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May I Copyright My Shovel? Intellectual Property Incentives and Conceptiual Art

Sarah Fenton Hinks

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INTELLECTUAL PROPERTY, INCENTIVES AND CONCEPTUAL ART

By Sarah Fenton Hinks

I. Introduction

Conceptual artist Marcel Duchamp's credo, "I was much more interested in recreating ideas in painting"[1] exposes the tension between conceptual art and copyright law. While the law rigidly defines what is copyrightable, conceptual art does not define what is art. Yet copyright law seeks to encourage artistic creation. Authors of works, receive exclusive rights to their creations. These rights allow the author to charge the public for the use of their creative expressions. By securing revenue for the creator, copyright protection inspires artists to produce work, which, in turn, benefits the public as recipients of the work. Yet, copyright law does not protect a work just because it is art—some of Duchamp's famous work would not be copyrightable. The denial of copyright to works of art raises important questions about how to incentivize artists whose work may defy the strictures of copyright law.

Part II of this paper describes the origin and theory of Conceptual Art. Part III examines the statutory and constitutional requirements for copyright protection as they might apply to particular works of art. Part IV describes, what this author calls, the alternative encouragement system for artists. This system includes: the private art market, government and charitable funding, as well as state law protections. Part V reviews the inherent risks in these alternative structures theorizing on the viability of the system. Part V compares the risks of the alternative encouragement system to the administrative costs of expanding copyright protection to include works of conceptual art. Part VI analyzes why copyright protection may not work effectively to encourage conceptual works and why the alternative encouragement system may work better.

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[1] TONY GODFREY, CONCEPTUAL ART 27 (1st ed. 1998) (describing his painting *Nude Descending the Staircase (No.2)*).

This paper concludes that copyright protection does not need to be expanded because the alternative encouragement system is better adapted to encourage artists.

II. A Brief History of Conceptual Art

Conceptual Art was an American art movement during the 1960s,[2] but its philosophy had antecedents in the early development of modern art. There is no single genesis point for modern art, though there were hints as early as the Eighteenth Century that a schism had begun in the Western art tradition. During the classical art period that preceded modernism, schools and salons rigidly defined art and the role of the artist. Artists began questioning these precepts. Rejecting the canon of classical art, modern artists engaged in the process of defining art thereby changing their job from crafting art to defining it. [3] Conceptual Art would further elevate the role of the artist and the process of defining art, from a constituent part of creation, to the most significant part of creation. Conceptual Art dismissed both execution and beauty in what was known as the "dematerialization" of art.[4]

Conceptual Art changed the role of the audience too. The viewer now had an active role in defining art through context. Artists required the viewer to reflect on contingent elements as part of the meaning of the work.[5] Duchamp's readymades are considered the first works to posit meaning on a work through context. His most famous readymade, was a used urinal that he titled *Fountain*, signed R. Mutt, and submitted to the New York Society of Independent Artists' 1917

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[2] H.H. ARNASON, HISTORY OF MODERN ART: PAINTING, SCULPTURE, ARCHITECTURE, PHOTOGRAPHY 589 (Peter Kalb, 5th ed. 2003).

[3] *Id. at* 1-14 (discussing classical art and artists who rejected classical art without issuing manifestos).

[4] Alexander Alberro, *Reconsidering Conceptual Art, 1966-1977, in* CONCEPTUAL ART: A CRITICAL ANTHOLOGY xvii (Alexander Alberro et al. eds., 1st ed. 1999).

[5] *Id.*

exhibition.[6] This readymade, unlike many of his later works, was laden with symbolism and meaning, agitating the audience to question art.

Like earlier political changes that had influenced modern art, the growth of mass media in western culture after World War II and the ensuing rise of advertising and consumer culture raised questions for Conceptual artists regarding art status.[7] Artists were confronted by image making designed to promote consumption. Madison Avenue seemed to be influential in defining art. The artist was marginalized by the prevalence of commercial art. Conceptual artists reacted by utilizing the environment of the mass-produced image, or even the image itself. These artists developed a new role in this new social order by critiquing industrial artistic practice.[8]

Conceptual Art became a movement rather than a philosophy in the 1960s and 1970s.[9] These artists were political critics, engaging their audience through the production of unsettling images and actions.[10] Meanwhile, a splinter group of Conceptual artists led by Joseph Kosuth, ignored political agitation and focused on the process through which art gains meaning.[11] His work attempted to expose the mental processes involved in creating meaning so that audiences could question how works of art gained meaning. Over time Kosuth's work graduated from a didactic display of Semiotic theory to nearly imageless dictionary definitions.[12] Conceptual Art as a movement lasted only a decade.

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[6] ARNASON, *supra* note 2, at 248.
[7] *See*, PETER OSBORNE, CONCEPTUAL ART: THEMES AND MOVEMENTS 38-41(1st ed. 2002).
[8] Piero Gilardi *Politics and the Avant-garde, in* CONCEPTUAL ART: A CRITICAL ANTHOLOGY 128-34 (Alexander Alberro et al. eds., 1st ed. 1999).
[9] ARNASON, *supra* note 2, at 588.
[10] *Id.* at 590.
[11] Joseph Kosuth, *Art After Philosophy, in* CONCEPTUAL ART: A CRITICAL ANTHOLOGY 158 (Alexander Alberro et al. eds., 1st ed. 1999).
[12] ARNASON, *supra* note 2, at 589 (comparing Kosuth's work *Art as Idea as Idea* from 1966 to his earlier *One and Three Chairs* from 1965).

Despite the counter trend of formalism, as well as exaggerated criticism that conceptual artists were unskilled, the tenants of conceptual art have remained relevant for current artists. The theory of intellectual creation—idea over form—undergirds the work of Postmodern art.[13] Appropriation Art, Commodity Art and Environmental Art are all premised on the theory that any artist has the ability to define art without regard to materials, style or final output.

III. WHAT WORK DESERVES COPYRIGHT PROTECTION?

Copyright is designed to promote the arts.[14] It seems logical that any creative work termed "art" should then be copyrightable. However, copyright analysis involves a more nuanced analysis to determine when a monopoly should be granted because it will serve the public good. Copyrightable works are original, creative expressions of an author, which are non-useful and fixed in a tangible medium of expression. Excluded from the protections of a copyright are works of art, even works that have garnered critical praise, that do not meet these requirements. Marcel Duchamp's *Fountain* is an example of an artwork that does not fit comfortably within the copyright regime, despite art critics holding it out as one of the most important works of the 20th Century.[15] The dematerialization of the art object, and the inclusive definition of artist, has created a tautology for conceptual artists that has obscured the term art. Conceptual art considers anything produced by an artist to be art, and anyone who produces art to be an artist. Conceptual art poses no restrictions and makes not stipulation regarding art status. This tautology makes it impossible to exclude from the designation of art anything. The law cannot rely on a work's art

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13 ARNASON, *supra* note 2, at 688.

14 *See*, U.S. CONST. art. I, §8, cl.8. "The Congress shall have Power…to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." (interpreting "Science" to mean books, this clause has been interpreted as a congressional mandate to create laws to promote creative expressions).

15 *Rogue Urinals, Has the Art Market Gone Dada?* THE ECONOMIST ART.VIEW (March 24, 2010), http://www.economist.com/node/15766467 (last visited Dec. 9, 2012).

status for copyright protection because that could include works that may not serve the purpose of promoting art for the public.

A. *Conceptual Artwork and Authorship*

Codified in the 1976 Copyright Act is the constitutional grant to authors of the exclusive rights in their writings. The statute requires the work to be an "original work of authorship, fixed in a tangible medium of expression…from which it can be perceived, reproduced, or otherwise communicated." [16] The constitutional language has been interpreted to support only those works that are entirely human endeavors.[17] The Copyright Office has said this of authorship; "A work must be the product of human authorship and not the forces of nature."[18]

As new tools of creation have developed to assist humans create expressive works, courts have had to grapple with what it means to author a work. In the famous case *Burrow-Giles Lithographic, Co. v. Sarony* the Supreme Court held that a photograph was more than just a mechanical reproduction, it qualified as a writing, and the photographer, as an author. Through control of the constituent elements that made the final work, the photographer was the author. The camera only captured the photographer's choices.[19]

Unlike the *Sarony* court, the Seventh Circuit Court of Appeals found that Chapman Kelley's conceptual work *Wildflower Works*, embodied in the form of a garden, did not meet the explicit requirements of authorship.[20] Chapman Kelley explained that he used flowers as if they were paint. He planted seeds with the expectation that when they bloomed they would complete

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[16] 17 U.S.C. §102(a) (2006).
[17] WILLIAM F. PATRY, PATRY ON COPYRIGHT, §3:22 (2007), available at Westlaw (PATRYCOPY)
[18] U.S. Copyright Office, Compendium II: Copyright Office Practices § 503.03(a) (1984).
[19] *See*, e.g., Burrow-Giles Lithographic, Co. v. Sarony, 111 U.S. 53 (1884) (describing the photographer's choice of subject, decoration and lighting as creative work that made the photograph).
[20] Kelley v. Chicago Park Dist., 635 F.3d 290, 304 (7th Cir. 2011).

his palette.[21] His work, like many Environmental artists, relied on nature to produce the finished product. The court described Kelley's role as a planner and an assistant, rather than an author.[22]

Despite the appellate court conceding that the work may be classified as a "postmodern conceptual artwork," worthy of merit and acclaim, it could not be copyrighted. [23] The forces of nature, according to the court, made the contested work: rain, sun, germination, pollination, birds and the wind.[24] Unlike *Sarony*, the work of the artist in planning and planting was not enough to make him the author of the work. The forces of nature, having ultimate control over the final product, authored the work.

Copyright law requires authorship. Conceptual art considers execution perfunctory. The law seeks to promote artistic production, while conceptual art continually redefines the form of that production. The limitations of copyright law are designed to promote the arts without denying the public access to more intellectual property than is necessary to encourage works.[25] Copyright law seeks to encourage the author of a work. A copyright is unnecessary if the artist has not authored the work. If the law were to grant a copyright to a work called art, but not authored by the artist, the law would be providing property rights to a party for a work that could have been produced without that party. This could not encourage creation by the artist, because the artist has not created. It would unnecessarily grant a monopoly and deny the public access to the expression. If *Wildflower Works* were copyrighted it would give exclusive rights to an expression that was inadvertently created. It is useless to attempt to encourage inadvertent creation because it is outside of the artist's control.

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[21] *Id.* at 293 (discussing the artists purpose in using blooming flowers).

[22] *Id.* at 305.

[23] *Id.* at 304.

[24] *Id.*

[25] *See*, Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN L. REV. 1342, 1441-43 (1989) (describing the prevailing theory of balancing public benefit in copyright protection against "unnecessary" deadweight loss).

B. Conceptual Artwork and Fixation

The 1976 copyright statute requires that protectable work be fixed.[26] A reduction of the expressive work into a form that makes the work "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration," will suffice for fixation.[27] It may be fixed in "any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[28]

The ephemeral nature of Environmental artist Andy Goldsworthy's sculptures are often due to their integration with nature or the use of impermanent materials like ice or water. His sculpture *Strangler Cairn* relies on nature to give it final form. An egg-shaped stone encasement of a Strangler Fig sapling, Goldsworthy's sculpture has been designed to be impermanent. The sapling is a parasite that will grow up through and around the stones, living on them and eventually destroying the sculpture.[29] The work is ephemeral because it was designed by the artists to be temporary, never outlasting the fig tree, and capable of being captured only in stages.

While the stone of *Strangler Cairn* is long lasting and qualifies as a tangible medium of expression, the arrangement of stones comprising the sculpture is not long lasting. The growing fig tree will alter the sculpture, upsetting, breaking and eventually consuming the stones. Even photographs of the sculpture are only temporary fixations of the work. They can only capture a fleeting image of the work because it is in flux. The sculpture would have to be fixed by constant recordation. No such fixation has been made of *Strangler Cairn*.

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[26] 17 U.S.C. §101 (2006).
[27] *Id.*
[28] 17 U.S.C. §102(a) (2006).
[29] *Strangler Cairn,* ART + PLACE, QUEENSLAND PUBLIC ART FUND.GOV.AU, http://www.artplace.arts.qld.gov.au/projects/completedprojects?gal=56 (last visited November 24, 2012)

The Australian website that promotes *Strangler Cairn* places a copyright symbol next to the name. [30] United States law requires fixation for a copyright. Courts have not defined how long the work must be fixed to meet the requirement. They have however, given some indication of the minimum amount of time required. The language of the statute sets the minimum for fixation at "more than transitory duration."[31] At no time does *Strangler Cairn* come to rest in one state. As the sun and the rain and the rock promote the growth of the tree the sculpture is changing. The volatility of this work is important to Goldsworthy; he sculpted the stones around the sapling with the intention that the tree would eventually consume his work.[32] The success of the artist's design would, ironically, be fatal to its copyright protection in the United States.

Copyright law requires the artist to transform an expression from a mental creation into a physical creation that will last for more than temporary duration. Artist must capture their work in some tangible medium that will provide a record and an artifact for the public. The law requires this artifact both because it eases adjudication by providing evidence of the artist's property, and because it provides the public with something tangible of the artist's expression that the public may use.[33] Without fixation, neither the law nor the public can know what property the artist claims. Works that are fixed serve to promote the arts by providing the public and their posterity with a tangible record of that expression. Fixation also eases the administrative costs of adjudicating intellectual property disputes. These benefits warrant the requirement of fixation for all works regardless of their temporal beauty.

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[30] *Id.*

[31] 17 U.S.C. 101 (2006).

[32] *See*, Andy Goldsworthy, ART INFO.COM, http://www.artinfo.com/news/story/822886/the-700000-disappearing-andy-goldsworthy-sculpture-dumped-in-the-australia-desert.html (last visited Dec. 8, 2012) (describing the intention of the artist to have the work dissolve into the environment).

[33] *See*, Gregory S. Donat, *Fixing Fixation: A Copyright with Teeth for Improvisational Performers* 97 COLUM. L. 1369 (June 1997) (discussing the need for fixation for proof of infringement), and Gordon, *supra* note 25, at 1380-81 (describing fixation as the equivalent of physical boundaries in real property).

C. Conceptual Artwork and Originality

The copyright statute requires that a work be original.[34] Originality consists of independent creation and creativity. The Supreme Court has stressed the importance of creativity within the scheme of copyright law by describing it as the "sine qua non" of copyright.[35] The Court has tempered that monumental requirement by setting the creativity bar very low.[36] In judging creativity, courts must adhere to the principle of aesthetic non-discrimination set forth by the Court almost a century earlier.[37] Aesthetic non-discrimination delineates copyright protection from fine art protection. Using this principle a court must review a work for originality without regard to the purpose or the artistic merit of the work.

Appropriation art is another offshoot of Conceptual Art that utilizes mass media elements and techniques while divorcing them from their commercial context.[38] The artist may use advertisements, magazine images, or even works of fine art in their creations.[39] Appropriation art has commonly been called graphic theft because the artist relies on another's image to create their message.

All appropriation art relies on the recontextualization of familiar images or devices. By placing a comfortable commercial image in a new context, or recasting it in a new medium the artist asks the viewer to reexamine the work without its original meaning.[40] Many of the images

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[34] 17 U.S.C. 102(a) (2006).
[35] Feist Publications, Inc. v. Rural Telephone Service Company, *Inc.*, 499 U.S. 340, 345 (1991).
[36] *See, id.* (describing the level of creativity as minimal and distinguishing it from novelty).
[37] *See*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250-52 (1903) (deterring courts from determining copyright based on a works art status).
[38] ARNASON, *supra* note 2, at 686.
[39] *See*, e.g., Cariou v. Prince, 784 F.Supp.2d 337, 343 (S.D.N.Y. 2011) (appropriation artist Richard Prince using fine art photographs from the book *Yes, Rasta*), and Rogers v. Koons, 960 F.2d 301 (2nd Cir. 1992) (appropriation artist Jeff Koons utilizing Rogers postcard photograph *Puppies*), and Blanch v. Koons, 485 F. Supp.2d 516 (S.D.N.Y. 2007) (Koons appropriating Blanch's advertising photograph of shoes).
[40] ARNASON, *supra* note 2, at 686.

that Appropriation artists use are copyrighted. Consequently Appropriation artists are frequently asked to defend their work from charges of infringement despite their recontextualization.[41]

In 1988, appropriation artist Jeff Koons commissioned the sculpture *String of Puppies* based on a postcard that Koons had found in a gift shop. The photograph comprising the postcard was the work of professional photographer Art Rogers. Rogers sued Koons, alleging infringement of his copyrighted work.[42] The court held that Koons had infringed the work because they had evidence of copying in the form of numerous notes written by Koons to the manufacturers, directing them to reproduce the work "as per the photograph."[43]

The same evidence that revealed Koons' copying is critical to a creativity and origination analysis for a copyright. Koons was not the originator of the work, Rogers was. Koons argues that he changed Roger's expressive work by changing the meaning of the work--Koons elevation of the work from simple kitsch to fine art. This alteration from one context to another was Koons' creative work, the sculpture he argues, as a work of fine art is original to him.[44] By moving the expressive work from the gift shop to the gallery Koons argues he has created.

Changing the context of a piece to give it new meaning, is an important device for conceptual artworks. However, context is difficult for the law to assess. Context is dependent on numerous factors extrinsic to the work. Context is usually site dependent, like Duchamp's shovel, urinal or bicycle wheel displayed in a gallery. Without changes to the underlying work to promote that transformation, the meaning may disappear in a different location. The meaning may change with different audiences, or in the case of a shovel, a change in the weather.

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[41] *See*, Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, Dec. 28, 2011, at AR1 (discussing the how Appropriation Art and copyright law are at odds).
[42] *See*, *Rogers v. Koons*, 960 F.2d at 301.
[43] *Id.* at 305.
[44] *Id.*

Appropriated images often have an established meaning that the artist attempts to exploit through changing context, but the reverse may happen if the context cannot be settled.

Context is particularly difficult to evaluate in a copyright creativity analysis. If the artist defines their creative effort solely through the manipulation of context--Koon's placing a piece of kitsch in an art gallery--that creative effort requires a subjective analysis of the intent of the artist not evident on the face of the work. The artist would have to describe their artistic intent, and courts would be forced to review the intent against the success of the artist in creating new meaning for the work. As yet, this is not part of copyright analysis. The courts have held that slavish reproductions do not meet the creativity requirement without reaching any decision on the intent of the artist in reproducing the work.[45] Case law implies that the court requires facially creative activity, rather than intended creative activity.[46] Copyright law would have to expand its evaluation of creativity to include the subjective qualities of the work that exist due to changed context in order to recognize creativity of this kind.

A unanimous Court opined that creativity was the quid pro quo between the author and the public.[47] Creativity separated that part of the work that was copyrightable from any parts that were not. The law seeks to promote creative activity because creative activity benefits the public by bringing new work. Appropriation art uses a vocabulary that does not owe its origin to the Appropriation artist. The movement of the appropriated image from one context to another is the creative work of the Appropriation artist because context creates new meaning. Copyright law does not recognize this as creative activity because it would require a subjective evaluation of the

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[45] *See*, Bridgeman Art Library, Ltd. V. Corel Corp. 25 F.Supp. 2d 421, 427 (S.D.N.Y. 1998) (discussing slavish reproduction lacking creativity despite the intended use of the work).

[46] *See*, *e.g.* Bucklew v. Hawkins, Ash, Baptie & Co., LLP, 329 F.3d 923, 929 (7th Cir. 2003). (describing the work as non-infringing because of the ability of the original creative work to be detached from the underlying copyrighted work), and Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc., 150 F.3d 132, 144 (denying creative activity has occurred upon a review of the elements of the derivative work), and Williams v. Broadus, 2001 COPR. L. DEC. 28, 311 (reviewing originality for an infringement analysis through the amount and quality of the copying).

[47] Feist Publications, Inc. v. Rural Telephone Service Company, *Inc.*, 499 U.S. 340, 345 (1991).

new meaning of the work. Any evaluation that delves into whether a work of art has been created deviates from the principle of aesthetic non-discrimination so wisely laid out by Justice Holmes. Such an investigation, as a condition to copyright protection would necessarily create undependable results. Copyright would be granted based on the subjective standards of judges or art critics. A copyright would no longer encourage creativity but would instead encourage works that could attain critical appeal.

D. Conceptual Artwork and the Idea/Expression Dichotomy

Congress adopted a judicial principle known as the Idea/Expression doctrine into the 1976 Copyright Act.[48] An idea, unlike the expression of an idea, is not protectable.[49] The Act denies protection to any "procedure, process, system, method of operation, concept, principle or discovery." [50] The doctrine has two aspects: ideas are not copyrightable and when there are only a limited number of ways of expressing an idea they merge with the unprotectable idea.[51]

The exclusion of ideas from copyright protection is a significant bar to copyright for conceptual artwork. Artists who develop concept over form often create works that have few recognizable expressive elements. The Duchamp readymade *In Advance of the Broken Arm* is an example of such a work. Duchamp's novel and startling idea that art may be found in the commonplace was expressed by hanging a purchased snow shovel on a hook in an art gallery.[52] This expressive activity is so naturally related to a shovel, and to the typical depiction of a shovel that it seems to necessarily merge with the idea of a shovel. Duchamp did not fabricate a unique

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[48] 17 U.S.C. §102(b) (2006).
[49] *See*, e.g., Baker v. Selden,101 U.S. 99, 102 (1880). (denying copyright to a book of accounting forms because it contained only concepts and no expressive elements).
[50] 17 U.S.C. §102(b) (2006).
[51] *See, e.g.*, Morrissey v. Procter & Gamble Co., 379 F.2d 675, 682 (1st Cir. 1967). (holding that rules to a game were not copyrightable because there were only a few ways of expressing them), and Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003) (holding artist could not protect depictions of jellyfish that were inherent in, or natural to, the creature).
[52] ARNASON, *supra* note 2, at 248.

or unusual means to display the shovel, he did it in the most natural way that something with a handle might be displayed, by hanging by the handle. Despite the work being art, the display could not be foreclosed to others and so must merge with the idea.[53]

The U.S. Supreme Court extols the Idea/Expression doctrine as a significant protection of the public's First Amendment rights.[54] The public is free to use the ideas underlying a work, while copyright protection extends only to the artist's expression of that idea. Once an artist releases their idea to the public through their work, they may only protect the elements that express that idea, the ideas is as free for the public to enjoy as the sun or the air.[55]

Copyright law attempts to distinguish ideas from expression, the latter being more easily identified as property once fixed, and the former unprotectable because they are intangible and necessary for public use.[56] Given the purpose of copyright law, any protection of ideas would reduce the creation of works by reducing these building blocks of creation. Furthermore, when an idea is intertwined with an expression, but lacks delineation, the idea must merge with the expression courts would impermissibly restrict the public from the free exchange of any ideas intertwined.[57] Conceptual Art is both at odds with copyright law on the restriction of ideas and dependent on the free use of ideas. Conceptual artists rely other artists' work to inform their art; the ideas of their contemporaries structure the dialogue of the conceptual work. However,

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[53] *See,* J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. &ARTS 159, 160 (1993) (assuming that copyright would not be granted to Duchamp's readymade work Fountain).
[54] *See*, Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) (upholding the constitutionality of copyright term extensions on the grounds that First Amendment rights were protected by *inter alia* the Idea/Expression doctrine).
[55] *See*, Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1744 (describing intellectual property as a non-rivalrous good possible of being consumed at zero marginal costs)
[56] *See*, Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN L.REV. 1342, 1371 (1989). (describing the limitations of copyright law).
[57] *See*, Estate of Hemingway v. Random House, Inc. 279 N.Y.S.2d 51, 60 (N.Y. 1967) (holding that exclusive rights to conversations would impinge freedoms of speech and press).

Conceptual art is at odds with copyright law when the law requires an expressive form for that idea. In the end, the law provides the fertile ground that these artists use to create new works.

E. Conceptual Artwork and Non-Utility

The statutory language of the Copyright Act denies protection to useful articles which it defines as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[58] The law does protect pictorial, graphic or sculptural works that have utilitarian aspects, if the useful aspects of the work may be identified separately from the work, and can exist independently from the work.[59]

Courts have developed different tests to accomplish the Solomonic undertaking of separating the utilitarian aspects of a work from the expressive aspects. If the work is a three-dimensional piece, a test of physical separability will distinguish the expressive from the utilitarian, and if the work is a two-dimensional piece the court reviews the conceptual separability of the expressive and the utilitarian elements.[60] Both tests are fact sensitive.[61]

Commodity Art is a branch of Conceptual art that utilizes and exploits the commodities of capitalism to critique consumerism and exploit the intersection of mass-produced items and art.[62] The artist Jeff Koons created the Commodity art piece *New Hoover Quadraflex, New Hoover Convertible, New Hoover Dimension 900, New Hoover Dimensions 1000*. Koons displayed the four vacuums of the title on a Plexiglas stand in a gallery, displaying each of the

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[58] 17 U.S.C §101 (2006).
[59] *See*, Mazer v. Stein, 347 U.S. 201, 214 (1954) (holding that a copyrightable work does not have to be a work of fine art but must be a work of art separable from its utilitarian elements).
[60] *See*, Pivot Point International Inc. v. Charlene Products, Inc., 372 F.3d 913, 922 (7th Cir. 2004) (identifying conceptual separability as well as physical separability in evaluating copyright for useful articles).
[61] *See*, *Id.* at 922-25. (describing conceptual separability analysis as a review of the artist's design choices).
[62] ARNASON, *supra* note 2, at 718.

cleaning devices upright as if they were in a showroom. The representation of the work was described as "fetishistic" in its purity because they appeared to be ready for sale.[63]

If *Hoover* were reviewed for copyright protection a court would have to undertake the physical separability test of a sculptural work. Vacuums are inherently functional items and seem to lack any expressive qualities for copyright protection. However, the copyright statute excludes from useful articles, an object whose utilitarian function is merely to portray the appearance of the useful article or to convey information.[64] Therefore if these appliances were used merely to portray vacuums they would not be useful. Koons seems to have intended that these vacuums convey information in the form of an art message. Yet the copyright statute does not seem to contemplate the transformation of the item from a useful article to one that conveys information. The language of the statute requires the useful article "merely" convey information. By placing them in a gallery Koons has not deprive the appliances of their utility. Koons elevation of these useful articles to art status allows them to convey information in addition to their utility, but not to the exclusion of their utility. Furthermore, while the display of the vacuums may be the expressive element of the work, under a copyright analysis that element must be separable from the utilitarian element of the work, something that is impossible in this work.

Commodity Art is a reaction to and a critique of consumer society.[65] By utilizing the objects of consumerism the artist highlights the significance of consumerism in a capitalist society. Copyright analysis does not attempt to distinguish between artwork and consumer goods, but does distinguish between expressive works and useful articles. The first may be copyrighted while the latter may not. Copyright law can ignore useful items without any loss to

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[63] *Id.*
[64] 17 U.S.C §101 (2006).
[65] *See*, OSBORNE, *supra* note 7, at 150.

the public because patent law may protect useful articles.[66] When the art object however, is also a useful article with no physically or conceptually separable elements it may not fit comfortably within either intellectual property regime.[67] Artists who produce Commodity works may not be afforded copyright protection and they may not desire patent protection and so must find alternatives to encourage and reward their work.

IV. Alternative Encouragement System for Artists

Copyright protection represents only one way to encourage artists. There are existing structures outside of the federal law that may work as well, or better, at promoting the arts. There are two significant revenue structures for artists, the private art market and government and private grants. While the private market pays large sums for artwork the works chosen are relatively old and often the artists are dead. Grants, on the other hand, support a wide spectrum of art creation usually through direct funding of a work at the inception stage rather than through sales. States have common law copyright protections that promote art creation through a regime similar to the federal system, though some have more relaxed requirements than the federal statute. All of these encouragement systems work in different ways to promote the arts.

A. Market Incentives

Since World War II works of fine art have appreciated enormously.[68] The majority of works sold at auction that have broken records have been modern works by the Impressionists, German Expressionists, and Abstract Expressionists. However, buyers have also shown considerable interest in conceptual artworks. The 2008 sale of 15 works from the series *Canal Zone* by the appropriation artist Richard Prince grossed between $16,480,00 and $18,480,00 not

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[66] *See*, 35 U.S.C. §101 (1952) (defining utility as required by patent law).
[67] *See*, J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. &ARTS 159, 171 (1993) (theorizing that artists are not benefitted by the short duration of patent protection).
[68] *The US Art Market*, THE FINE ART FUND.COM, http://www.thefineartfund.com/art-asset-class (last visited Dec. 09, 2012)

including $6,784 in exhibition catalogs.[69] One of 12 authorized copies of Marcel Duchamp's original *Fountain* sold at auction in 1997 at Sotheby's for $1,762,500.[70] Appropriation artists Jeff Koons sold his sculpture *Tulips*, at Christies for $33, 682, 500.[71] The overall demand for artwork has allowed conceptual artist to command substantial prices for their work.

Increased demand coupled with new, inexpensive means for artists or galleries to communicate with buyers, has led to increased outlets for art sellers.[72] The Internet allows artists to sell their work through outlets as diverse as eBay and fineartonline.com. Artists may now communicate directly with their audience to promote and sell their work, avoiding gallery and dealer losses and growing their reputation.

B. Government Support and Private Donations

Charitable and government funding provide incentives to artists to produce artwork outside of the traditional commercial relationship. Government grants support various works in all parts of the country. These grants are usually given at the inception stage of the work, unlike private sales, and do not give the donor any ownership of the work. Artists are free to sell the work they create after receiving the money. Grants from the government are not loans and do not need to be repaid. There are currently seven government-sponsored agencies that oversee a combined budget of $289,933,000.[73] The largest of these is the National Endowment of the Arts (NEA), founded in 1965 and responsible for $154, 255,000 (Fiscal Year 2013).[74]

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[69] *See*, Cariou v. Prince, 784 F.Supp.2d 337, 350-51 (S.D.N.Y. 2011).
[70] *Auction price for Duchamp's Fountain*, CITY REVIEW.COM, http://www.thecityreview.com/s02pco1.html (last visited Dec. 09, 2012).
[71] *Artist Jeff Koons*, WIKIPEDIA.COM, http://en.wikipedia.org/wiki/Jeff_Koons (last visited Dec.07, 2012).
[72] *See*, Patricia Cohen, *A Picasso Online for Just $450? Yes, It Is a Steal*, N.Y.TIMES, Sept. 3, 2012, at A1 (describing the growth and dangers of online art outlets).
[73] GENERAL SERVICES ADMINISTRATION, CATALOGUE OF FEDERAL DOMESTIC ASSISTANCE (2012).
[74] NEA, APPROPRIATIONS REQUEST FY2013 (Feb. 2012).

Private donations to the arts was $13.8 billion in 2010. Donations to the arts come from individuals, foundations and corporations.[75] Artists who are given money from private donors are selected based on the unique criteria of the individual donor. There is no public data to indicate which artists receive private donations or who donates to these programs.

C. State law rights

Common law copyright exists in all states and many states have adopted moral rights within their intellectual property regimes. Moral rights are rights beyond those usually granted to authors, they inhere in the work and override the First Sale doctrine as well as any transfer agreement. Moral rights are granted to artists and provide rights in the work after it has been sold by the artist. Significant among these rights is the droit de suite, the right of the artist to continue to collect income on any future sales of their work after the original sale. States also have rights of attribution and rights of integrity. A right of attribution grants the artist the right to be acknowledged as the author the work, and to prevent misattribution of their work. The right of integrity grants the artist the right to protect the work from mutilation or distortion.[76]

Some states, like California have incorporated droit de suite into their law and provide greater protections than the VARA provisions in the federal law.[77] Although these states also limit the application of moral rights to certain types of visual works some have fewer requirements to attain a copyright.[78] As of the most current data, 11 states have their own inherent rights legislation in the form of Preservation Statutes.[79]

Contract law offers conceptual artists protections for their work that federal law does not. An original work of art is a chattel and constitutes a good as defined by the Uniform Commercial

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[75] THE CENTER ON PHILANTHROPY AT INDIANA UNIVERSITY, GIVING USA (2011).
[76] CRAIG JOYCE ET AL., COPYRIGHT LAW 573 (8th ed. 2010).
[77] *See* 17 U.S.C. §106A (1999) (lacking droit de suite).
[78] *See*, Cal. Civ. Code § 987 (2010) (requiring no fixation for copyright protection to adhere).
[79] See, Jessica L. Darraby, ARTS ARTIFACT, ARCHITECTURE AND MUSEUM LAW *§9:37* (Feb. 2012) (describing state preservation laws)

Code (UCC).[80] Any agreements regarding the sale, or transfer of rights are governed by the UCC. An artist may define the responsibilities of the gallery showing the artist's work, as well as any continuing rights in the work through contract.[81] These rights provide new artists with powerful incentives to develop more work and build their reputation so that they may receive additional income on completed sales once they have built a body of work.

All of these alternative systems could supplant federal copyright law as an incentive to create art. They provide economic incentives, promote unknown artists and provide additional rights beyond what those provided by the federal statute. These systems are established, function well, and do not impose any additional costs to the public. Artists excluded by the requirements of the federal copyright system may that these schemes encourage their work better.

V. Potential Risks of an Alternative Encouragement Structure

The alternative encouragement system has risks that federal copyright law does not. If these risks are realized artists who could not gain copyright protection may be deterred or unable to continue to create works. Without the incentives of either copyright or an alternative system young artists may not become artists and established artists may not create. Damage to the alternative system could reduce the production of art thereby creating a loss to the public.

The greatest threat to the alternative system is market risk. If another global financial crisis occurred it could dampen the demand for fine art. The once booming Chinese art market has experience a significant downturn caused by the recent financial crisis.[82] If the slowdown in art purchases in Asia impacts overall demand, all artists may receive less for their work.

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[80] Steven C. Schechter, *Understanding the Rights of Visual Artists*, NJ LAWYER, THE MAGAZINE. Dec. 2004, at 3.
[81] *See, e.g.,Chris Dolmetsch* BLOOMBERG NEWS. COM *(*Sep 12, 2012 6:27 PM ET) *http://www.bloomberg.com/news/2012-09-12/ronald-perelman-sued-by-gagosian-gallery-for-breach-of-contract.html* (describing lawsuit over artist Koons droit de suite-like contract provision).
[82] *See,* Sonia Kolesnikov-Jessop, *Hoping That Art Will Continue to Pay Off*, NY TIMES, (Sept. 3, 2012) http://www.nytimes.com/2012/09/04/business/global/hoping-that-art-will-continue-to-pay-off.html (last visited Dec. 09, 2012) (describing the Chinese art auction market, the largest in the world, declining by 32%).

Uncertain tax rates in the United States may cause sellers to shy away from art as an investment.[83] Investors may look for other vehicles that provide higher returns, more liquidity, and a lower capital gains rate taxation. Faced with uncertain resale values, investors may restrict purchases to those critically acknowledged works that have sold well, overlooking new artists. Unless the market for conceptual artwork is unique, any downturn in the art market would impact the price and demand for conceptual artwork.

Government and charitable donations face many of the same risks as the private market. A long-term economic crisis could reduce the amount of income available to individuals and to the government. Individuals may choose to forgo art donations, and the government may cut spending by eradicating arts programs. Unless art is seen as a critical cultural asset voters may not endorse government spending on the arts. New artists may be forced out of the art field because there would be little or no funding for them to develop their craft.

Censorship is a significant risk inherent in governmental funding of artwork. Politicians may have a vested interest, originating with their constituents, in de-funding works of art that are controversial.[84] Religious or political ideology may impact the amount of funding as well as the selection of works funded, thereby undermining this incentive system for certain artists. Conceptual art work may be specifically targeted because they are often political, difficult to understand, and are less readily identifiable as art. Budding conceptual artists may be deterred from entering the conceptual art field if there is reduced funding as well as heightened public criticism of art.

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[83] *See*, http://www.irs.gov/taxtopics/tc409.html (describing capital gains rates for art sales at 28%).

[84] *See*, Abby Goodnough, *Giuliani Threatens to Evict Museum Over Art Exhibit*, NY TIMES, (September 24, 1999). http://partners.nytimes.com/library/arts/092499brooklyn-museum.html (last visited Dec. 09, 2012) (describing the mayor's threats to end funding to the museum because of a painting displayed), and Isabel Wilkerson, *Trouble Right Here in Cincinnati: Furor Over Mapplethorpe*, NY TIMES (March 29,1990). http://www.nytimes.com/1990/03/29/us/trouble-right-here-in-cincinnati-furor-over-mapplethorpe-exhibit.html (last visited Dec. 09, 2012) (describing threats to NEA funding by the U.S. Senate after photography show).

The protections of state copyright protection may not be any more applicable for conceptual artist than the federal counterpart. State laws may not apply to conceptual artworks and the VARA provisions of the copyright statute may preempt state law moral rights claims. An artist would have to show that the claim is qualitatively different than the federal right to avoid preemption.[85] Works that are not expressly included in the federal statute will not be preempted by VARA, however, the artist must still clear all of the hurdles for common law copyright protections to adhere.

Contract agreements provide an excellent alternative structure for artists but they may be hard for unknown artists to negotiate. Artists who do not have enough reputational leverage may be unable to find a counterparty willing to agree to the artist's continuing rights in the work. Even if the artist is able to negotiate droit de suite, some state courts have found that the right violates the commerce clause.[49] Furthermore, contracts involving subsequent sales by third parties may be difficult to enforce.

A. The Theoretical Future of the Alternative Encouragement System

The risks of an alternative encouragement system could pose a threat to art creation but based on historical trends these threats seem unlikely to materialize. The art market has been resilient despite crisis in other markets.[86] The United States market for fine artwork has experienced a bubble over the past five decades that is bigger than the recent housing bubble and seems to be less fragile. The art market experienced a brief downturn during the recent financial crisis before rebounding and breaking pre-crisis records. Only one year after the start of the recent recession, the art market experienced a significant improvement with eleven of the 20

[85] *See*, Darraby, *supra* note 79, at 1 (warning that preemption is a significant barrier to state preservation statutes).
[86] *See*, Carol Vogel, *This Little Rothko Went to Market*, N.Y. TIMES, Nov. 04, 2012, at 14. (highlighting the resiliency of the art market, though tempering positive predictions based on a lack of diversity in sales).

highest prices ever paid at auction occurring after 2008.[87] The fall-off of sales in the Asian art market has not impacted the peak prices for art. Prices for works have continued to increase with conceptual art work among them. Investors have traditionally found new works an inexpensive way to enter the market. Conceptual art, some of it still underappreciated, represents an inexpensive asset for collectors. While the stock market has seen inconsistent gains the art market has remained robust.[88]

The risk of censorship is always present for works of art. Despite decades of uproar over modern artworks, public agencies have remained independent from political restrictions and continued to fund the arts. Furthermore, threats of censorship are not always detrimental to artists. Often the cries of the censor only serve to fan the flames of notoriety and provoke interest in the work. Artists who may have been overlooked gain national attention for their work.[89]

Based on the strength of the market, the public disdain for censorship, and the expansion of moral rights in state copyright protection federal copyright as an encouragement system is adequately supplemented by alternatives. While these alternatives to copyright protection have risks, based on historical trends, they are minimal. Conceptual artists who may not find federal protection for their work should be encouraged by these alternatives.

B. The Increased Costs of Expanding Copyright Protection

Copyright law incurs costs to the public in different ways, though two are critical for this analysis: the first cost is administrative; the second is the overall cost to the public by the lost use of the copyrighted good.[90] The public incurs administrative costs through the adjudication,

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[87] *See*, Mark Davidson, *How the Art Market Thrives on Inequality*, (*I'll take the Rothko for $87million*), NY TIMES, May 30, 2012, at MM26 (explaining why the art market is healthier than other financial markets).
[88] *See*, Vogel *supra* note 86, at 14 (describing gains in the art market).
[89] *See*, *e.g.*,ARNASON, *supra* note 2, at 590 (suggesting that the Guggenheim cancellation of Hans Haacke's *Real Estate* piece because it was inflammatory increased public interest in the show).
[90] *See*, Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 5 (2005) (outlining the costs in providing exclusive rights in intellectual property).

legislation and recordation of copyright disputes, laws and rights. The loss of the use of the intellectual creation reduces the net benefit to the public derived from creative activity. When the copyright holder excludes the public from their intellectual property this loss is borne by the public and reduces the overall gain to the public by the encouraged creative activity.

Expanding copyright law to protect conceptual art would create significant administrative costs. The law would have to annex aesthetic theories to the current copyright analysis to understand context as creative work. Judges would put in the position of art critics as they attempted to evaluate the art status of recontextualized items.[91] As Justice Holmes warned this would be "a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations".[92]

Scholars and theorists have argued that the legal monopoly granted by copyright is a necessary evil that is justified by the public benefit of increased creative goods.[93] Intellectual property rights, they argue, are granted to authors to incentivize them to create. The law must balance incentivizing creation through exclusive rights and supporting free access to the information embodied in the creative works.[94] Any increase in exclusive rights necessarily costs the public by lost access. The resulting corollary is that there should be no more rights granted if their costs exceed the net benefit to the public.[95]

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[91] *See*, Glen Chang, *The Aesthetics of Copyright Adjudication*, 19 UCLA Ent. L. Rev. 113, 132-4 (2012) (arguing that the law needs to annex aesthetic theories to include works of conceptual art), and J. Alex Ward, *Copyrighting Context: Law for Plumbing's Sake*, 17 COLUM.-VLA J.L. &ARTS 159, 173-75 (1993) (arguing that copyright law should protect any work that is deemed an artwork by including recontextualization as creative activity).

[92] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

[93] *See*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 350 (1970). (analyzing the proposed extension to the duration of copyright protection against a background of public gain).

[94] See, David W. Barnes, *The Incentives/Access Tradeoff*, 9 NW.J.TECH. & INTELL.PROP. 96, (describing the balance between incentives and access in intellectual property law).

[95] *See*, William M. Landes and Richard Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 325-33, 344-53 (1989) (describing the balance between incentives and access as economic efficiency).

Expanding copyright law to include conceptual artworks would have to increase the output of that creative good to justify such an expansion. There is little evidence, particularly in light of the alternative encouragement system, that expanded copyright law would be able to encourage more artistic creation. The law changes very slowly while art changes rapidly. There is a danger that once the law adapted to include conceptual works a new art movement would redefine art. The costs of expansion seem to outweigh any modest benefit that may be gained by granting conceptual artwork copyright protection.

VI. Copyright Law and Conceptual Art, an Uneasy Relationship

A copyright provides the holder with the exclusive right to reproduce, adapt, distribute, display and perform their work as well as the right to authorize another party to engage in any of these activities.[96] In addition, certain artistic works may qualify for limited moral rights if they were produced after June 1, 1991.[97]

The most significant right within the bundle of rights for most authors and artists is the right to make and control any reproductions of their work. Conceptual artists, in contrast, receive very little benefit from the exclusive right of reproduction. For example, the author of a book relies on the sale of multiple copies of her book by an authorized copyist in order to make money and gain fame. She also relies on her right to stop others from copying her book and selling it without paying her royalties. This scenario is less applicable to works of fine art. The fine artist expects to make her money on the sale of the original or limited copies of the work.[98] Conceptual Art is not adapted to reproduction because many of the qualities of the work cannot be captured by a reproduction, the work may have more sequences or utilize more senses than can be captured in a reproduction. In the case of readymades or Commodity Art, any reproduction of

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[96] U.S.C. §106 (2006).
[97] *Id.*
[98] *See*, Charles Cronin, *Dead on The Vine: Living and Conceptual Art and VARA*, 12 VAND. J. ENT. & TECH. L. 209, 248-50 (2010) (asserting that reproduction rights for certain works of living art is inapplicable).

these common objects would be hollow because they are mass-produced. The object only has artistic value when the artist has endorsed them; a urinal from Marcel Duchamp is art but one from Pfister is just a toilet.

The illegal reproductions of fine art interrupts revenue for a fine artist differently than the lost royalties of the writer or the commercial artist. Unauthorized copies of fine art may drive down the prices of original works by the artist by creating uncertainty as to origin of other works. Illegal copies may also dilute the value of existing work on the market by over supply. Investors and gallery owners who fear they may be purchasing inauthentic works may discontinue buying the artist's work.[99] However, the fine artists who does not have a copyright in their work is not without a remedy for illegal reproductions, charges of fraud may be brought by the purchaser of the forgery as well as the artist.

Overall, copyright law is a poor fit for Conceptual Art. The rights offered by copyright protection are ill suited to works of fine art that require authentication to give them value. The exclusive reproduction and licensing rights that are so critical to other works has less value for works that are difficult to reproduce, or meaningless if reproduced when they too are reproductions. The extension of copyright protection to conceptual artworks would incur substantial costs for little, if any, gain to the public.

VII. Conclusion

There is no doubt that society is better off with more artwork. Artists add to the public storehouse of knowledge by their creations. Society and individuals may take solace, inspiration, or even find offense in a work of art. The ability of a work of art to prompt such responses indicates its powerful totemic significance. Artists should be encouraged to create. Yet, when

[99] *See*, Patricia Cohen, *Lawsuits Claim Knoedler Made Huge Profits on Fakes* N.Y.TIMES, Oct. 21, 2012, at C1 (reporting on the investigation of $60million worth of fake artwork and the potential impact on the market).

their work does not fit within the strictures of copyright law the law must balance the costs of expanding property rights to include such works against the benefits gained by that expansion. This paper has theorized that a well-established, alternative encouragement system, better suited to incentivize fine art, is viable. Based on the uncertainty of art evaluation by the courts, any expanded copyright system that includes artwork based on aesthetic theory will bring additional costs. This author believes that the costs of expanding copyright law are too high, and the benefits too few, to support expanding copyright protection to include works of art that do not presently merit protection.