the public from *accessing* nonprotectible features of a 'Thin Copyright' work."[345]

This Article proposes that certain categories of recent art should be extended "thin copyright" protection to reflect the fact that they "derive significant value from material in the public domain."[346] Readymade artworks, which are taken without modification from common manufactured goods, are naturally described as being "thinly copyrightable." Accordingly, copyright protection to Duchamp's shovel should be closely limited to near-replicas of the shovel itself. Infringement liab-

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cert. denied, 439 U.S. 880.

[341] *Id.*

[342] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).

[343] *Id.*; *see supra* text accompanying notes 55 and 165.

[344] *See* U.S. Copyright Office, Comments on Rulemaking on Exemptions on Anticircumvention, Comment 28 by John C. Vaughn, Executive Vice President, Assoc. Am. Univs. (Dec. 18, 2002), *available at* http://www.copyright.gov/1201/2003/comments/028.pdf (last visited Feb. 5, 2012).

[345] *Id.* (emphasis in original).

[346] *See id.*

ility in the case of Duchamp's shovel should attach only to deliberate copying of the shovel, as in the fictional work "Homage to Duchamp" discussed above.[347] Likewise, purist works such as Klein's *Blue Monochrome*, which commit themselves to abstract representation of an idea via the presentation of a single color, are logical subjects of "thin copyright."

3. The Work of Art in the post-Industrial Era

Industrialism tore down the traditional barriers between art and industry, such that both sides must now accommodate each other for forms of trespass previously unforeseen.[348] Walter Benjamin has commented on the effects of the exponential speed at which technology has increasingly encroached on the Artworld.[349] The category of readymade art can thus be seen as part of the Artworld's cultural revolution against "the age of mechanical reproduction." If mechanical reproduction takes away "the aura" of an artwork as a unique phenomenon, then a readymade work challenges the industrial era's claim that "mere objects" are the sole domain of manufactured goods.

Notwithstanding readymade art's reclamation of purportedly "mere objects" as denizens of the Artworld, it is important to note that an artist who purchases a commercial good and subsequently transforms it into a display in an art gallery creates no economic unfairness to the original manufacturer or seller of the shovel. First, the original manufacturer was willing to sell (and is able to continue selling) the shovel at the price for which the product was sold.[350] Under the first sale doctrine, also known as the exhaustion doctrine, "[a]n alteration that includes (or consumes) a complete copy of the original lacks economic significance."[351] Second, the manufacturer may well appreciate the

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[347] *See supra* text accompanying notes 334–35.

[348] *See* BENJAMIN, *supra* note 192, at XII ("Mechanical reproduction of art changes the reaction of the masses toward art.").

[349] *Id.* at II (stating that "that which withers in the age of mechanical reproduction is the aura of the work of art").

[350] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 353–57 (1989); *accord* Lee v. A.R.T. Co., 125 F.3d 580, 581 (7th Cir. 1997). In fact, if a readymade based on a manufactured article becomes sufficiently famous, the readymade artwork may create increased demand, and consequently increased profits, for the original manufacturer of the article. Note that "stolen readymades," which consist of readymades that were intentionally stolen for the purposes of creating an artwork, see, e.g., Olivier Zahm, *Maurizio Cattelan*, ARTFORUM INTERNATIONAL (June 22, 1995), create economic unfairness to the manufacturer or retailer of the original object (unless, perhaps, the stolen objects are promptly returned to the seller).

[351] *Lee*, 125 F.3d at 581.

free advertisement of its product. Third, any manufacturer is free to submit its own products to art galleries. Anyone who wishes to contribute to the Artworld may seek to do so, though the creation of a commercially successful artwork typically involves considerable aesthetic understanding and judgment.[352]

4. Artists Have Feelings, Too

One of the most important benefits of copyright protection is that the author of the copyrighted work becomes eligible for protection of his "moral rights" over the work. The Visual Artists Rights Act of 1990 (VARA)[353] grants to creators of "work[s] of visual art"[354] the fundamental rights to claim authorship of and to prevent destruction or defacement of their works.[355] The VARA rights vest in the author of the work of art, and do not transfer to the owner of the work of art upon purchase of the artwork.[356] These rights are so fundamental that the VARA rights apply even after the work transfers ownership, such that an artist can protect the integrity of her work even when there is no privity of contract between the artist and the owner of the artwork.[357] However, VARA explicitly denies its moral rights protection to "any work not subject to copyright protection."[358] Because Duchamp's work is not copyrightable under the current copyright scheme, Duchamp (if he were still around today) would be denied the right under VARA to "prevent any intentional distortion [or] mutilation" of his work in ways

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[352] If a manufactured product has not been presented and accepted as a work of art under the Historical Definition of Art, anyone is free to present the manufactured product as a readymade artwork. Thus, a manufacturer could not block an artist from presenting the manufactured good as a readymade artwork merely by including the following line in the user manual: "This shovel is sold both for use in digging and for contemplation as a work of art." The manufacturer could of course seek to have its product accepted as art under the Historical Definition, but it would have to be accepted into the Artworld before such a disclaimer in the user manual could be effective.

[353] Pub. L. No. 101-650, 104 Stat. 5089, 17 U.S.C. § 106A (1990).

[354] Title 17 of the United States Code, section 101, defines a "work of visual art" as "a painting, drawing, print, or sculpture, existing in a single copy [or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."

[355] *See* 17 U.S.C. § 106A(a).

[356] *See* 17 U.S.C. § 106A(b) ("Only the author of a work of visual art has the rights conferred [by VARA], whether or not the author is the copyright owner.").

[357] *See* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 263 (2009) ("Normally when you buy something, you can do what you want with it. If you buy a chair, or a dress, or a car, you can alter it, embellish it, neglect it, abuse it, destroy it, or throw it away. But if you buy a work of art, your freedom to do what you want with that object—your own property—is severely curtailed.").

[358] *See* 17 U.S.C. § 101 (defining a "work of visual art").

he would find repulsive.[359] Moral rights are important to artists, who are often bound up personally in their work.[360] VARA rightly protects the often intense emotional investment that artists make in their art, as well as preserving important artworks for the benefit and cultural education of posterity.[361] Every artist deserves the right to protect the integrity of his works, and a denial of copyright currently carries with it the denial of these basic moral rights.[362] Thus, courts that apply the Historical Definition of Art to determine the existence of an artwork for copyright purposes simultaneously restore the scope of moral rights protection to their rightful authors.[363]

V. THE NEW STATUTORY EXCEPTION FOR USEFUL ARTICLES

Reformulating the originality standard to grant equal protection to certain categories of recent art raises concerns arising from a copyright owner's power to prevent others from copying or using his work. The most significant of these concerns focus on chilling innovation or limiting free speech.[364] This section reviews these concerns and pro-

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[359] *See* 17 U.S.C. § 106A(a)(3). Note that VARA protects against defacement of artworks. An artist cannot simply block any modification of his work to which he disapproves. *See* the Seventh Circuit's discussion in *Lee v. A.R.T. Co*, *supra* note 71.

[360] Many artists consider their work an "extension" of themselves. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (noting that moral rights "spring from a belief that an artist in the process of creation injects his spirit into the work").

[361] In enacting VARA, Congress noted that VARA's grant of moral rights to artists would protect an "important public interest." *See* H.R. Rep. No. 101-514, at 5–6 (1990). *But see* Adler, *supra* note 351, at 265–66, 279–94 (arguing that moral rights for artists should be weakened or altogether stripped, because "the conception of 'art' embedded in moral rights law has become obsolete" and "there is an artistic value in modifying, defacing and even destroying unique works of art").

[362] *See* Roberta R. Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006) (arguing that the Copyright Clause's objective of promoting progress and innovation are best served by "a legal framework that promotes the public's interest in knowing the original source of a work and understanding it in the context of the author's original meaning"); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) (arguing, prior to enactment of VARA, for Congress to grant moral rights to artists); *but see* Adler, *supra* note 357, at 265–66, 279–94 (arguing that moral rights for artists should be weakened or altogether stripped, because "the conception of 'art' embedded in moral rights law has become obsolete" and "there is an artistic value in modifying, defacing and even destroying unique works of art").

[363] Of course, there is no logical reason why copyrightability must be a prerequisite condition to moral rights protection. A simple way to restore moral rights to artists even without altering the standard of copyrightability would be for Congress to modify the definition of a "work of visual art" in 17 U.S.C. § 101 to no longer explicitly require copyright protection. The courts could then enforce VARA rights upon an artist's successful showing that his work is a *bona fide* work of art using the Historical Definition of Art outlined above, *supra* Part IV.A.7.

[364] *See* Petruzelli, *supra* note 62, at 138.

poses the creation of a new statutory exemption to balance the equities between artists and the public.

A. *Objections to Extending Copyright Protection to Recent Artworks*

1. Concerns about Limiting Free Speech

Extension of the current copyright scheme to include recent forms of art would be consistent with free speech principles and with copyright's purpose to "promote the creation and publication of free expression."[365] The Supreme Court has noted that copyright law "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[366] Because the copyright scheme "incorporates its own speech-protective purposes and safeguards," courts do not apply heightened judicial review under the First Amendment.[367]

Concerns about limitation of free speech are answerable with "copyright's built-in free speech safeguards."[368] First, as noted above, copyright does not protect ideas, but only expression.[369] Second, the "fair use" defense allows the use of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[370] This defense "affords considerable latitude for scholarship and comment, and even for parody."[371] Third, the right of a retailer or a news reporter to display of the copyrighted work for commercial advertisement or news purposes would remain protected by Section 113 of The 1976 Act.[372]

Furthermore, commercial protection of expressive works itself

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[365] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (emphasis removed). The Supreme Court in *Eldred* upheld Congress's 1998 extension of the term of copyright protection as consistent with Free Speech principles. *See id.* at 187.

[366] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *accord* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[367] *Eldred,* 537 U.S. at 219.

[368] *Id.* (noting that the First Amendment "and the Copyright Clause were enacted close in time" and that this indicated "the Framers' view that copyright's limited monopolies are compatible with free speech principles").

[369] Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

[370] 17 U.S.C. § 107.

[371] *Eldred*, 537 U.S. at 220.

[372] *See supra* notes 364–66 and accompanying discussion.

promotes free expression. The Supreme Court has noted that "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[373]

2. Concerns about Chilling Innovation

Current copyright law doctrine contains certain mechanisms designed to protect innovation. One of these built in safeguards is reflected in the process of proving infringement. The standard of proof for graphical or three-dimensional works is higher than that for literary works, which have a "linear dimension."[374] As the Second Circuit explained in *Warner Bros. v. ABC*, a defendant who copies "substantial portions of [an author's literary] sequence . . . does not escape infringement by adding original episodes."[375] In contrast, "[a] graphic or three-dimensional work is created to be perceived as an entirety," such that significant additions or changes to the non-copied portions of the graphical or three-dimensional work could negate an impression that the work was copied.[376] Thus, objects originally based on but subsequently improved from copyrighted readymades would be significantly less likely to face an infringement injunction.

The 1976 Act also encourages utilitarian adaptations of artworks by protecting the subsequent commercial display and advertisement of the utilitarian adaptations.[377] Section 113 grants the owner of copyright in a work "lawfully reproduced in useful articles that have been offered for sale or distribution to the public" no rights to exclude pictures or photographs of the usefully adapted works from being used in advertisements or news reports.[378] Thus, the statutory scheme encourages innovation by allowing situations similar to *Brandir*, where an innovator adapts an extant sculpture for a utilitarian function and then advertises his innovation.[379]

Notwithstanding the above safeguards, one may rightly be concerned that to extend copyright protection to ever-increasingly

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[373] *Harper & Row*, 471 U.S. at 558; *accord Eldred*, 537 U.S. at 219.

[374] *See* Warner Bros., Inc. v. Am. Broad. Cos., 720 F.2d 231, 241–42 (2d Cir. 1983).

[375] *Id.*

[376] *See id.*

[377] *See* 17 U.S.C. § 113 (2006).

[378] *See id.*

[379] In *Brandir International Inc. v. Cascade Pacific Lumber Co.*, it was the sculptor's friend, "a bicycle buff and author of numerous articles about urban cycling," who informed the sculptor that his artwork would make an excellent bike rack. *See supra* notes 113–115 and accompanying discussion.

minimalist forms of art could significantly stifle innovation. A substantial body of scholarly literature has poignantly criticized copyright law's excesses and argued for legal reform.[380] Certainly, consistent with the goals of the Constitution, copyright protection must extend only for "limited Times."[381] Similarly, copyright protection must extend only to original works. One may fear that to extend copyright to readymade artwork would be to accord copyright to all "mass-produced, commercial articles," a position that was explicitly rejected in *Mazer v. Stein*.[382] Indeed, if copyright were extended to readymade artworks, artists would have the statutory rights to exclude others from "reproduc[ing] the copyrighted work in copies,"[383] from "distribut[ing] copies,"[384] and from "prepar[ing] derivative works based upon the copyrighted work."[385]

Classical artworks in painting, photography, or sculpture do little to chill innovation insofar as they merely portray a useful article. The 1976 Act does not grant copyright owners in these cases rights to

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[380] *See, e.g.*, WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009) (arguing for reform based on the concept of copyright as a utilitarian government program, not a property or moral right); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 561 (2007) (commenting on several areas needing reform in the current copyright scheme, while accepting current copyright law's focus on "originality" as requiring only "a modicum of creativity"); W. Ron Gard and Elizabeth Townsend Gard, *Marked by Modernism: Reconfiguring the "Traditional Contours of Copyright Protection" for the Twenty-first Century*, in MODERNISM AND COPYRIGHT 155–170 (2011, Paul K. Saint-Amour, ed.) (arguing for greater flexibility of copyright protection to accommodate the reality that audiences in the digital age have become "creator-publisher-consumers" that constantly digitally recreate and modify works).

[381] U.S. CONST. art. I, § 8, cl. 8. This Article takes no position on the appropriate amount of time for which copyright should extend. The Sonny Bono Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (2008) extended copyright protection for 20 years for many works, even works already in existence the time of its enactment. *See* 17 U.S.C. § 303 (2006). At the time of passage of the CTEA on October 27, 1998, many scholars and critics lamented what they perceived to be an expansion of the Copyright Regime's already-excessive stifling of innovation. *See, e.g.*, Robert Spoo, *Ezra Pound, Legislator: Perpetual Copyright and Unfair Competition with the Dead*, in MODERNISM AND COPYRIGHT 39–64 (Paul K. Saint-Amour ed. 2011) (describing Ezra Pound's strong criticism of the Copyright Term Extension Act and detailing Pound's proposal for a new copyright statute that in Pound's view would greatly encourage the free flow of ideas); *see also* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1066–73 (2001) (describing Lessig's experience in court representing Eric Eldred, a literary advocate and online publisher of literary works in the public domain who challenged the constitutionality of the CTEA in *Eldred v. Ashcroft*).

[382] *See* Comment on Mazer v. Stein, *supra* note 188, at 824–25 (arguing that such objects have a "tenuous connection to a [copyright] system which was not originally designed for them and remains unequipped to handle them").

[383] 17 U.S.C. § 106(1).

[384] 17 U.S.C. § 106(3).

[385] 17 U.S.C. § 106(2).

control the "making, distribution, or display" of the useful article depicted.[386] This precludes an artist who paints or photographs a shovel from preventing future manufacture or sale of the depicted shovel.[387] However, readymades break down this traditional barrier in that Duchamp's "artwork" shovel not only portrays, but is physically identical to, the "mere object" shovels lining the shelves of any hardware store. A formulation of originality that comprehends the rapidly evolving state of the Artworld necessarily expands intellectual property protection and destabilizes the current copyright protection scheme. This expansion necessitates a further statutory limitation on the scope of copyright protection.

B. *The Need for a New Statutory Exemption for Useful Articles*

Copyright law must not only afford equal rights to all artists, but it must do so in a manner that continues to encourage innovation for public benefit. As the Supreme Court noted, "[t]he sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public from the labors of authors."[388] The copyright scheme must therefore guard against any expansion of power that detracts from public well being.

This Article's art-theoretical standard of originality affords copyright protection to previously uncopyrightable categories of recent art, including readymade art. Because readymades are art-adaptations of existing works, the copyright on a readymade artwork should never work economic unfairness on creators of art-adapted commercial goods. The original manufacturer of a subsequently art-adapted commercial good, such as Duchamp's shovel, would not be liable for infringement under current copyright doctrine. This is because the original manufacturer independently designed his the shovel, rather than basing his design on Duchamp's work. Indeed, at the time of the original manufacturer's design of the shovel there was no copyrighted work to copy. However, manufacturers that enter the shovel-manufacturing market after Duchamp's art-appropriation of the original shovel could potentially be liable for damages upon a showing that the manufacturers intentionally copied Duchamp's work. This result is plainly counterintuitive, because Duchamp should not be able to block manufacturers from using a design that Duchamp did not even

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[386] *See* 17 U.S.C. § 113.

[387] *See* HOUSE REPORT, *supra* note 28, at 105.

[388] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948); *accord* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

create. Copyrights on works not created or substantially modified by the author of the work should not include any right to prohibit the manufacture, sale or purchase of the original products.

In the interests of encouraging innovation, Congress should grant a statutory exemption from infringement liability[389] to manufacturers who seek to enter a product market of a good that has subsequently become accepted by the Artworld as a readymade artwork.[390] The new statutory exception would in such cases grant compulsory free license of the designs of readymade works to manufacturers of physical objects similar to the copyrighted work.[391] This system of compulsory license would be in line with the recently created statutory compulsory license systems for nondramatic musical works[392] and cable retransmissions.[393] As scholars have noted, this recent proliferation of statutory compulsory license systems is indicative of the increasingly pressing need to rethink the basic modernist, materialist assumptions of the copyright statute in light of the need for freer availability of information in a digital age.[394] Because such a determined reform project would be unlikely to occur in the near future,[395] however, this Article proposes the statutory exception as an interstitial remedy.

Where an artist substantially modifies the aesthetic design of a "useful article-turned artwork" under the new statutory exemption, the artist would remain free to sell or negotiate a commercial license on the aesthetic modification. The statutory exemption would in such a case

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[389] "[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." Eldred v. Ashcroft, 537 U.S. 186, 207 (2003).

[390] This statutory exemption clearly envisions protection against infringement suits involving readymade works of art. The statutory exemption could perhaps be located in a new section 123 of title 17 of the United States Code.

[391] Of course, a grant of immunity from infringement liability provides a similar legal result to a restriction of the rights of a copyright holder. Therefore, a perhaps less elegant means of achieving a similar result would be to grant the copyright owner only the right of public display (17 U.S.C. § 106(5)), without granting the other section 106 rights, such as the exclusive rights to reproduce copies (§ 106(1)), to sell copies (§ 106(3)), or to prepare derivative works (§ 106(2)).

[392] *See generally* 17 U.S.C. § 115 (2006).

[393] *See generally* 17 U.S.C. §§ 111, 119; Copyright Royalty and Distribution Reform Act of 2004, 17 U.S.C. §§ 801–805 (2006) (detailing responsibilities of Copyright Royalty Judges).

[394] *See supra* note 374 and accompanying discussion. Professor Samuelson notes that "[v]irtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer." Samuelson, *supra* note 374, at 552.

[395] *See* Samuelson, *supra* note 374, at 556 ("As enthusiastic as I am about copyright reform, I am not so naive as to think that there is any realistic chance that a copyright reform effort will be undertaken in the next decade by the Copyright Office, the U.S. Congress, or any other organized group.").

grant the original creator of the useful object a right to compulsory good-faith negotiation with the artist for a license to incorporate the aesthetic modification into the manufacturer's next line of commercial products. In the event that negotiation between the parties fails, the manufacturer would have the right to compel arbitration of license dispute.[396]

Copyright law must balance the rights granted by the new statutory exception with artists' legitimate interests in protecting the economic value of their artworks.[397] The reformulated originality standard would not alter the exclusive rights of an artist to publicly display her work in an art gallery. A contemporary artist can continue to benefit from the exclusive sale of her work, and may prevent other artists from copying her work for purposes of public display or distribution in art galleries, print or online publications.

VI. CONCLUSION

Copyright protection is intended to encourage and reward creative work.[398] However, judges have often been loath to make decisions about art-status, perhaps viewing art as subjective and nonrational, unfit for judicial determination.[399] Yet questions of copyrightability often hinge on art-status.

Art is a constantly evolving, reflexive field in which artists and philosophers continually challenge the status quo. The American legal system is unable to continue avoiding the question of art versus non-art. Indeed, judges would benefit from analyzing claims to art-status under the objectivity provided by aesthetic theories, aided by expert testimony when needed. Due to the nature of certain types of recent art that would be granted limited copyright protection under an art-theoretical adjudicative analysis, a new statutory exception should be created to protect the free flow of ideas and the free production of useful articles. This statutory exception would further the purpose of copyright law to "promot[e] broad public availability of literature,

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[396] In unusual cases of bad faith negotiation by copyright holders, resort to civil adjudication could be necessary. If requested to do so, courts can ultimately exercise their equitable powers to compel a license where harm to the public would be substantial. *Cf.* eBay v. MercExchange, 547 U.S. 388, 391 (2006) (holding that courts must apply the traditional four-factor test in equity to determine whether a permanent injunction should issue on a patent-holder's request).

[397] *See* Comment on Mazer v. Stein, *supra* note 188, at 824.

[398] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

[399] *See* Farley, *supra* note 14, at 807–08.

music, and the other arts."[400]

[400] *See Twentieth Century Music Corp.*, 422 U.S. at 156; *accord* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).