

## The Interplay between Contemporary Art and Copyright Law

Annamma Samuel<sup>1</sup> and Rachel Florence James<sup>2†</sup>

<sup>1</sup>DPIIT IPR Chair Professor, Gujarat National Law University, Gujarat — 382 421, India

<sup>2</sup>Boston University School of Law, Boston, MA 02215, United States

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The Law of Copyright is capable of facilitating creativity as well as hindering it. Art has progressed over the years and the past few decades witnessed the expression of art in several forms. The market for contemporary art is thriving and this raises a very important question: Should the ambit of copyright law be extended or modified to protect newer forms of art work? As the art movement across the world is undergoing some dynamic changes, it becomes necessary to study the art protection laws across jurisdictions to hatch a regulatory framework, especially for contemporary artworks like appropriation art which are two fields of expression that are trickier than others. This article aims to provide a comprehensive deep-dive into the sufficiency of law and the changes that need to be made to both secure economic and moral rights of the creator and incentivize new art, but also to not thwart away the existing regime to accommodate trivial ideas, drifted from expression.

**Keywords:** Appropriation Art, Copyright, Fair Use Rule, Derivative Work, Fixation Requirement

It is a tradition that art practitioners challenge and explore the community's moral, intellectual and social boundaries. It might also be said that some of the most conclusive definitions of those boundaries are provided by the judiciary. Those limits are formulated from the bundle of rights and their co-relative duties. However, when the rights exercised by one individual conflicts with the rights exercised by another individual, it paves way for problems. The law of copyright strives to protect the artistic creations by offering economic incentives to the creator of the artistic work. Affording Copyright protection encourages a diverse array of artistic and creative work from various genres by providing the artists the property rights in their works.<sup>1</sup> Ironically, the Copyright law sometimes hinders creativity too. The past few decades have seen some dynamic advancements in mediums of expression that have drastically changed the creative outputs that require protection. This raises a very important question: should the ambit of law be willing to completely modify to accommodate newer forms of expression that require protection? Scholars are truly divided on this point. While some believe that any progressive law would be expected to metamorphosize according to the needs of the time and not restrict artistic expression to traditional norms, the other half believe

that the characteristics of copyright protection cannot be altered because doing so, increases the challenges two-fold. Contemporary art is constantly evolving at a faster pace when compared to the related legislations. There are no qualitative tests to determine whether an art can be copyrighted or not. In most jurisdictions, a mere requirement of originality and the need for the work to be an expression rather than an idea is the only qualification mandated by the copyright Act.<sup>2</sup> Unfortunately, the Copyright Act of India, USA and UK do not do justice in providing protection for many post-modern art movements in spite of this comprehensive framework and flexible approach.

### With Post-Modern Art

In simple terms, we can state that the post-modern art is a movement and cannot be restricted to fit into the conventional definition of art. The Post-modernism movement essentially revolts against the customary norms of ownership, originality and expression that are integral to the copyright protection. The post-modern artists lift images from already existing works and present newer ideas and perspectives on politics, consumerism, society and other thought-processes of that era. The post-modern artists create art works that rebels against the high-powered lot in the society which may monopolize dominion over the way in which the very imaged that create our popular culture is communicated to the

<sup>†</sup>Corresponding author: Email:rachel.florence626@gmail.com

society at large.<sup>3</sup> In real world, the copyrighted works of other artists are appropriated by the post-modern artists to critique and comment on the society and this makes majority of the post-modern art non-copyrightable.

The 'Blued Trees Symphony' is an excellent example of how Contemporary art was used as an instrument to challenge capitalism. This was an initiative to challenge the limits of the Visual Artists Rights Act (VARA) that protects only the rights of permanent art of recognized art historical statute but not movable, transient or activist art. This movement sought protection for eco-art as a new genre. The language defining legal theories of copyright ignores the power of the phrase *droit moral*. Resultantly, this continental-scale work of interdisciplinary art was copyrighted in the year 2015, requiring the courts to recognize an emergent overlap between eminent domain law, copyright ownership and new forms of art.<sup>4</sup>

Post-modern art has risen to the occasion, replacing the modern art of the early twentieth century. The concept of post-modernism traces its origin from the use of "found objects". These found objects could either be natural or human-made and they were minimally modified or in some cases, they were left entirely untouched by the artist. These works were finally offered as artworks. In the paintings of artists like Andy Warhol and Jasper Johns, we can observe the use of institutional symbols and commercial items. Minimalist sculptors deployed construction materials, like stone, mud, wood, wire, or metal, and exhibited the works with minimal or zero modifications.<sup>1</sup>

Appropriation art is one such art form in the post-modern movement, which lifts the images of other artists and incorporates them into already existing artworks to criticize on the society. Similar to the appropriation artists, conceptual artists also challenge the same high-powered lot by redefining the conventional notions of what is art and what are socially valuable ideas. The conceptual artists implement this by creating artworks that carry originality in idea, but not in expression.<sup>5</sup>

"Earthworks" artists install a sculptural matter in an outdoor environment or relocate the already existing materials that appear in a natural landscape to create artworks in nature.<sup>6</sup> The performance artists try to blend different elements of theatre with traditional forms of visual art to create a fusion of choreography, sculpture and theatre. Mark Kostabi<sup>7</sup> and Jeff Koons

are New York based artists who believe that the financial value of an artwork is determined by the number of aesthetic elements present on it. Ever since Duchamp's time, the post-modern artists, rather than advocating for the artwork itself, have insisted that the primary stimulus for the creation is the idea behind the artwork.<sup>8</sup>

The protection of artistic works through copyrights, awards a veil of economic incentives to the proprietor of the work.<sup>9</sup> This further enables and fosters the production of other creative works. Copyright is fascinatingly, an automatic right that is secured by the creator of the art, as long as the work is fixed in a tangible medium. However, like many other forms of Intellectual Property Rights and works that they protect, there lies a perennial conflict of balance. On the one hand, while copyright serve as a medium to reward and stimulate creativity by requisite protection through law, the other side requires there to be a public domain from which inspiration can be quarried.<sup>10</sup> While like copyrights over other works, a major benefit denomination for the owners of artistic works lies in the economic rights, which is secured through assignment and royalties of their work. However, they also seek to protect their work through their moral rights- to avoid any derogatory treatment, inferior reproduction of their work, or likewise. However, it is pertinent to note that the conceptions of what art connotes keep expanding. Every new movement of art arises by rebelling against the traditional norms of the movement that preceded it. They also find new mediums and modes of expression to depict the changing phases of society, politics and consumerism. Thus, keeping up with the essence of the works, it becomes imminent that the law governing them must provide a contemporarily adapting protection.<sup>9</sup>

Despite the long history and success of the US Copyright Act, which provided economic incentives thereby fostering creativity in various mediums and movements, it contradicts the foundations of post-modern art. A very evident example is the subset of post-modernism that rebels against the concepts of originality, ownership and fixation which form the very fundamental tenets of copyright protection.<sup>11</sup> The question that then arises is whether this regime of law must be drastically changed to accommodate contemporary art or whether doing so, would lead to an amorphous regulatory framework

### Fair Use Test

When any copyrighted work which is used for limited and transformative purpose is copied, and such copy is used for the purpose of commenting, criticizing or for creation of a parody work, the "Fair use" rule kicks in. It is pertinent to understand that a copyrighted material can be copied for the above-mentioned reasons even without obtaining permission from the copyright owner. Simply put, the fair use rule is a defensive strategy adopted by the defendant when a copyright infringement suit is initiated against him.<sup>12</sup> The main purpose behind the US Copyright Act can be found in the 'Copyright and Commerce' Clause present in the US Constitution (Article I, Section 8, Clause 8) It is 'to promote and facilitate the progress of art and science'. In order to fulfill this purpose, the doctrine of fair use becomes imperative.<sup>13</sup> After all, copyright law is supposed to be an "engine of free expression" and not a hindrance to it. If the fair use defense were absent, the copyright law may have suppressed the creative processes.<sup>14</sup>

The US Copyright Act of 1976, provides an equitable four-factor test to determine whether a particular use is fair or not:

- i. The purpose and character of the use, including whether such use is for non-profit educational purposes or of commercial nature;
- ii. The nature of the copyrighted work;
- iii. The substantiality and amount of the section used in relation to the copyrighted work as a whole;
- iv. The effect of the use on the market or the potential market for the original copyrighted.<sup>15</sup>

However, by the 1994 judgment in *Campbell v Acuff-Rose Music*, the application of the four-factor test changed dramatically. The Supreme Court withdrew from its market-focused approach i.e., the fourth factor of the test, and elevated the first factor of the test. The Court filtered the fair use inquiry into a single question: whether the copied work is "transformative"?<sup>16</sup>

### Post Campbell Regime to the Fair Use Test

As we read above, the test of transformativeness was used to ascertain fair use after the ruling in the Campbell case. Particularly, a court must scrutinize whether the secondary work "adds something new, with a different purpose or further character, amending the first with new expression, meaning, or message." If the answer to this question is yes, the use is "transformative" and the other factors diminish in importance.

For example, Alfred Bell, transformed works in the public domain by old masters into mezzotint engravings. The engraver used dots and lines to create shade and light which differentiated the reproduced artwork from the original oil paintings. This is different from the use of brush strokes and color by the old master to produce shade and light in the original work.<sup>17</sup> The Court ruled that these reproductions were "transformative" from the underlying work to meet the originality standard.<sup>18</sup>

### Are Appropriation Art Derivative Works?

Majority of Contemporary art are derivative works. The official legal definition of derivative works is seen in the United States Copyright Act of 1976, 17 U.S.C. Section 101 states: A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".<sup>19</sup> Whenever a derivative work is created by an artist, it consists of appropriated, borrowed or transformative elements from a pre-existing work. However, it is important to understand that the absolute right to prepare such derivative works rests with the copyright owner.<sup>20</sup> It can be arguably stated that appropriation artists borrow from the original work and add some transformative touch to the art.<sup>21</sup>

### The Test of Originality and Contemporary Art

The work created by the post-modern artist must always fulfill the originality requirement even if it is borrowed from the public domain and transformed by the artist. Originality in a derivative work mandate that the author must contribute "something more than a 'merely trivial' variation, something recognizably 'his own. No matter how poor artistically the author's addition is, all that is required is that the work of the artist must be his own."<sup>22</sup> In simple terms, the derivative work must pass the distinguishable variation test.

Originality, as a requisite for copyright protection, has been interpreted by the courts in two ways. In *Bleistein v Donalds on Lithographing Co.*<sup>23</sup> The Supreme Court presented the concept of originality as

a creative impulse that "always consists of something unique. It expresses its uniqueness even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. Thus, under the *Bleistein* standard, originality subsists in the unique, personal contribution of the author. However, the standard enumerated in *Feist* requires *de minimis* proof that the "work was independently created by the author and that the "requisite level of creativity is extremely low".<sup>24</sup> The *Feist* standard emphasizes creativity, however slight, over the unique.

In Germany, for example, "objetstrouvés and ready-mades have been denied copyright protection"<sup>25</sup> on the grounds of the requirement of 'creativity'. Ready-mades and found objects<sup>26</sup> are items that are manufactured on an everyday basis, de-contextualized from their original use and elevated to the state of art. Such elevation is attributed to their artistic subsistence and to their author's personality not because he made them from scratch, but because such creation was a fruit of his creative and free choices.<sup>27</sup> This results in a new 'original' work that bears the author's personal imprint.

The low threshold requirement of originality precludes some movements within post-modernism like super realism. However, there exists some works within the post-modernism movements that create artworks containing low levels of original expression. Nevertheless, these works receive copyright protection because they contain original expression.

### ***Expression v Ideas***

The core objective of Copyright law is to afford protection to original expression and not original ideas. "Idea" can be compared to a work's animating concept like, the story of two star crossed lovers, while "expression" can be compared to the ultimate and literal expression like, the play that unfolds the story of the two lovers.<sup>28</sup> Copyright's formulation of originality lies at the heart of the copyright law. The UK Copyright Act, 1911 introduced originality as a key concept of copyright protection which has since been adopted by several jurisdictions today including USA and India. In US, the Copyright Act goes about classifying what works are worthy of protection by examining the basis for originality. Postmodernism, conflicts with both common and statutory constructions of copyright law by giving more importance to the idea. Eight types of expression,

including painting, sculptures, photographs, and conventional forms of theater are offered protection by the Copyright Act, 1976. The protection to visual works occupies a broadened purview, more specifically "pictorial, sculptural and graphic works,"<sup>29</sup> which are defined to include "applied art, photographs, prints and reproductions" in either two or three dimensions.<sup>30</sup>

According to the founder of the Dada movement called Marcel Duchamp, the intention of the artist had more to do with art, rather than any creative act or aesthetic expression. According to Duchamp, art was an idea.<sup>31</sup> 'As such, the materials of the conceptual artist are innumerable as the number of interpretations and ideas'.<sup>32</sup> The work titled Manet Project, created by German artist Hans Haacke is an excellent example that establishes that art is an idea and not an expression. This work consists of panels that enlist the name of every person who bought and sold Manet's Bunch of Asparagus from 1880 until the Wallraf-Richartz Museum in Cologne procured that painting. The importance of his work does not lie on the aesthetic or visual qualities of the letters on the panels, but it lies on questioning the association of business transactions with the art world.<sup>24</sup>

Similarly, Malevich's White on White expressed the creative idea of absolute artistic purity by painting the minimalist thing a person could paint: a monochromatic white canvas.<sup>33</sup> If the copyright protection is extended to artworks that are so simple that the idea integrates with the expression, some post-modern art movements like the minimalist art can be offered protection under this veil. On the downside, this could lead to one artist holding a monopoly over the color white, if the work in question consisted of nothing more than a white panel or canvas.

"The *sine qua non* of copyright is originality".<sup>34</sup> The Court in *Feist Publications, Inc. v Rural Telephone Service Co*<sup>35</sup>, articulated the standard for originality in the following words

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

In addition to the originality requirement, *Feist* also observed that the work should possess at least a minimal degree of creativity. All that is required to qualify for copyright protection is that the underlying

work should possess “some creative spark, no matter how crude, humble or obvious.” Such originality and creativity must be demonstrated in terms of expression and not ideas. Similarly, in the 2012 case of *Designers Guild Ltd v Russell Williams Ltd*<sup>36</sup>, the Court of Appeals in England ruled that “copyright subsists, not in ideas, but in the form in which the ideas are expressed”.<sup>37</sup>

This poses a serious problem for appropriation artists and minimalist artist. Currently, only works of original expression are awarded copyright protection. One of the core attributes of copyright law is that it affords protection only to the ‘material expression’ of a work while any ideas behind the ‘material expression’ remains copyright resistant.<sup>2</sup> If the Copyright law were to protect movements like appropriation and minimalist art, the copying protection would have to include original ideas as well. Under such a framework, potentially everything could be regarded as copyrightable art as long as the conception was original. Thus, the Copyright Act in India, USA and UK has fixed a very low threshold for creativity and originality thus making it flexible for various contemporary to art to receive protection. However, it is pertinent to point out that even the minimal level of creativity is absent in some works of post-modern art. This absenteeism is attribute to the great amount of focus in such works is placed on original ideas rather than original expression. Other post-modern works fail to receive protection under the copyright law because they are the appropriated work of someone else, and not the independent creation of the artist.

### **Copyright Law and the Idea Expression Dichotomy**

The main reason that led to the formulation of the idea expression dichotomy was to ensure that the copyright law protected only the manifestation of the idea rather than the idea itself. But when it comes to contemporary art, adhering to this dichotomy becomes impossible at times. The underlying purpose of the copyright law is to protect the works of the original artist by forbidding the copying of the expression. However, copying of ideas is permitted in order to encourage creation of new works. Practically speaking, there is no way a new artist may manage to extract the ‘idea’ without the ‘expression of it. The artist’s attempt to separate the idea behind the artwork itself may prove to be futile because the value of the

artwork is often determined by the artist’s own definition of what constitutes art and how their work reflects their artistic identity, in other words, the artist’s creation is often only considered valuable as a representation of the artist and their perspective of the nature of art.<sup>38</sup>

The French court had to decide whether photographing the work of the artistic duo Christo and Jeanne-Claude by two news companies without authorization was infringing. This resultantly raised another question as to ‘whether environmental works<sup>39</sup> created by the duo was protected by the copyright law’. The Paris Court of Appeal in the Jeanne-Claude case noted that ‘The idea of emphasizing the pureness of the lines of a bridge and its lampposts with the help of ropes and cloth in order to illustrate the form and pure lines of the bridge represents an original work, and thus it is eligible to be protected under the copyright law. However, in Christo’s case, the French Court delivered a contrasting verdict. In this case, a suit was filed against an advertising agency for covering the subject of the photo shoot in a similar cloth. The Court stated that the copyright law would only prohibit someone from using the exact same cloth for wrapping the exact same object, and it is not extendable to the principle of packaging a different object in an artistic way.

There is a plethora of contemporary art examples like the above that is likely to confuse the courts in case of a dispute. In Jannis Kounellis’s ‘Untitled (12 Horses)’ (2015), the live horses were tied up in a gallery, where the expression on the work was not an object, but a living organism. Similarly, the artist transformed her body to look like a human clock in Virginia Mastrogiannaki’s ‘Jargon’(2016).<sup>40</sup> Furthermore, in Damien Hirst’s work involved a shark floating in a glass tank filled with formaldehyde, and we are not sure what rights under the copyright law was applicable to his work.

The abovementioned examples convey that a balance must be struck between protecting the works of the artists and sustaining right of the public to freely disseminate ideas.<sup>41</sup> However, due to the absence of a clear yardstick that separates ideas from expression, contemporary artworks are vulnerable: in the aspect of being infringed as well as infringing. However, an idea blocking crusade by the courts and legislators is not the way forward; this stumbling block for substantial protection may only be satisfyingly addressed as a matter of doctrinal policy copyright policy.

### **Appropriation Art- An Overview**

Appropriation art is not a recent or new movement and for centuries, artists have been borrowing and appropriating from each other's work. The appropriation artist lifts images from others and sometimes in their entirety. Thus, the element of Originality is absent in most of these works and also, they often infringe copyrighted works. The inception of appropriation art can be traced back to the nineteenth century with literary borrowing from existing works such as T.S. Elliot's *'The Wasteland'* and James Joyce's *Ulysses*. Art was inspired from pop culture and mass media by the twentieth century. Appropriation artists employ a wide array of techniques and methods; from appropriating another image in its entirety without any modification (appropriation) to integrating a few elements from a pre-existing piece of art to create a new work (collage).<sup>42</sup> Pablo Picasso's use of Diego Velazquez's *Las Meninas* in his *Maids of Honour* is a classic example of appropriation art. Appropriation art essentially entails critiques and commentaries about the society and therefore is less like "stealing" and more like a "political speech".<sup>43</sup> William Landes while explaining appropriation art as a movement stated that:

*"Appropriation art borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art. Often, the artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning. Appropriation art has been commonly described 'as getting the handout of art and putting the brain in.'"*<sup>44</sup>

### **Fair Use Rule and Appropriation Art**

As we read in the foregoing section, appropriation artworks are essentially derivative works and the only way they could be non-infringing is by satisfying the fair use test. Appropriation artist never really try to conceal the fact that they have borrowed images from the works of other artists.<sup>45</sup> Furthermore, the viewers or audience are challenged to discover the "genesis" of their work.<sup>46</sup> Appropriation artists often challenge the conventional "ideas about ownership and originality" during the process of creating appropriation art, which utilizes another artist's work as a keystone.<sup>47</sup>

In order to determine whether the copied work can invoke the fair use defense, the element of transformation is one of the main factors the court will look for.<sup>48</sup> When the latter work does not merely supersede the original work but instead "adds a new touch to it, with a different purpose or character, modifying the former work with new meaning, expression or message"<sup>49</sup>, the use may be described as fair. Creation of transformative work furthers the ultimate goal of copyright law i.e., Aid in promotion and progress of arts.<sup>50</sup> The Copyright law was enacted not to reward the artist's hard work, but to establish a sense of guarantee to the artist that his/her original expression will be protected, while simultaneously motivating others to transform the pre-existing original expression into something new. The appropriation artist transforms the original work of art into an art with new "meaning, message and expression" by compelling the audience and viewers see something new in something that already exists.

In *Rogers v Koons*<sup>51</sup>, "the Court inclined in favor of the original artist. In this case, artist Jeff Koons appropriated an image of a couple with German Shepherd puppies from a photograph taken by Artist Rogers. Koons made an exact replica of Rogers' work in a garishly painted sculpture. Although Koons' idea was distinct from Rogers', his expression was not. The ultimate goal of Koons's *String of Puppies* was to comment on society's obsession with reproducible images, whereas Rogers' goal in his *Puppies* was to show an inoffensive and charming scene."<sup>52</sup> Koons claimed parody as a defense and the court applied the fair use rule to critically analyze the same. The court rejected the parody defense on the ground that "the copied work must at least be partially an object of parody, otherwise there would be no need to conjure up the original. "This judgment by the court signaled a death knell to appropriation art as a whole.

### **Fair Use Rule: Indian and American Judiciary USA**

The courts in US after expansively reading the scope of fair defense found that, in most cases, appropriation art that minimally alter the original works comes under the purview of fair use and is not hit by copyright infringement. Certain courts in several cases<sup>53</sup> in US have accepted Appropriation Art as a transformative work such as courts in the 9th Circuit however, there are certain courts such as courts in 2nd Circuit, which take nonflexible

approach while determining transformative use for works. But the recent decision of the court of appeals for the second circuit in the case of *Andy Warhol v Goldsmith*<sup>54</sup> will have significant implication on how appropriation art will be considered in US. It held that "in order for a new artwork to be transformative when it does not comment on, relate back to, or use the original borrowed work for a new purpose, the new artwork must have a new distinct artistic purpose and be reasonably perceived as having a new meaning or message separate from the borrowed work and should not be substantially similar to the original work". The court also commented upon the overreliance of transformative use and said greater reliance should be given to potential market harm i.e., the fourth factor. Even in the few cases that have gone to trial, there seems to be no consistency in the holdings to provide guidance to artists or courts, which illustrates that judges do not have clarity as to what constitutes fair use in the visual arts. Despite uncertainty, majority of courts in the US have consistently upheld the work of appropriation artists as transformative use, giving a flexible interpretation to the fair use doctrine and to transformativeness.

### India

The Indian courts while determining transformative use:

- (i) Look at the independent creation that the person has made to the original work.
- (ii) The purpose and nature of the new work must be different from that of the original work.
- (iii) The secondary work must not harm the potential/original market of the author of the original work.

The court takes into consideration these factors while determining fair dealing apart from the factor of substantial copying. Thus, it can be understood that, unlike USA for a work to be considered transformative in India, it requires higher degree of creative input into the original work, a comment or review of that work and since the Indian Courts have adopted US approach, the courts should liberally interpret a work as transformative use even if the secondary work comment on something which is not the work itself. The same could be adopted in the Indian system as it allows for criticism or review of the original work or any other work.<sup>55</sup>

To advance the very basis of copyright law to promote the creation of art and science and

dissemination of information it is necessary that India adopts a flexible approach and give the sections a broader interpretation to include works which are more than just mere commentary or review of a particular work. A secondary work can be transformative work even if it makes a general, societal comment, critique using that work with some independent contribution of the author.

### Alternate Recourse

Majority of the appropriation art, like that of Koons will not stand good when the fair use defense is invoked because the artist usually lifts the heart of the image or the image in its entirety. Post the *Rogers* case, appropriation artist now has four options:

- (i) Take the original artist's permission before using his/her work;
- (ii) Pay a licensing fee;
- (iii) Provide due credits to the original artist;
- (iv) Make a distinction between an appropriation artist's one time use of an image (as in a painting) and multiple uses (as in prints or derivative works)

Since most of the function of appropriation artist functions as a political commentary, the artists can also invoke the first amendment defense in the United States. An example of such defense is Keith Haring's *Reagan Slain by Hero Cop*<sup>56</sup>, which is another collage using copyrighted wire service photograph and newspaper clipping. This work was an undisguised political commentary and orthodox speech that encourages public discourse. *Reagan Slain by Hero Cop* could not be repressed in any way by the copyright holder under the first amendment defense. The appropriation artist would have the liberty to use another's work in any way he deems fit. However, this approach will likely subsume the US Copyright Act and lead to illimitable copying.

### The Fixation Requirement- Does Contemporary Art Satisfy this Test?

It is a well-settled principle of copyright law that protection can be granted to works only when they are expressed in some tangible form. This is referred to as the fixation requirement in copyright law. Simply put, the fixation requirement mandates that the work must be exhibited in a copy which makes it possible for others to copy and perceive it. One of the primary reasons for fixation to be a requirement in copyright law is to facilitate a distinction between the mere idea and the entitled expression of a work. This

requirement appears to be incompatible with contemporary works that are either composed of impermanent materials or are heavily improvised.<sup>57</sup> Common law countries mandate the fixation requirement whereas the civil law countries do not. The TRIPS Agreement does not specify anything about the fixation requirement. Instead, the fixation requirement is incorporated in the Berne Convention which grants discretionary power to its signatories to decide whether the work must be fixated "in some material form".<sup>58</sup> A work is considered to be fixed if and only if the work has been reproduced, perceived or otherwise communicated for a period exceeding that transitory duration.<sup>1</sup> However, this rigid fixation requirement does not hold good for contemporary art creations that are created with transient materials or that which are highly improvisatory.

An example where fixation requirement proves to be problematic is, the work by Scottish land artist,<sup>59</sup> Andy Goldsworthy. In this work, Andy constructed Cairns by the shore and allowed the incoming tides to destroy it and documented their decaying process by using photography and videography.<sup>60</sup>

### Position in USA

The fixation requirement is stringent in USA. Under §102(a) of the 17 U.S.C., copyright protection extends to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Also, according to §101, "A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phono record, by or under the authority of the author, is stable or sufficiently permanent to be seen, reproduced, or otherwise communicated for a period that is longer than the transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission".<sup>61</sup> This poses a threat for works where the tangible medium in which the works are fixated happen to be transitory in nature.

In *Kelley v Chicago Park District*<sup>61</sup>, the Seventh Circuit, while evaluating Chapman Kelley's Wildflower Works project, the Court looked into the copyright limitation of transitory duration. The court performed a comparative analysis of the Wildflower works project and artist Jeff Koons's

plant-based sculpture Puppy. The Court opined that "for a work of art to be protected by the copyright law, it must communicate the fact that it was created by humans. The court faltered in categorization of Kelley's artwork, which it called 'infinitely malleable'".<sup>62</sup> The Court ruled that requirement of fixation precluded his work from being copyrightable and held that his work could be treated as painting and not a sculpture. However, the court refuted its ruling when comparing Kelley's Wildflower Works installation to Koons's Puppy. The Court noticed that even though the sculpture was fixed, different exhibition site bloomed differently and created a "noticeably different 'Puppy'" at each blooming location.<sup>54</sup>

### Position in UK

The fixation requirement is a lot more ambiguous and unclear under the UK Copyright law. The requirement of fixation is mandated only for literary, dramatic and musical works.<sup>63</sup> The UK law has not mandated a similar fixation requirement for artistic works. However, in some cases, a similar requirement was demanded by the court at times.<sup>63</sup> For example, in the case of *Merchandising Corp of America v Harpbond Ltd*<sup>64</sup> popularly known as the Adam Ant case, the court ruled that make-up cannot be placed under the purview of artistic work since 'it was not permanently fixated to a material surface'.<sup>64</sup> Contrarily, in *Metix v GH Maughan*<sup>65</sup> it was observed that "a sculpture made from ice in no less a sculpture because it may melt as soon as the temperature rises".<sup>66</sup>

### Position in France

Under the French Law, there is no fixation requirement *per se*. Furthermore, even speeches, once they become perceptible by the very action of speaking, qualify for copyright protection.<sup>67</sup> In addition, the Paris Supreme Court for Judicial Matters found that unauthorized photographs of a fashion show infringed the copyright over the shows as performances. In interpreting the fixation requirement, the court held that the fixation was merely an evidentiary requisite for the infringement action, not a prerequisite for the existence of copyright.<sup>68</sup> Under French law the recognition of a fixation requirement would also contradict the moral right of divulgation, according to which artists "are able to decide upon the access of the public to their work".<sup>69</sup>



### Does Copyright protection limit Contemporary Art?

The ruling in *Koons v Rogers*<sup>70</sup> illustrates that there is no uniform standard to apply to fair use in contemporary art and more specifically, appropriation art. Even at the Supreme Court judgment in *Campbell v Acuff*<sup>71</sup> Rose provides no guidance in this regard. Justice Scouter seemed to authorize fair uses for the purpose of parody, but not for satire, when he states, "If, on the contrary, the commentary has no critical bearing on the style or substance of the original composition, which the alleged infringer simply uses to garner attention or to escape the drudgery in working up something fresh, the claim to fairness in borrowing from another's work recedes accordingly."<sup>71</sup> However, he also continues to state directly after that there may be situations when a satire could be a fair use. This confusion is reflected in the case law where sometimes a parody is a fair use, and sometimes it is not; sometimes a satire is a fair use, and sometimes it is not.<sup>72</sup>

Besides, 'originality' is the sole criterion for determining copyrightability and as such its determination entails threatening power over works that fail to fulfill it. Works incorporating elements of appropriation, minimalism or make use of found objects, fail under certain circumstances to be eligible for copyright since they lack 'originality'. Common law systems are much more lenient towards Contemporary art than the Civil law systems. Thus, in the UK, for example, where only 'trivial effort' serves as a sufficient requirement to conferring 'originality', courts have easily granted protection to any and every work including works that are minimalistic.<sup>73</sup>

### Conclusion

Most contemporary artworks are lauded for their uniqueness, and their massive prices are attributed to the uniqueness of the first copy of the work. Thus, it is undeniably clear that the present copyright regime cannot claim complete sufficiency in issues of contemporary art. Copyright law remains the principle regulating legislation for the creative economy making the maintenance of its orderly functionality vital for the continuation of a prosperous and healthy art market. However, it is the nature of post-modern art to stretch the limits on what is deemed to be considered art. The Copyright Act would have to be indefinitely stretched and re-written to accommodate post-modernism as artists throughout the ages have

been continually redefining and rewriting the rules of authorship, originality and creativity. On the other hand, the copyright law not only fails to keep up with the very significant justification for its existence, but it also endangers its own presence as the vital administrative force for artistic creation by precluding copyright protection to numerous art movement that constitute eminent agents of the market.

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