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# Beyond Oil on Canvas: New Media and Presentation Formats Challenge International Copyright Law's Ability to Protect the Interests of the Contemporary Artist

*Molly Ann Torsen*[*]

***Abstract***

*Current copyright laws in all jurisdictions are lacking explicit provisions for protecting many types of contemporary art. It remains unclear to what extent ideas should be copyrightable as art, if at all; or whether an artwork's commercial nature provides a decisive factor regarding appropriation. Certain situations seem plainly inappropriate, such as artists needing to seek legal counsel in conjunction with creating their artwork: inappropriate in its financial extravagance and in its inevitable curb on creativity. As such, it is incumbent upon courts and legislatures to analyze the issue and to provide guidance. It is the author's finding that strong moral rights and a vibrant public domain are not necessarily at odds with each other, especially when parties are open to communication. Laws operate to provide structure when parties do not make other arrangements amongst themselves; contracts between artists and galleries, artists and publishers, even artists and other artists may provide the highest degree of satisfaction for specific parties to a specific situation. Not surprisingly, parties with legal or business interests in art and parties with artistic interests in art would communicate better if they understood each other's situations. Hopefully the issues will continue to be the focus of some thought on all platforms such that informed legal decisions can be made and artists can pursue and protect their creative productions, no matter their format.*

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[*] J.D., University of Washington School of Law, 2005. The author spent several weeks in the fall of 2005 at the AHRC Centre, working on this paper. She is now involved in other copyright-related research for the British Academy, for the World Intellectual Property Organization, and is a Program Attorney at the International Intellectual Property Institute in Washington, DC.

> *That copyright law cannot accommodate whole swathes of contemporary artistic production under its protective umbrella is clear.*[1]
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> *The digital media explosion has created some of the biggest challenges to copyright law since its existence.*[2]

## 1. Introduction: Laws and Issues

International interpretations of copyright law are often similar but rarely identical. This is true for the gamut of copyrightable material, ranging from software to traditional cultural expressions. And the same is true for contemporary art, in its several manifestations. This paper will highlight and analyze a brief but issue-rich menu of digital art projects – and other types of artwork that depend upon technology or new directions in art -- and will demonstrate that current interpretations of certain intellectual property tenets are a poor fit for emerging artistic genres. It will then go on to point out specific problems that artists are faced with in producing their artwork and will showcase some of the unsolved controversies that plague the possibilities for legal protection of current artistic genres. With a divergent international web of intellectual property legislation and practices superimposed on already-convoluted copyright problems, the importance and complexity of these new situations should be discussed on the international platform as soon as possible. A list of examples will follow some introductory remarks. The examples begin with artworks that elicit some basic concepts and end with an exploration of some of the more nuanced and challenging issues. It will hopefully demonstrate some of the impasses brought about by the current state of copyright law and the current explosion of creative works resulting from art's integration with technology.

Although there is no legal definition for "art," its legal description and treatment is a useful place to start. On its website, the United States Copyright Office offers a list of examples of "visual artworks" for purposes of American copyright legislation. Visual arts are defined as "original pictorial, graphic, and sculptural works, which include two-dimensional and three-dimensional works of fine, graphic and applied art."[3] Its list of examples includes a vast range of examples constituting a "visual art," ranging from the traditional, such as paintings and drawings, to non-traditional formats such as labels, decals, wallcovering designs, "holograms, computer and laser artwork," as well as lithographs and architectural blueprints.[4] While computer artwork is therefore one of the enumerated protected categories of copyrightable visual art, there is no definition for "computer artwork" to be found; it could ostensibly mean anything from

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[1] Anne Barron, *Copyright Law and the Claims of Art*, I.P.Q, No. 4, at 369 (2002).

[2] Christopher Blagg, *2k5 Conference Examines How Digital Music Explosion Will Affect Artists*, The Boston Herald, April 11, 2005.

[3] *See* Visual Arts Examples, United States Copyright Office, available at http://www.coyright.gov/register/va-samples.html (last visited Sept. 15, 2005).

[4] *Id.*

a simple webpage to a complex video download. The array of new media art has been elucidated insofar as its definition intended by the Legislature, which was to be illustrative rather than all-inclusive.[5] This seemingly generous list of protectable artwork is curtailed by what is explicitly *not* copyrightable, including works that have not been fixed in a tangible form, familiar symbols or designs, typography, ideas, procedures, methods, systems, process, concepts, or principles.[6] The United Kingdom's copyright law, on the other hand, provides protection for a closed list of representations of creativity, including graphic works, photographs, sculptures or collages, works of architecture and works of artistic craftsmanship,[7] although, in many cases, "it is extremely difficult to determine whether any particular creation constitutes a 'work of artistic craftsmanship.'"[8]

Many other international statutes and treaties have similar language. The World Intellectual Property Organization's 1996 Copyright Treaty[9] [hereinafter WIPO Copyright Treaty] protects computer programs "as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression."[10] Article 2 of the Berne Convention for the Protection of Literary and Artistic Works protects expressions but not ideas, procedures, methods of operation or mathematical concepts as such.[11] France's Intellectual Property Code, however, explicitly protects a longer list of "works of the mind," including "graphical and typographical works" and "photographic works and works produced by techniques analogous to photography."[12] Between the lists of what expressly is and what is *not* copyrightable – as they vary from jurisdiction to jurisdiction and as they relate to the Berne Convention[13] -- lie complex questions emanating from some of the world's most cutting-edge contemporary art. Also vital to this issue from a bird's eye perspective is that copyright protection inherently *means* different things, depending on the jurisdiction and context:

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[5] The list "sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories." House Report at 53, reprinted in 1976 U.S.C.C.A.N. 5666.

[6] *See* Copyright Basics (Circular 1), U.S. Copyright Office, available at http://www.copyright.gov/circs/circ1.html#wwp (last visited Sept. 20, 2005).

[7] See the United Kingdom Copyright, Designs and Patents Act of 1988, Part I Copyright, Section IV.

[8] *See Copyright*, E. Eder & Co., available at http://www.intellectual-property.co.uk/copyrt-02.htm (last visited Oct. 5, 2005). See also the 1999 case *Hensher v. Restawile,* in which several definitions of the term are discernible.

[9] WIPO Copyright Treaty, adopted Dec. 20, 1996, available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html#P51_3806 (last visited Sept. 21, 2005).

[10] *Id*., Art. 4.

[11] The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971 and amended on September 28, 1979, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P82_10336 (last visited Sept. 20, 2006).

[12] *See* The Intellectual Property Code of France, Dernier texte modifacteur Loi 2003-706 du 01/08/03, Chapter II, Art. L112-2, WIPO Translation available at http://www.wipo.int/clea/docs_new/en/fr/fr062en.html (last visited Sept. 21, 2005).

[13] The Berne Convention is supreme within its domain; Article 20 of the Paris Text allows members to enter into other agreements amongst themselves, but *only* to the extent that authors are granted greater rights and so long as the agreements are not otherwise contrary to Berne. *See* Goldstein, *id*., at 149.

> *What is copyright? A policymaker in the United States will tell you that copyright is an instrument of consumer welfare, stimulating the production of the widest possible array of literary and artistic works at the lowest possible price. But ask the question of a practitioner on the European continent, and he will tell you that copyright is at best a watered-down version of author's right – that grand civil law tradition that places the author, not the consumer, at the center of protection…. Copyright is not about bolstering international trade balances, nor is it about protecting art, high or low…. Copyright, in a word, is about authorship…. Copyright law must protect authors from any influence other than their audience; it must not judge authors' efforts by too exacting a standard; and it must not impose too severe a prohibition against authors' borrowing from others.*[14]

## 2. The International Contemporary Art Environment

At the 2005 International Media Art Biennale, based in Poland, the jury stated that "[t]he complexity of this practise which crosses and merges various formats and media, has led us to abandon traditional categories of genre, such as performance or video art."[15] And a recent publication from the British Tate Museum forecasts that "[d]iscussions about authenticity and time-based media works of art will become more prevalent in time."[16] From contemporary art museums[17] to creative international competitions[18] and other fora, new technology is influencing or enabling an array of art, not to mention inciting art-related intellectual property concerns. While advancement in technology is not a new problem with which the law must contend, there are several types of arguably "new" art that are simultaneously receiving mainstream notice, thereby focusing attention on art-related intellectual property issues. Five years ago, the Whitney Museum of American Art in New York held its Biennial exhibition and it included artwork that incorporated use of the Internet.[19] Maxwell L. Anderson, then-director of the Whitney, noted that "Internet art has reached a critical stage where a significant number of artists are producing works for this new medium…. As of 2000, Internet art can no longer be ignored as a legitimate art form."[20] It is 2005 and the international art and law arenas seem no closer to coming to a consensus regarding technology's place on the palette of copyright-protectable contemporary art.

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[14] Paul Goldstein, *Copyright*, 38 J. Copyright Society 109, 109-111 (1991) (emphasis added).

[15] *See, e.g.,* the International Media Art Biennale, available at http://wro05.wrocenter.pl/wro05intro_en.php (last visited Sept. 15, 2005).

[16] Pip Laurenson, Tate Papers, *The Management of Display Equipment in Time-based Media Installations*, Spring 2005, available at http://www.tate.org.uk/research/tateresearch/tatepapers/05spring/laurenson.htm (last visited Sept. 15, 2005).

[17] *See, e.g.,* the Museum of Modern Art, Online Collection, available at http://www.moma.org/collection/search.php (last visited Sept. 15, 2005).

[18] *See* International Media Art Biennale, *supra* note 15.

[19] Reena Jana, *Whitney Speaks: It* Is *Art*, Wired News, March 23, 2000.

[20] *Id., quoting* Maxwell L. Anderson.

The Whitney will again host a Biennial in 2006, and it promises to be "a provocative and powerful show of the best new work by emerging and established artists."[21] And indeed the Whitney, amongst other international art institutions, is representative of the vanguard of technology-enhanced and technology-reliant art. At its 2004 biennial, 12 video artists, 12 conceptual artists, three "net" artists and six digital artists were chosen amongst a total of 108 artists, most of whom continue to work in more traditional media.[22] One of the original goals of copyright law – enunciated in the Berne Convention -- is to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.[23] As noted above, the law's struggle to keep pace with changing modes and media is not new. One example of the law's need to address new technology is the advent of photography in the mid-1800s, which elucidated some aspects of copyright law doctrine regarding the law's requirements for originality and whether taking a photograph amounted to copyrightable art.[24] Photography's continued use and popularity since its invention has refined some tangential questions, such as whether color transparencies of public-domain paintings should be afforded copyright protection.[25] The expansion of such media as 3-D modeling, graphic design, motion graphics, programming, sound editing, video editing, video effects, web animation, and web design may provide similar opportunities today insofar as refining their place in the realm of copyright law.

## *3. Examples*

### 3.1 Robert Cahen, France

Robert Cahen is recognized as one of France's foremost video artists and has produced and exhibited a variety of work since 1972.[26] For the recent International Media Art Biennale, one of his works received an award; it is called *Tombe (avec les mots)*. Logistically, the work is an eighteen-minute-long DVD silent color projection of levitating and falling words on a screen that is four meters high by three meters wide. "This projected alphabet of phantom objects in which even people are no more than fallen angels is both framed and larger than life."[27] The video is projected onto the vertical screen and has the effect of a painting to the viewer, whose optimal vantage point is directly in front of the screen. Amongst the words that fall are (translated from French): transparency, sky, leave, to be, earth, laugh, light, dawn, skin and Jewish. Commentary on the art itself reveals some of the artist's fascinating

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[21] Chrissie Iles and Philippe Vergne to Curate 2006 Biennial, Whitney Museum of Art, available at http://whitney.org/exhibition/biennial.shtml (last visited Sept. 20, 2005).

[22] *See* http://whitney.org/biennial/ (last visited Sept. 20, 2005).

[23] *See* The Berne Convention, *supra* note 11.

[24] *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

[25] *See Bridgeman Art Library, Ltd. v. Corel Corp*., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[26] *Robert Cahen, Biography*, Electronic Arts Intermix, available at http://www.eai.org/eai/biography.jsp?artistID=294 (last visited Sept. 20, 2005).

[27] *See* Robert Cahen, 11th International Media Art Biennale, available at http://wro05.wrocenter.pl/tombe_en.php (last visited Sept. 20, 2005).

techniques and philosophies.[28] While not too difficult to conjure this artwork in the mind's eye, the art's intellectual property characteristics reveal a range of questions and possibilities.

### *3.1.1 Subject Matter and Fixation*

A legal analysis of the artwork may best be begun by separating the various physical aspects of the work into separate categories. For example, as a video installation, it is at least partly a "motion picture," which is a subset of audiovisual works "consisting of a series of related images, which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any."[29] Here, then, as an 18-minute video loop without computer-aided interference, *Tombe (avec les mots)* is part-video and the protection of audio-visual works falls under various rubrics, depending upon the legal jurisdiction. In the United States, the Copyright Act addresses audiovisual works directly and provides the exclusive rights to the copyright holder of such a work to both perform and display it publicly.[30] In the United Kingdom, audiovisual works are not explicitly protected under the Copyright, Designs and Patents Act,[31] and in France, the Intellectual Property Code was regrouped in 1985 to confer "rights of authors and the rights of performers, producers of phonograms and videograms and of audiovisual communication companies."[32] The common denominator for the U.S., U.K. and France is the WIPO Performance and Phonograms Treaty of 1996, to which they are all party.[33]

Because it involves a particularly sized screen, however, it may also be described as installation art. Installation art is defined variously as art made for a specific space, which exploits certain qualities of that space,[34] or art that uses sculptural materials and

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[28] *See id.* In Cahen's uniquely nuanced world, fiction and document alike are presented as metaphoric voyages of the imaginary, exquisite reveries that describe passages of time, place, memory and perception. Genres such as narrative and performance are expanded and transformed as he explores visual, aural and temporal transformations of represented reality. From the formal elegance of Cartes postales vidéo (Video Postcards) (1984-86) to the intricate musical and visual transitions of Boulez-Répons (1985), Cahen's work is characterized by a sophisticated application of electronic techniques that manipulate sound and image, space and temporality, resulting in subtle transmutations of the illusory and the real. Building on his extensive research in acoustics, music, and filmmaking, he plays with the textures of sound and image to restructure representational modes, from the optical to the sonic, from the "picturesque" photograph to the conventions of narrative cinema. Resonating with wit and charm, executed with technical precision, his works allude to both formal and thematic motifs of travel, movement, and transition. Cahen's dreamlike journeys depict fleeting glimpses of a transitory reality, transformed in time within the pictorial frame.

[29] 17 U.S.C. § 101.

[30] 17 U.S.C. § 106 (4, 5).

[31] The United Kingdom Copyright, Designs and Patents Act of 1988, Chapter I, Section III.

[32] *See* Legal and Regulatory Framework in France, Société civile des Producteurs de Phonogrammes en France, available at http://www.sppf.com/version_anglais/protecton/contenu.html (last visited Oct. 11, 2005).

[33] *See* the WIPO Performance and Phonograms Treaty, available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (last visited Oct. 11, 2005) and the accompanying list of contracting parties, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20 (last visited Oct. 11, 2005).

[34] *See, e.g.*, Installation Art, ArtLex, available at http://artlex.com/ArtLex/ij/installation.html (last visited Sept. 20, 2005).

other media as it seeks to modify the way people experience a particular space whether it be a gallery space or a public area; materials used in contemporary installation art range from everyday and natural materials to new media such as video, sound, performance, computers and the internet.[35] Whether it is a specific screen that Mr. Cahen uses, set in a particular place, or whether it simply the dimensions or proportions of the screen that concern him is unclear from the descriptions of the artwork, but many artists do have specific preferences regarding the manner and specific space in which something is presented.[36] Not only does this issue spill over into the copyright-related realm of moral rights (discussed below), but it also relates directly with copyright law subject matter.

In 1997, a UK judge stated that he would not rule on copyright law as it relates to installation art generally, but he did deny protection to a placement of objects and people around a swimming pool, declaring that did not comprise an artistic work.[37] Not surprisingly, this type of ruling begs the question "What *is* an artistic work?" – a question that no court would want to answer since "courts are not authorized to judge the artistic merit of the work in deciding whether pictorial, graphic, and sculptural works ought to qualify for copyright protection other than to determine that the threshold of original expression has been attained."[38] Generally, for something to be copyrightable, it must be fixed in a "tangible medium of expression,"[39] under U.S. law. British law grants copyright to a brief list of "artistic works," and otherwise provides that it "does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise.[40] In opposition to this requirement, two British artists recently installed an exhibition called "Presence" at the Isabella Stewart Gardner Museum in Boston, in which green grass turns straw-colored.[41] Dan Harvey, one half of the artistic pair, noted: "Our work is about time…. It's about art's being ephemeral."[42] Harvey and his partner Heather Ackroyd work in other non-traditional media such as crystals, mold, rust and mushrooms.[43] But if artistic works need be *fixed* as opposed to *growing or changing*, copyright protection will not adhere. A work is fixed "when its embodiment in a copy or phonorecord…is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[44] With new technology

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[35] *See* Wikipedia, Installation Art, available at http://en.wikipedia.org/wiki/Installation_art (last visited Sept. 20, 2005)

[36] *See, e.g.*, Roberta Smith, *A Curator's Startling Use of Space at the Whitney*, The New York Times, Sept. 3, 2005.

[37] *Creation Records Ltd. v. News Group Newspapers Ltd* (1997) 39 IPR 1.

[38] Robert P. Merges, Peter S. Menell, Mark A. Lemley, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE, 3d ed., 368 (2003).

[39] 17 U.S.C. § 102(a).

[40] United Kingdom Copyright, Designs and Patents Act of 1988, Part I Copyright, Chapter I, Sections 3 and 4.

[41] Christine Temin, *Splendor in the Grass at the Gardner, Two British Artists Will Show How They Grow their Own Medium and Message*, The Boston Globe, Oct. 28, 2001.

[42] *Id., quoting* Dan Harvey.

[43] *Id.*

[44] 17 U.S.C. § 101.

and media being used in the arts, it is being argued more and more often that the fixation threshold should be interpreted as the functional equivalent of fixation as opposed to an absolute static fixation, "in order to further copyright law's ultimate aim of stimulating artistic creativity for the general public good…."[45]

### *3.1.2 Originality Threshold and the Idea/Expression Dichotomy*

Cahen's work uses a screen and some words. Beyond the question whether the entirety of his work comprises a copyrightable artwork and beyond the issues of artistic merit and fixation is the issue of how high or low the "threshold of original expression" is actually set in the realm of law. Indisputably, artists give and take ideas from each other and from the world around them all the time. Andy Warhol's famous paintings of Marilyn Monroe and of Campbell's soup cans, as a classic example, came directly from other fabrications: respectively, a publicity photograph of Marilyn Monroe by Gene Korman for the film *Niagara* made in 1953, and a Campbell's soup can, designed and trademarked by Campbell's. Warhol altered the images, however, such that the new artwork is recognizably his own. "Certainly Warhol's canvases are the most highly valued and sought-after commodities among this artist's work in diverse media. One of Warhol's achievements is the elevation of photography to the grand tradition of painting…."[46]

What, then, is the threshold of originality? Must it be a new medium? Must the artist employ a different color scheme? Must the artist have an artistic or sociological message to convey? A 1951 United States Second Circuit case, *Alfred Bell & Co. v. Catalda Fine Arts, Inc*., ruled that only a very slight variation on an original artwork constituted originality for purposes of copyright protection – in this case it was transforming public-domain paintings into mezzotint engravings.[47] However, the recent and controversial *Bridgeman Art Library* case,[48] wherein digital reproductions of public-domain paintings may *not* receive copyright protection either under UK law or US law, is arguably at odds with that outcome. The *Catalda* court commented on the originality requirement:

> *It may mean startling, novel or unusual, a marked departure from the past…. [But] 'original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary…. A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a*

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[45] *See, e.g*., Kelly M. Slavitt, *Fixation of Derivative Works in a Tangible Medium: Technology Forces a Reexamination*, 46 IDEA 37, 40 (2005).

[46] William V. Ganis, ANDY WARHOL'S SERIAL PHOTOGRAPHY, 3. Cambridge University Press, 2004.

[47] 191 F.2d 99 (2d Cir. 1951). The defendant produced and sold copies of the plaintiff's engravings of 18th and 19th century paintings that were in the public domain. The plaintiff's engravings were realistic reproductions requiring great patience and skill. The defendant had argued that since the engravings were merely copies of works in the public domain, they failed the originality requirement. Originality lay in the art of copying, which required significant expenditures of time, effort and skill. Since these expenditures are subject to free riding by the defendant, however, the plaintiff's incentives would be undermined in the absence of copyright protection. Moreover, copyright protection does not prevent the defendant from making copies of these same paintings.

[48] *See Bridgeman Art Library, Ltd. v. Corel Corp, supra* note 25.

> *variation unintentionally, the 'author' may adopt it as his and copyright it.*[49]

The *Bridgeman* case, referring to the "creative spark" as the *sine qua non* of copyright protection,[50] introduces the question of digitization. It seems the court's contention that digitization, unlike the mezzotint reproduction, does not require – or indeed cannot include – the creative spark; more examples of both digital and non-digital artwork will be highlighted below. As another example of the inconsistencies in this area, it has been noted that it is one of the "ironies of international copyright that, at the same time European countries were turning away from creativity as condition to copyright protection of borderline works, the United States Supreme Court espoused the measure for the first time."[51]

Various scholars have argued that the originality standard should be heightened and that "the (United States) law has eviscerated much of the doctrine's force, granting copyright protection to many works whose originality is questionable."[52] The 1884 United States Supreme Court case *Burrow-Giles Lithographic Co. v. Sarony* provides a foundation for the issue; it held that a photograph of Oscar Wilde was adequately original to qualify for copyright protection. The Court stated that "Congress very properly has declared ("writings") to include all forms of writing, printing, engraving, etching, *etc*., by which the ideas in the mind of the author are given visible expression. The only reason why photographs were not included in the extended list in the act of 1802 is probably that they did not exist…"[53] The law could be in a similar situation today with respect to contemporary art. Video art was arguably not included in recent copyright legislation because the technology did not exist when the law was made. Installation and "appropriation" art, while they *could* have been made since time immemorial, are "new" insofar as they have only gained recognition as a type of art form within the past twenty to fifty years, and artists do not generally have the financial capacity to have their interests represented during the formation of legislation.[54] More interesting in this regard is the 1903 Supreme Court case *Bleistein v. Donaldson Lithographing Co*. Here, the Court "provided the foundation for modern American originality jurisprudence."[55] At issue was the originality of certain circus posters whose level of artistic merit was in question; the Court stated that the

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[49] *See Catalda, supra* note 47 (emphasis added).

[50] *See Bridgeman, supra* note 25, *citing Feist Publications, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340 (1991).

[51] Goldstein, *supra* note 14, at 168.

[52] Ryan Littrell, *Toward a Stricter Originality Standard for Copyright Law*, Boston College Law Review, Vol. 43, No. 1, 193, 194 (2001), *citing* Jessica Litman, The Public Domain, 39 Emory L.J. 965, 1008 (1990).

[53] 111U.S. 53, 60 (1884).

[54] *See, e.g*., Joseph Beuys' biography at the Walker, explaining his involvement in the Fluxus group in the 1960s: http://www.walkerart.org/archive/4/9C43FDAD069C47F36167.htm (last visited Sept. 26, 2005); *see also* Bill Viola's biography: http://www.billviola.com/biograph.htm (last visited Sept. 26, 2005); *see also* Ann Hamilton's bibliography at the Greg Kucera Gallery regarding her installation artwork and prizes she has received: http://www.gregkucera.com/hamilton.htm (last visited Sept. 26, 2005).

[55] *See* Littrell, *supra* note 52, *citing* James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 Cal. L. Rev. 1413, 1466-67 (1992).

pictures had sufficient artistic merit and were of sufficient value and usefulness to be entitled to copyright.[56]

More specifically, however, the Court stated that "[p]ersonality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. *That something he may copyright* unless there is a restriction in the words of the act."[57] While the personality aspect of an artwork is discussed under the aegis of the originality requirement here, it is also an important element of moral rights law.

The strength and applicability of this right of "personality" or "integrity" is essential to this writing because it could be the difference between whether an artwork is *inspired* by a former artwork or whether it *infringes* the copyright of a former artwork. Undoubtedly, the rights of artists can and must protect the interests of *contemporary* artists if they are to address and carry out the mandate of the Berne Convention, which is "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."[58] Henry Lydiate, Emeritus Professor of Art and Law, University of the Arts, London,[59] has found a similar situation in British law: "No one knew anything of dadaism, Marcel Duchamp and conceptual art when the (UK) legislation was framed, and in contemporary art – where the idea is more important than the form – there is a lack of protection for ideas."[60]

### *3.1.3 Moral Rights*

If one considers Cahen's work as a whole – or if his interests and opinions regarding his artwork are taken into consideration – it is likely within the framework of moral rights. Moral rights provide perhaps the most illustrative example of differences amongst international copyright jurisdictions. Moral rights are rights, separate from the economic benefits conferred by standard copyright laws, which are granted to artists with the goal of protecting their personality and reputation;[61] France statutorily recognizes four separate categories – more than any other jurisdiction -- of moral rights.[62] The categories include the *droit de divulgation* (right of disclosure); *droit de repentir ou de retrait* (right to correct or withdraw works previously disclosed to the public); *droit de paternite* (right of attribution including misattribution, nonattribution, anonymous or pseudonymous publication and the right to void a promise to publish anonymously or pseudonymously); and the *droit au respect de*

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[56] 188 U.S. 239 (1904).

[57] *Id.*, at 250 (emphasis added).

[58] *See* the Berne Convention, *supra* note 11.

[59] Institut d'Etudes Supérieures des Arts, London, The Teaching Faculty, available at http://www.iesa.edu/uk/articlePG.php3?id_article=13 (last visited Sept. 28, 2005).

[60] Alex Wade, *Can You Own an Idea*, The Guardian, May 6, 2003, *quoting* Henry Lydiate.

[61] *See, e.g.*, *What are moral rights?*, Intellectual Property, UK Intellectual Property Resource, available at http://www.intellectual-property-gov.uk/std/faq/copyright/moral_rights.htm (last visited Sept. 27, 2005).

[62] *See* The French Intellectual Property Code, Authors' Rights, Title II, Chapter I, available at http://www.wipo.int/clea/docs_new/en/fr/fr062en.html (last visited Sept. 27, 2005).

*l'oeuvre* (right of integrity in and respect for the work).[63] Certainly, even after the development and implementation of the most recent WIPO treaties, there remains significant leeway for contracting states to retain differences amongst national copyright regimes.[64] The reason moral rights are important in the context of this paper will hopefully become apparent as more individual artworks are examined. In 2002, then-President of the International Intellectual Property Institute spoke at a symposium regarding digital commerce and gave his opinion that "the lack of clear direction in digital rights management today is the result of three factors. First and most important is the remarkable and disturbing emergence of a culture that does not respect authors' rights."[65] Broadly, Continental European jurisdictions (France, Germany and Italy for example) offer a much higher level of moral rights protection than does the United States or the United Kingdom:

> *The French and U.S. copyright systems are well known as opposites. The product of the French Revolution, French copyright law is said to enshrine the author: exclusive rights flow from one's (preferred) status as a creator…. By contrast, the 1787 U.S. Constitution's copyright clause, echoing the 1710 English Statute of Anne, makes the public's interest equal, if not superior, to the author's.*[66]

The United States' implementation of the Berne Convention's requirements for moral rights protection is embodied in the Visual Artists Rights Act of 1990,[67] which protects only a narrow range of artwork including unique works or prints, sculptures or photographs whose production in a limited edition does not exceed 200 copies.[68] Moral rights in the United Kingdom have been criticized for being similarly weak: "Britain lost sight of its goal in the legislative process, and the result was the creation of rights that are well below the Berne Convention standard."[69]

On the other end of the spectrum for moral rights protection is France, which grants a list of specific rights to creators of almost any kind of artistic work: "The provisions of this Code shall protect the rights of authors in *all works of the mind*, whatever their

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[63] French Intellectual Property Code, *id.*, Art. L-121.

[64] The WIPO Copyright Treat and the WIPO Performances and phonograms Treaty were adopted in 1996 and became law in 2002. The United States signed both and the European Union implemented both treaties through its European Copyright Directive. *See, e.g.*, The Berkman Center for Internet and Society and GartnerG2, *Copyright and Digital Media in a Post-Napster World: International Supplement*, Jan 2005.

[65] Hon. Bruce A. Lehman, *Digital Commerce in Copyrighted Works: Where is the World Going?*, Prepared for the Copymart Symposium, September 5-6 2002, Berlin, Germany.

[66] Jane Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, in Sherman and Strowel Eds., OF AUTHORS AND ORIGINS: ESSAYS ON COPYRIGHT LAW, 131 (1994).

[67] The Visual Artists Rights Act of 1990 added Section 106a to the Copyright Act (Pub. L. No. 101-650, 104 Stat. 5089, 5128). *See* http://copyright.gov/title17/92chap1.html#1-37 (last visited Sept. 21, 2005).

[68] *See id.* For a thorough discussion of VARA, *see* William M. Landes, *What has the Visual Arts Rights Act of 1990 Accomplished?*, U. Chicago Law & Economics, Olin Working Paper No. 123, March 2002.

[69] Sheila McCartney, *Moral Rights under the United Kingdom's Copyright, Designs and Patents Act of 1988*, Columbia VLA Journal of Law and the Arts, Vol. 15, Winter 1991.

kind, form of expression, merit or purpose."[70] Indeed, the French term for "copyright" is *droit d'auteur*, literally meaning author's right(s). Beyond this, even, as noted above, there is an entire chapter in the French Intellectual Property Code devoted to moral rights and it enumerates the rights listed above, including publication, attribution, respect for the work itself, an author's right of retraction, protection of honor, and reputation. "In the French tradition…authors' rights are personal rights, to be discussed on the level of human rights…. [t]here is little more need to argue for moral rights than there is to argue for literacy or for freedom of expression; they are fundamental."[71] Indeed, a 2004 decision in the Cour d'Appel de Paris imposed a symbolic fine on the publisher of a sequel of *Les Misérables*, holding that the new work infringed the moral rights of Victor Hugo, who would not have allowed a third person to write a continuation of the novel.[72]

As such, the question whether an artwork is copyrightable as a whole potentially becomes much simpler within the French copyright model: the artwork is comprised of exactly what the artist wants it to be comprised of and *that* is the copyrighted artwork; there is no need to analyze the video portion of Cahen's work as opposed to the work as an installation, a poem, or an amalgam of different types of works using a specific typeface;[73] the work in its multifaceted variety and in its entirety is the copyrighted work and its reproduction – as a video installation or one-time interactive experience – would occur only under the direction or upon permission of the artist. It was noted as early as 1995, however, that moral rights in contemporary situations require a degree of flexibility that encompasses a baseline understanding of technology, schools of art and jurisdictional differences despite the Internet and despite international work: "If modern copyright law has a certain tendency to cover all and everything, in the very interest of authors of literature and art, music and film, we must adapt our positions to the new situation, in order to save the principle as such."[74]

### *3.1.4 The International Aspect*

One of the most difficult issues underpinning this discussion is the aforementioned range of discrepancies between jurisdictions despite very broad adherence to the

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[70] *See* The Intellectual Property Code of France, *supra* note 12, at Chapter II, Art. L112-1 (emphasis added).

[71] Mike Holderness, *Moral Rights and Authors' Rights: The Keys to the Information Age*, The Journal of Information, Law and Technology, Feb. 1998, available at http://elj.warwick.ac.uk/jilt/infosoc/98_1hold/ (last visited Sept. 21, 2005).

[72] *See Le droit moral de Victor Hugo s'oppose à ce que quiconque pubile une suite aux Misérables*, available at http://www.lextenso.com/lextenso/site/chronique_file_copyright.php?IdChron=165#Toc4-02 (last visited Sept. 27, 2005). *See also* Olivier Delcroix, *Les descendants de Victor Hugo assignent en justice les editions Plon; La suite des 'Misérables' sera-t-elle interdite?,* Le Figaro, May 2, 2001.

[73] Different jurisdictions treat fonts differently in copyright law. The United States, for example, does not copyright typefaces: 17 U.S.C. 102(b), although other jurisdictions do. Germany, for example, has allowed copyrighting of typefaces since 1981. For more information, *see, e.g.*, Font Utilities, Legal Issues, Delorie Software, available at http://www.delorie.com/gnu/docs/fontutils/fontu_129.html (last visited Sept. 30, 2005).

[74] Adolf Dietz, *The Moral Right of the Author: Moral Rights and Civil Law Countries*, 19 Columbia – V.L.A. Journal of Law and the Arts 199, 227 (1995).

Berne Convention.[75] The United States has not yet adopted the spirit of the Berne Convention; indeed, it has been predicted that "[n]ew battles to move U.S. law further toward a fuller acceptance of Berne's wider implications will certainly be fought in the future."[76] The French decision regarding a sequel to Victor Hugo's play, for example, arguably clashes with a recent American case that settled out of court: The estate of Margaret Mitchell sued an author who wrote the *Gone with the Wind* story from the perspective of a mulatto slave. The U.S. Court of Appeals for the Eleventh Circuit vacated an injunction[77] against publishing the book, after which the case settled out of court in 2002 when the publisher of the new work made a donation to Morehouse College, a traditionally African American college in Georgia in exchange for the estate dropping the lawsuit.[78] While this example demonstrates a literary aspect of copyright law, the concepts in the context of art law are similar: an artist could face highly variable legal obstacles for mimicking or artistically commenting on or extrapolating from a previous work, depending on the country in which he is showing his work.[79] Internationally-viewed artists could have substantial legal problems. Indeed, "the likes of Yves Klein, Christo and artist-collaborators such as Seth Siegelaub have all worked directly with legal concepts and lawyers in the development of works of art."[80] But if we accept the tenet that "[c]opyright law must protect authors from any influence other than their audience,"[81] it is counterproductive to expect or require artists to work with lawyers in producing their artwork.

### 3.2 Damian Loeb, United States

As an artist working with contemporary imagery, Damian Loeb has run across an array of legal roadblocks: "You do not want to get in a copyright case. Right and wrong are different in the real world than in the art world."[82] One of his recent

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[75] As of September, 2005, there are 159 contracting parties to the Berne Convention, including the United States (in force as of March 1, 1989), the United Kingdom (in force as of December 5, 1887), France (also in force as of December 5, 1887), Japan (in force as of July 15, 1899), and Australia (in force as of April 14, 1928). The most recent adherents to the Convention are Uzbekistan (in force as of April 19, 2005) and Comoros (in force as of April 17, 2005). *See* WIPO, Treaties and Contracting Parties, Berne Convention, available at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 (last visited Sept. 27, 2005).

[76] Jane C. Ginsburg and John M. Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 Colum. – V.L.A. J.L. & Arts 1, 6 (1988).

[77] *See Suntrust v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001).

[78] *See* Thomas L. Tedford, *Freedom of Speech in the United States, 2002*, available at http://www.bc.edu/bc_org/avp/cas/comm/free_speech/update02.html (last visited Sept. 27, 2005).

[79] Domestic laws remain variable despite broad acceptance of the Berne Convention. Each country must, however, treat foreign works the same as national works. "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." *See* the Berne Convention, *supra* note 11, at Article 5(1).

[80] Alex Wade, *Can You Own an Idea*, The Guardian, May 6, 2003, *quoting* artist Anna Livia Lowendahl-Atomic.

[81] See Goldstein, *supra* note 13.

[82] Adrian Dannatt, *Culture*, Talk Magazine, March 2001, at 68, *quoting* Damian Loeb.

exhibitions was entitled *Public Domain*,[83] a show wherein Loeb takes portions of film stills, although their origins are not immediately identifiable, to examine the relationship between reality and fiction. An example of his legal troubles developed after his incorporation of a copyrighted photograph into one of his paintings, embroiling him in a defense of the 'appropriation' school of art.[84] Loeb is represented by Mary Boone Gallery in New York and by White Cube Gallery in London. In his biography statement at White Cube, he is quoted as saying, regarding his artwork, that "appropriation is a dead term; we're not plundering. We've been force-fed. We're not sampling – we're digesting."[85] Loeb has encountered both financial and logistic difficulties in showing his artwork. Insofar as he views copyright law as it relates to contemporary art, he finds that legal "ideals are expressed through the legal system which has very little time or interest in ascertaining the merits of creativity."[86]

The White Cube Gallery biography goes on to say: "Cramming juxtapositions of images gleaned from magazines, newspapers and television onto his canvas, Loeb creates seamless narratives that, whilst confident in execution, hint at disturbing hidden meanings…. Like the models poised within the ad campaign that Loeb borrows from for the work, the expressionless faces of the characters within his paintings echo the cynicism and nonchalance prevalent in western counter-cultures today."[87] Some view his artwork as mere infringement; Daniel Grant, in a 2004 article for the magazine American Artist, wrote: "Some infringers, such as art world luminaries Jeff Koons, Damian Loeb and Barbara Kruger, view their appropriation of other artists' imagery not as theft but as fair use, which is an accepted defense against charges of copyright infringement…. [t]here is no unanimity of opinion on the wisdom (of finding the fair use defense applicable in the realm of artwork)."[88] Professor John Henry Merryman, a recognized expert in art law at Stanford Law School, has "strong views about appropriation art, much -- but not all -- of which is cheap, feeding off of the creative work of real artists."[89] Art is, arguably, a special and idiosyncratic realm as it relates to the law. Because there is no single type of "artist," there is no one "law of appropriation" that seems to fit well for all artistic endeavors. If an artwork that "samples" from other work is made for commercial purposes, its commerciality will weigh against the newer artist in the U.S.'s fair use

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[83] Public Domain, at the Mary Boone Gallery (Chelsea), March 31 – May 5, 2001. An excerpt from the exhibition press release reads: "After one has lifted the veil to uncover a world of ideas one is confronted with another veil, and behind that the orgasmic notion of hyper-reality, where what we know and feel is even better than the real thing. This is the world of hyper-modern cinema, of fashion magazines, of the designer drugs that the laboratory rats at Stanford and Berkeley universities are keeping for themselves. Damian Loeb has acquired some, taken them and is sharing the experience with us through his paintings." *See Shows, Public Domain*, at www.damianloeb.com (last visited Sept. 30, 2005).

[84] *See Damian Loeb Sued for Appropriation*, Artnet News, Aug. 15, 2000, available at http://www.artnet.com/Magazine/news/artnetnews/artnetnews8-15-00.asp (last visited Sept. 22, 2005).

[85] *See Damian Loeb*, White Cube, available at http://www.whitecube.com/html/artists/dal/dal_frset.html (last visited Sept. 22, 2005).

[86] Extract of an e-mail from Mr. Loeb to the author, Sept. 24, 2005, on file with the author.

[87] *Id.*

[88] Daniel Grant, *In Depth: Internet Piracy and Copyright Infringement*, American Artist, June 2004.

[89] Extract of an e-mail from Professor Merryman, Oct. 6, 2005, on file with the author.

balancing equation, although courts have not yet ruled that it is a decisive factor.[90] This issue again begs the question "what is art?" Does "high art" become commercial art once it has become popular in cosmopolitan galleries or once it achieves high prices at auction? Or is a work commercial art only when it is specially commissioned for commercial purposes? And what about artworks made by non-professional artists that "sample" the same amount of art as Damian Loeb? What about Andy Warhol's use of Marilyn Monroe's photograph?

It seems inarguable that Warhol's *Marilyn* is now much more widely recognized than is the original photograph; did he therefore infringe the photographer's copyright? Or did he contribute to the introduction of a new school of art? Rob Grose, a British art lawyer, believes that "[i]ntellectual property law comes from old-fashioned property law, the aim of which was to protect tangible objects. It has not translated well to conceptual art, where often the only physical evidence of the idea is its documentation."[91] Ms. Pat Badani, an artist working in various media[92] and assistant professor of integrated media at the Illinois State University college of Fine Arts, believes that "where the appropriation also bec(omes) a commercial venture, (it) should be punishable by law, and legal, more accessible means should be put in place as a recourse to artists."[93] But, on some level, all art is intertextual, borrowed, and influenced by prior art.[94] Mr. Loeb would likely agree:

> *The history of art is rife with examples of great art cribbed from other art. Art is the expression of ideas through craft. If the art relies on a gimmick which is easily copied it is weak art. And good ideas should be copied so that they can be disseminated and disassembled. I have little sympathy for artists who sue other artists.*[95]

Because of the arguable gaps in categorization, such as appropriation art and even some aspects of audiovisual works, several commentators have advocated the introduction of a new copyright category of "multimedia work."[96] Regarding eligible subject matter, one author finds the best solution would be to introduce a sui generis right related to the investment put into the contents of multimedia works and the manner its interactivity is presented on a screen.[97] Other authors have suggested

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[90] *See, e.g., Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998). Annie Liebovitz sued Parmount for stealing the basic idea of her cover photograph of Demi Moore for Vanity Fair Magazine. Paramount had replicated the posture and other aspects of Ms. Moore in making its advertisement poster for a Naked Gun movie. The court decided Paramount's appropriation fell under the fair use defense.

[91] Alex Wade, *supra* note 80, *quoting* Rob Grose.

[92] *See, e.g.*, Lion Head, Pat Badani, printed fabric, 1992, available at http://www.ccca.ca/artists/work_detail.html?languagePref=en&mkey=7776&title=Lion+Head&artist=Badani%2C+Pat&link_id=1500 (last visited Sept. 28, 2005).

[93] Extract of an e-mail from Ms. Badani to the author, Sept. 26, 2005, on file with the author.

[94] Alex Wade, *supra* note 80.

[95] Extract of an e-mail from Mr. Loeb to the author, *supra* note 86.

[96] Tanya Aplin, Copyright in the Digital Society: The Challenges of Multimedia, 217. Hart Publishing, 2005.

[97] I. Stamatoudi, *To What Extent are Multimedia Products Databases?,* in I Stamatoudi and P Torremans (eds.), Copyright in the New Digital Environment. Sweet and Maxwell (London, 2002).

similar proposals because it 'would enable the clear definition of multimedia and specific rights tailored to suit its unique nature."[98] There has been no legislative response to these suggestions and its opponents find that a multimedia right would benefit too few types of works and would create confusion and overlap with existing forms of protection.[99]

### *3.2.1 Fair Use, Parody and Free Speech*

While fair use could comprise an entire discourse of its own in relation to this topic,[100] it is relevant to this specific discussion from the point of view of how – and whether – artists can and should receive more of a *carte blanche* with respect to using others' work in their own. Several organizations and individuals have contributed to movements such as Lawrence Lessig's ideas on free culture,[101] and his and others' theses regarding free appropriation, and "copyleft."[102] Negativland, an advocate group for fair use allowances for pop media collage, has been called "perhaps America's most skilled plunderers from the detritus of 20th century commercial culture."[103] The group states that "the beauty of the Fair Use Doctrine is that it is the only nod to the possible need for artistic freedom and free speech in the entire copyright law, and it is already capable of overriding the other restrictions."[104] Professor Lessig wrote an essay in the exhibition catalogue that accompanied a recent show at the Milwaukee Art Museum called *CUT: Film as Found Object in Contemporary Video;* in it, he pointed out that many of the artworks included in the exhibition could be considered illegal copyright infringement.[105] Related to fair use, parody and social criticism, of course, is the issue of free speech. Considered together, these doctrinal safeguards for creativity enjoy a nebulous protection; case precedent has not provided lucid guidelines.

In 1992, the United States Second Circuit Court of Appeals found that artist Jeff Koons infringed a photographer's copyright when he sent the photographer's photographs of puppies to Italian fabricators to be fabricated as a ceramic sculpture.[106] Koons claimed the parody defense, suggesting that his work satirized society. "Since

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[98] J Douglas, *Too Hot to Handle? Copyright Protection of Multimedia*, 8 AIPJ 96, 105 (1997).

[99] Aplin, *supra* note 96, at 254.

[100] For a very good introductory but thorough discussion of this issue, *see* David Lange and Jennifer Lange Anderson, Copyright, Fair Use and Transformative Critical Appropriation, Draft Paper made available to attendees at the Conference on the Public Domain at the Duke Law School, Nov. 9 – 11, 2001, available at www.law.duke.edu/pd/papers/langeand.pdf (last visited Sept. 22, 2005).

[101] See Lawrence Lessig, FREE CULTURE: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, Penguin Press, 2004.

[102] *See, e.g., What Is Copyleft?*, The GNU Project, available at http://www.gnu.org/copyleft/copyleft.html#WhatIsCopyleft (last visited Sept. 30, 2005). *See also* www.artlibre.org for a French perspective.

[103] Mark K. Anderson, *Where Everything is Negativland*, Wired News, May 9, 2000, available at http://www.wired.com/news/culture/0,1284,36195,00.html (last visited Sept. 23, 2005).

[104] Negativland, *Fair Use*, available at http://www.negativland.com/fairuse.html (last visited Sept. 23, 2005).

[105] Mary Louise Schumacher, *'Cut' Takes on the Art of Sampling,* Milwaukee Journal Sentinel, June 19, 2005, *citing* Lawrence Lessig.

[106] *Rogers v. Koons*, 960 F.2d 101 (2d Cir., 1992).

1979, Koons has been making art that provokes thought…. Koons communicates through a heightened sense of symbolism. He attaches a profusion of meaning to the things he sees and likewise to those objects he presents as art."[107] The Court, however, required that the copied *work* be the object of parody, rather than society at large. The Court further found that Koons' work was made for monetary gain and that it prejudiced the market for licensing reproductions of the original photograph. A professor of modern art at Harvard University at the time of the lawsuit agreed with the Court's decision: "As far as my own judgment, his work is totally trivial and a pure product of the market. He's considered to be an heir to Duchamp, but I think it's a trivialization of all that. I think he's kind of a commercial artist."[108] Should the law find and recognize a difference between artists who create for social commentary rather than financial gain? Some argue that American court decisions tend to rule along financial lines,[109] although there is nothing explicit in the law with this tendency made explicit and case law is inconsistent in that regard.

The United Kingdom does not have a general "fair use" defense to copyright infringement but rather has a limited "fair dealing" defense for research, private study, criticism and news reporting.[110] Several continental jurisdictions do not provide a parody defense whatsoever.[111] In seeming contrast to the *Koons* decision, however, is a 2003 United States Ninth Circuit of Appeals case wherein an artist developed a series of 78 photographs entitled *Food Chain Barbie* wherein he portrayed Barbie in odd or sexual positions. Barbie's manufacturer, Mattel, sued the artist, who in turn claimed the parody defense; the Court in this case found the artist's work "highly transformative" and his use of Barbie therefore justified.[112] The Barbie decision is more suited to the artistic borrowing or "appropriation" that unquestionably takes place in contemporary art,[113] but the balance between parody, fair use and free speech is delicate and far from objectively predictable.[114]

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[107] Constance L. Hays, *A Picture, A Sculpture and a Lawsuit*, The New York Times, Sept. 19, 1991, *quoting* I. Michael Danoff in a catalogue for a Koons show at the Museum of Contemporary Art in Chicago.

[108] *Id., quoting* Yves-Alain Bois.

[109] *See, e.g., Rogers v. Koons, supra* note 106.

[110] *See, e.g.*, Simon Stokes, *The Right to Copy in the UK: The Public Domain and Free flow of Ideas Are Under Threat*, The Art Newspaper, 2001. *See also* the UK Copyright, Designs and Patents Act of 1988, *supra* note 31.

[111] *See* Stokes, *id.* *See* also the French Intellectual Property Code, *supra* note 12.

[112] *See Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

[113] '(A)ppropriation art' is a school of contemporary art widely practiced in a variety of forms by visual artists. This art may involve verbatim appropriation of pre-existing images…. This tension between adequately balancing intellectual property rights such as copyright and trademark with the public interest in wider access and free expression is evident in a wider debate in the digital age, carried out in the media and scholarly commentary as well as in legal decisions. The heart of the matter is whether existing doctrines are flexible enough to create the breathing space required to permit the new technology to reach its full potential. Barbara Hoffman, *Visual Artists Benefit from a Delicate Balance; In Cases Involving Parody, Fair Use Analysis Upholds Free Speech*, National Law Journal, Dec. 6, 2004. *See also* the Milwaukee Art Museum, CUT/Film as Found Object, June 25 – Sept. 11, 2005, an exhibition exploring appropriation art, available at http://www.mam.org/exhibitions/exhibition_details.aspx?ID=46 (last visited Sept. 28, 2005).

[114] Hoffman, *id.*

### *3.2.2 Human Rights, Privacy Law and a Moral Rights Reprise*

Mentioned above, the case wherein the Australian judge denied copyright protection to the placement of people and things[115] around a swimming pool could have posed more possible quandaries than whether the grouping constitutes copyrightable subject matter. One such quandary would exist if the individuals involved had opposed the reproduction of their images either as art or as a commercial product. Specifically, when individuals' likenesses or photographs are used in a work of art, there is an element of their personhood which is undeniably used in that work.[116] The rights that individuals have in controlling the eventual manner in which they are portrayed in an artwork – be it exhibited in a museum or meant for commercial use -- are arguably similar to the rights an artist has in whatever artwork he or she produces because both circumstances involve an extension or infusion of that person's personality in the work of art. French commentary on the topic links privacy with moral rights doctrine, both of which are related to human rights tenets; France protects both the commercial and dignitary aspects of personality in its Civil Code.[117] German law interestingly embodies a specific right to the development of personality, granted to an individual portrayed – in any form whatsoever -- such that he or she can decide on publication.[118]

Exhibiting a counterpoint decision, a recent U.S. District Court case seems to uphold free speech rights over privacy rights insofar as both "museum art" and "commercial art" are concerned. In the 2002 case *Hoepker v. Kruger*,[119] a woman who was the subject of a 1960 photograph by a German photographer brought suit against a New York museum, alleging a violation of her privacy under New York Civil Rights Law. The original photograph itself had fallen into the public domain and, under the New York law, either advertising or commercial use would have to be proved to succeed on a right of privacy claim, which failed in this case.[120] The sales were made in conjunction with a museum exhibition. The "new" artwork – incorporating her image -- in question was a manipulated version of the photograph wherein the woman's right eye was partially enlarged by a magnifying glass; the accompanying commercial artworks included the image's reproduction on postcards, note cubes, T-shirts and other exhibition memorabilia. The Court stated that "[t]he balance struck in the privacy laws and in their application is consistent with First Amendment jurisprudence, for government may encumber or restrict commercial speech more readily than 'pure' First Amendment expression such as political discourse."[121]

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[115] See *Creation Records Ltd. v. News Group Newspapers Ltd, supra* note 37.

[116] This issue is almost always separated into two categories – one for people who are celebrities, the other for non-celebrities. Celebrity treatment is a very interesting and detailed topic but, here, I concentrate on non-celebrity subjects to avoid an overly-broad tangential discussion.

[117] French Civil Code, Art. 9.

[118] *See* Article 2 (1) and Article 1(1) Grundgesetz. *See also* 1907 Kunsturhebergesetz (KEG) § 22. *See also* G. Thwaite & W. Brehm, *German Privacy and Defamation Law: The Right to Publish in the Shadow of the Right to Human Dignity*, 8 EIPR 336 (1994).

[119] 200 F. Supp 2d 340 (S.D.N.Y. 2002)

[120] N.Y. Civ. Rts. §§ 50-51.

[121] 200 F. Supp 2d at 348.

A legal commentator on the case noted: "In other words, if the gift shop items were found to be art, as opposed to merchandise items bearing (the woman's) image for commercial purposes, (she) would lose her case."[122] Or, as a New York Law Journal article following the decision was titled: *Art Triumphs Over Copyright and Privacy Claims*.[123] The Court found the gift shop items to be extensions of the exhibition so long as the artwork is actually included in the museum's collection or is exhibited by the museum. "In the larger context of social contemplation of the question '*What is art?*,' (the creator of the artwork in question here) adds another spice to the mix, specifically in its discussion and articulation between art and merchandise."[124]

It must be remembered, however, that this particular point of view regarding the tension between privacy and free speech in the art realm is American and, more specifically, from New York. Had this case been brought in another jurisdiction -- Germany for example -- the outcome may have been just the opposite. In the United Kingdom, as another example, there is no written constitution and no guarantee of the right to free speech.[125] The recent UK Human Rights Act of 1998, however, recently incorporated the European Convention on Human Rights into UK law, such that UK citizens are now guaranteed the right to freedom of expression. "It remains to be seen whether the UK courts would find that an artist's right to express themselves through their works would be a viable defence to an allegation of breach of privacy."[126] In France, no similar case law has been decided by the courts, but it has been recently noted that copyright problems abound in this area and that artwork in the digital age -- for example, the right of paternity, a moral right, is even more of a delicate subject now than it was with respect to traditional media.[127] In the context of musical works, certain works of the composer John Cage are very difficult to interpret today because of changes in technology such that reproducing his works via contemporary technology risks distorting the original work.[128] Various organizations are discussing the possibility of a "best practices" guide for moral rights as they should apply to digital works but none is currently in place. Martha Lufkin, a Massachusetts attorney and writer for the international Art Newspaper, believes that art that depends on technology should be accompanied by artist contracts that give the buyer the right to

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[122] Heather Angelina Dunn, *But is it Art? One Court Weights In*, National Law Journal, Jan. 20, 2003.

[123] David Goldberg and Robert J. Bernstein, *Art Triumphs Over Copyright and Privacy Claims*, New York Law Journal, May 17, 2002, at 3.

[124] *Id.*

[125] *See, e.g.*, Henry Lydiate, *Theft, Lies & Videotape*, Art Law, 2003, available at www.artquest.org.uk/artlaw/pdf/TheftLies.pdf (last visited Oct. 6, 2005).

[126] *Id.*

[127] Laurance N'Kaoua, *L'art numérique trouve des adeptes mais cherche son marché*, Les Echos, Oct. 6, 2004.

[128] "Et 'certains travaux du compositeur John Cage sont très durs à interpréter car les techniques ont changé ', assure Roland Cahen. Or, reproduire ces oeuvres via des technologies modernes risque de les dénaturer. La Fondation Daniel-Langlois de Montréal et le Guggenheim Museum de New York réfléchissent à établir des standards de conservation des oeuvres numériques." *Id., quoting* Roland Cahen.

transfer the art to an upgraded technology when the medium used by the artist becomes outdated, "so long as the artist's stated intentions are respected."[129]

Within the rubric of aboriginal art – to rewind and look at the issue through a different lens -- the past director of the National Gallery of Australia remarked upon the importance of creativity and artistic expression as fundamental manifestations of our humanity, and emphasized that they are therefore inevitably linked to human rights.[130] He quoted a passage from an introduction to a New Zealand conference on *Culture, Rights and Cultural Rights* by Mary Robinson, former High Commissioner for Human Rights at the United Nations:[131] "Despite the progress in international standards and norms, cultural rights remain among the least understood of all human rights in that we have a clear sense of neither their contours and content nor the relationship between culture and rights."[132] Cultural rights – whether titled "moral rights" or "personality" or "privacy" -- have a place in the human rights dialogue and their study and application should be applied to extend the gamut of cultural expressions ranging from aboriginal to contemporary art.

### *3.2.3 The Digital Aspect*

Beyond the above issues in Mr. Loeb's work is the aspect of the manner in which technology enhances or enables much of his work.

> *Some of (his) paintings are direct transcriptions of freeze-frame scenes, others are computer collages assembled from a range of different shots, for Loeb uses the latest technology as both a practical tool and metaphor for a sort of new world memory system minted from the ever-expanding digital matrix.*[133]

As was noted in this paper's introduction, computer software programs are generally granted copyright protection and one example of an art project incorporating software will be discussed below in *Milk Project*. Software programs, however, do not comprise the full scope of how technology has altered and provided new outlets for creativity. Video art, discussed above with Cahen's work, is just one other example.[134] "The current debate over intellectual property is the result of tension between two important goods: the system for rewarding creators, and the growing capabilities of computers and the Internet. The tension arises because the very technologies that are helping fuel an expansion of the marketplace of ideas on the

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[129] Martha Lufkin, *Why Harvard Had to Sign 45 Contracts to Install a Work by Pierre Huyghe*, The Art Newspaper, January 6, 2005.

[130] *See* Brian Kennedy, *Witnessing and Reconciliation, Keynote address to the conference Art and Human Rights*, Aug 7-10, 2003, available at http://www.nga.gov.au/Director/Previous/Kennedy/Reconciliation.htm (last visited Oct. 6, 2005)

[131] *Id. See also* Mary Robinson, United Nations High Commissioner for Human Rights, available at http://www.unhchr.ch/html/hchr/unhc.htm (last visited Oct. 6, 2005).

[132] Margaret Wilson and Paul Hunt, Editors. Culture, Rights, and Cultural Rights: Perspectives from the South Pacific. Pacific Island Books, 1998.

[133] Adrian Dannant, *The Art of Allusion: Damian Loeb's Work Relies on the Viewer's Recognition o the Visual Sources that He Quotes Liberally*, The Art Newspaper, Jan. 6, 2003.

[134] Video art was touted as "high art" as early as 1999 with an exhibition at the San Francisco Museum of Modern Art. *See, e.g.*, Reena Jana, *Video as High Art*, Wired News, Jul. 13, 1999.

Internet can also be used to undermine it."[135] In 1998, it was forecasted that "[l]itigation surrounding the use and reproduction of material placed on the Web by museums and galleries will undoubtedly mushroom over the coming decade."[136]

Different industries seem to employ different practices regarding digital rights management [DRM] or simply general means by which they make their cultural intellectual property available online. The Museum of Modern Art in New York, for example, has a searchable online "DADAbase" which holds, amongst other things, its entire collection of drawings. While some images are unavailable, most images are available not only as thumbnails but also as enlargeable clickable pictures. A digital image of a "pencil and watercolour on colored paper on book" work entitled *The Cabinet of Souls* by Michaël Borremans, is available online.[137] There do not seem to be any technological restrictions on the image and the only legal notice is a copyright symbol with the artist's name and year the image was digitized; it is even possible to "right-click" on the image such that the viewer could save the image to his or her hard drive. Beyond this, there is a "printable version" option,[138] with a clean version of the image that includes MoMA's title on the top and the copyright, media, dimensions and provenance information on the bottom. There is also a small print message providing: "If you are interested in reproducing images from this site, please visit the *Image Permissions* page. For additional information about using content from MoMA.org, please visit *About this Site*."[139]

Images on the Corbis website, on the other hand, are viewable as right-clickable thumbnails and as larger watermarked images;[140] slightly more controlled. Art galleries representing modern artists seem to follow the more relaxed practices similar to MoMA: the artists' images are viewable and reproducible and include an appended copyright notice.[141] This trend is possibly indicative of many things: confidence in public respect for copyright law, artists' wishes, gallery contracts that expressly require image availability for business and advertisement purposes or, in the case of the museum, an interpretation of its mission to present and disseminate its collection to a wide audience. In any event, it seems evident that the Internet is home to a vast collection of digital imagery and very little of it, even copyrighted contemporary imagery, is technologically protected.

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[135] *Protecting Copyright and Internet Values*, The Center for Democracy & Technology, Spring 2005.

[136] E.B., *Legal Uncertainty in Cyberspace*, The Art Newspaper, Jan. 4, 1998.

[137] *See The Cabinet of Souls*, MoMA, available at http://www.moma.org/collection/browse_results.php?criteria=O%3ADE%3AI%3A3&page_number=611&template_id=1&sort_order=1 (last visited Oct. 11, 2005).

[138] *See Michaël Borremans, The Cabinet of Souls*, MoMA, available at http://www.moma.org/collection/printable_view.php?object_id=86807 (last visited Oct. 11, 2005).

[139] *Id.*

[140] *See* www.corbis.com. Corbis' mission is to "to provide advertisers, editors, publishers, filmmakers, and marketers with a single source for all of their visual needs…not just images and footage, but the services that make them easy to source, locate, and license." *See Corbis Overview*, available at http://www.corbis.com/corporate/overview/overview.asp (last visited Oct. 11, 2005).

[141] *See, e.g.*, the Gagosian Gallery (United States), www.gagosian.com, the White Cube Gallery (London), www.whitecube.com, the Marian Goodman Gallery (New York), www.mariangoodman.com, Galerie GNG (Paris), http://www.galeriegng.com/ and Galerie Blaise Drummond (Geneva), http://www.galeriebs.ch/histoire/galeriebs.php.

### 3.3 Pierre Huyghe, France

Several major issues at the intersection of international copyright law and contemporary art have now been laid out; this penultimate example is meant to provide further provocation of thought on the matter since the issues involved in any given artwork are inevitably different; the last example – *Milk Project* -- will hone in on interactive art. One of the artists who exhibited in the aforementioned *'CUT'* exhibit in Milwaukee was Pierre Huyghe. Other artists have played with the intersection between law and art[142] but Huyghe has one of the longer and distinguished resumes, including having won the fourth biennial Hugo Boss Prize, an arts award that was conceived to recognize contemporary artists making "profound contributions to the cultural landscape."[143] He has gained world class stature for works exploring the intersection of memory and history by using film, video, sound, animation, and sculpture in his diverse works.[144] "Pierre Huyghe questions the very definitions of time, memory, and engagement in his practice."[145] One of his works that was brought to the Guggenheim Museum in New York is called *L'Expédition Scintillante, Act II: Untitled (light show)* (2002). In some ways, it could be classified as a sculpture; in other ways it functions as a music box. Music written by Erik Satie and re-orchestrated by Claude Debussy "filter(s) through the space as pulsing lights and smoke emanate from the stagelike sculpture…. The artist gives form to the memory of this type of *collective experience* while conjuring the strange connections between the realm of the familiar and that of the unknown."[146] Already addressed above, this work already incorporates the copyrightable element of music[147] and the nebulously protected installation work.

At the recent eighth annual Biennale of contemporary art in Lyon, France, Huyghe produced an animated film entitled *Temps des Cerises.* A similar Huyghe work premiered in a different format at the Carpenter Center for the Visual Arts at Harvard University and has been partially described as a 20-minute puppet opera. The opera tells the story of the Center's architectural commission, along with the story of Huyghe's own work at Harvard, featuring custom-crafted marionettes representing the architect, Le Corbusier, and a host of other characters. The artwork also comprises a temporary architectural extension to the Le Corbusier building done by Huyghe in

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[142] Louise Hopkins, for example, has a current exhibition up at Edinburgh's Fruitmarket Gallery entitled Freedom of Information. In it, she works on "canvases" that already contain information. "She diverts and subverts the information printed in newspapers, on maps, in history books and on street plans," for example. *See* Exhibition Guide, Louise Hopkins, Freedom of Information, The Fruitmarket Gallery, 8 Oct. – 11 Dec., 2005.

[143] *See* Susan Cross, *Pierre Huyghe*, The Guggenheim Museum, available at http://www.guggenheim.org/exhibitions/hbp_huyghe (last visited Sept. 28, 2005).

[144] *Id.*

[145] Pierre Huyghe, *Moving Pictures*, The Guggenheim Museum available at http://www.guggenheim.org/exhibitions/past_exhibitions/moving_pictures/highlights (last visited Oct. 6, 2005).

[146] Susan Cross, *supra* note 143. (Emphasis added).

[147] Similar to audiovisual works, addressed above, musical works are usually governed by a unique set of laws and distribute rights to the parties involved, including the composer, performers, distributor, if any, and may have a royalty structure in place.

collaboration with a Harvard Design School faculty member.[148] Beyond the puppetry and architecture, Huyghe created an accompanying videowork. It was filmed by multiple cameras and enhanced with special effects. The audience was able to view the one-time, unique premiere of the film through a glass wall separating the auditorium from the lobby of the Carpenter Center, and the video thereafter became the centerpiece of a multimedia installation that operates as the "primary documentation" of Huyghe's work at the Carpenter Center.[149]

Within this array of media and participants is, perhaps, a single work entitled *Huyghe + Corbusier: Harvard Project*. The distillation or "primary documentation" of the artwork seems to be the multimedia video installation but the artwork in its entirety is not fixed. The copyright issues are abundant: Subject matter is questionable (is it the video that comprises the copyrightable expression?); the idea/expression dichotomy could certainly pose a problem (is it the video on its own or the video-installation that comprise the copyrightable expression? If the latter, what *is* a video-installation?); is the fixation requirement met if the video-installation requires a certain type of set-up? Are Le Corbusier's moral rights infringed when Huyghe creates a temporary addition to his (Le Corbusier's) architecture? Does the copyright in the architecture vest with Huyghe alone or along with the Harvard design professor who helped in its design and, if the latter, does the professor's intellectual property automatically transfer to the University? Do the puppets parody the people they are meant to represent or is there a personality or privacy right infringed? Is there some computer mechanism or industrial design used in exhibiting the show?[150] Depending on a more detailed description of the artwork as a whole, the list of issues could go on and, not surprisingly, Harvard had to sign 45 contracts to install and exhibit his artwork.[151]

### *3.3.1 Commercialization and Trademark Issues*

An issue that could be applied to Huyghe's work, along with most of the artwork of described above, is the element of commercialization with which the artists (and courts) must grapple. Whether an artwork's classification as an aspect of free speech – something the artist uses to express his ideas – or as an aspect of commercial production -- something for which the artist gets paid – could be determinative of how his artwork is treated in court. As noted above, "art" is an undefined term. Some works of art fit more into a preconceived category of 'high art' as opposed to 'commercial art.' Two such "clear" examples might respectively be Jackson Pollock's Autumn Rhythm [Enamel on canvas, 1950, at the Metropolitan Museum of

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[148] *See* Pierre Huyghe Celebrates the Carpenter Center in Conjunction with the 40th Anniversary of Le Corbusier's Only North American Building: Huyghe + Corbusier: Harvard Project, Press Release, August 19, 2004, available at http://www.artmuseums.harvard.edu/press/released2004/huyghe.html (last visited Oct. 5, 2005).

[149] *See id. See also Huyghe + Corbusier: Harvard Project*, Indepth Arts News, Nov. 19, 2004, available at http://www.absolutearts.com/artsnews/2004/11/19/32538.html (last visited Oct. 5, 2005).

[150] There is often no bright line between copyright and patent when industrial designs or works that are both functional and aesthetically important. For a thorough discussion, *see* J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 Duke Law Journal 1143 (1983).

[151] *See* Lufkin, *supra* note 129.

Art][152] – a painting rife with social and artistic meaning -- versus the Bridgeman Art Library's bumblebee, an image associated with Bridgeman's webpages that arguably functions as a hybrid between a trademark and a decoration.[153] Between "high art" and "commercial art" is a wide and overlapping range of artwork. The posters of Henri de Toulouse Lautrec, for example, are exhibited in museums around the world today but are also classifiable as publicity posters and are seen as escaping clear classification in the realm of art;[154] in the realm of law, this dividing line – and whether it is used – provides no bright line rules.

The example of Pollock's painting is meant to highlight an artwork that has little financial motivation as compared to the Bridgeman bumblebee, whose very existence and use is predicated upon a business. Trademarks have a unique requirement in that they be used in conjunction with protecting financial business interests,[155] and, as such, their usefulness insofar as protecting aspects of artworks is questionable, at best. Trademark and, more specifically, trade dress principles are otherwise theoretically attractive for protecting an artwork's style or "look and feel."[156] Because of the nature of a work protectable under these tenets is commercial, however, artistic styles and techniques are still not copyrightable. Georges Seurat's style of pointillism in painting is attributed to him because art historians have kept track of styles and genres; Seurat did not have the power, however, to prevent other artists from using the same technique.[157] As Damian Loeb suggests, "[i]f the art relies on a gimmick which is easily copied it is weak art."[158] Copycat cases are inherently subjective; no jurisdiction has bright-line rules as to what constitutes artistic copying. But as "high art" and "commercial art" and even "appropriation art" infringe on each other's

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[152] *See* Jackson Pollock, Autumn Rhythm, The Metropolitan Museum of Art, available at http://www.metmuseum.org/Works_of_Art/viewOne.asp?dep=21&viewmode=0&item=57.92 (last visited Oct. 10, 2005)

[153] See The Bridgeman Art Library, available at http://www.bridgeman.co.uk/ (last visited Oct. 10, 2005).

[154] *See, e.g.*, Barbara Vitello, *Bohemian Portrait: The Art Institute of Chicago Captures the Culture and Celebrity of 19th-Century Montmartre as Seen by Toulouse-Lautrec*, Chicago Daily Herald, July 15, 2005. "Of course, no Toulouse-Lautrec exhibition would be complete without addressing the artist's magnificent publicity posters, which reflect his skill at straddling the commercial art and high art divide…. Toulouse-Lautrec's insistence on exhibiting his paintings alongside his lithographs and posters elevated those works to the level of fine art." *Id.*

[155] *See, e.g.,* the United States Lanham Act, 15 U.S.C. § 22. *See also* The Madrid Agreement Concerning the International Registration of Marks, available at http://www.wipo.int/madrid/en/legal_texts/trtdocs_wo015.html (last visited Oct. 11, 2005).

[156] Trade dress, a body of law that has developed to protect the look and feel of a distinctive product or services, is included in the Lanham Act, 15 U.S.C. § 1125 (a)(3): "In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional." *Id.*

[157] *See, e.g.,* Darren Heath, *Court of Appeal Decision on Guinness Advertisement*, Lovell White Durrant, Intellectual Property Law Newsletter, Dec. 1999, available at http://216.239.59.104/search?q=cache:eDiYT5_LmhQJ:www.lovells.com/germany/ControlServlet/en/publication/pubIssueId/1176/+heath+and+pointillism+seurat&hl=en (last visited Oct. 11, 2005). A UK court decision found that copying a style or technique does not infringe copyright law, and used Seurat's style of pointillism as an example. *See Norowzian v Arks Ltd. and others (No 2)* [1999] FSR 394, [2000] FSR 363.

[158] Loeb, *supra* note 86.

borders, courts should recognize that their careful guidance is necessary to provide some degree of predictability. Mr. Huyghe, like several artists before him, has challenged the very concept of what "art" is and, as such, the legal system must also challenge itself to find the right balance for copyright: "Copyright law must protect authors from any influence other than their audience; it must not judge authors' efforts by too exacting a standard; and it must not impose too severe a prohibition against authors' borrowing from others."[159]

### 3.4 Milk Project, Latvia and the Netherlands

The last spin on art and copyright this paper will address is interactive art. . "Interactive art," like the genres described above, has no firm definition. The Milk Project, described below, is possibly one example but other, very different artworks exist and have also been termed "interactive art." One such example is a 1997 multimedia piece called Audible Distance by Akitsugu Maebayashi. It employs virtual reality goggles, headphones and a heart monitor, requires more than one participant at a time, and "explores the idea that we take advantage of our senses, but are quick to adapt to life without them."[160] Other art world observers view fashion as interactive art: "[T]he best designers, from Balenciaga to Alexander McQueen, are as creative as any painter of sculptor, and even when they borrow from the past they add something new. Indeed, because the designer's medium is the human body, fashion is surely interactive art at its best."[161]

The Milk Project, recent winner of the 2005 Prix Ars Electronica 'Golden Nica' for Interactive Art, is a sort of online webcast employing Global Positioning System [GPS] technology; it is described on its eponymous website as a "Latvian/Dutch-GPS-mapping-art-landscape-documentary-portrait-project."[162] In essence, it employs several actors – all human except for one "participant" that is a type of cheese -- and follows their movements as they relate to Latvian-produced milk. The map, on the website, "follows the milk from the udder of the cow to the plate of the consumer, by means of the people involved. All those involved were given a GPS device for a day: one of the days that they were somehow occupied with the movements of this dairy."[163] One of the Project participants created special GPS visualization software to carry out the Project idea.

The interactive aspect of the Milk Project consists in an individual viewer's choices as he or she peruses the web experience. One reviewer noted:

> *The project became a completely different one once I actually sat down at the exhibit and read and listened to the farmers and farm families watch the visualizations and make anecdotal comments about what was happening along those paths. Seeing their visualizations unfold with the only boundary lines drawn being the*

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[159] Goldstein, *supra* note 14.

[160] Christoph Mark, *Conceptual 'Media Art' Deprives, Overloads the Senses at Opera City*, The Daily Yomiuri (Japan), March 10, 2005.

[161] *No End of Luxury*, The Economist, March 6, 2004.

[162] *See* www.milkproject.net (last visited Oct. 13, 2005)

[163] *See* http://www.milkproject.net/en/index.html (last visited Oct. 13, 2005).

> *paths of milk shipments around Europe was a fascinating representation of the route maps without political boundaries. It almost appeared as though a new land were being presented.*[164]

Similar to Pierre Huyghe's installations, any given viewer's experience of the artwork will be different from any other viewer's experience because of both the ephemeral nature of the artwork itself and the viewer's choices regarding how to experience it. As such, no one fixed relic can represent the artwork as a whole – and copyright will inevitably not inhere in the whole artwork because, more than it is an expression of an idea, it *is* an idea.

## 4. Conclusion

This article has demonstrated some varied types of art that are relative newcomers to the "art world" either because of their relationship with new technology or because of new directions in the manner in which social or visual effects are being used in art. Traditional copyright law in most jurisdictions aims to find an appropriate balance between protecting the artist's rights in his artwork and protecting the public right to see, use and be inspired by that artwork. International discrepancies in the strength of an artist's rights versus those of the public provide possibilities for situations wherein artists would require opposite legal counsel depending on the jurisdiction in which they are exhibiting their work. Most physically tangible art that is "exhibited" on the Internet is not protected by technological copyright protections, nor is artwork that only exists on the Internet, such as the Milk Project. Art – as a general concept and as it exists in the world – escapes definition. Art comments on society or exists solely for visual impact or is created in the hopes of attracting commercial value. Or all or none of these or – most often – some elusive combination of these motivating factors.

Current copyright laws in all jurisdictions are lacking explicit provisions for protecting many types of contemporary art. It remains controversial to what extent ideas should be copyrightable as art, if at all; or whether an artwork's commercial nature provides a decisive factor regarding appropriation. Certain situations seem plainly inappropriate, such as artists needing to seek legal counsel in conjunction with creating their artwork: inappropriate in its financial extravagance and in its inevitable curb on creativity. As such, it is incumbent upon courts and legislatures to analyze the issue and to provide guidance. It is the author's finding that strong moral rights and a vibrant public domain are not necessarily at odds with each other, especially when parties are open to communication. A sui generis multimedia law may yet be drafted and implemented, but as courts have done in the past with photography, it seems possible and likely that courts and legislators will begin to recognize "art" in its multitudinous formats and will protect it according to the spirit of copyright law. Hopefully the issues will continue to be the focus of some thought on all platforms such that informed legal decisions can be made and artists can pursue and protect their creative productions, no matter their format.

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[164] Julian Bleecker, Ars Electronica Reviews, available at http://interactive.usc.edu/members/jbleecker/archives/004883.html (last visited Oct. 13, 2005) (emphasis added).