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Artists, Artworks, and Intellectual Property in an Electronic Environment

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Preface

At the beginning of the fifties, information and telecommunication technologies were marginal issues in the art and legal discourses. In the case of artists using electronic aids, small and specialized publications are good sources for researchers; vehicles – if you will – for the earliest communication of the notions and concepts that the artists and legal experts concerned were developing. Through these channels a community of interested parties and a body of thought – or discourse – can be studied. Nevertheless, access to such information is scarce. As a researcher, I have been used to finding large national collections which routinely collected the odd issues pertaining to contemporary art. But these extraneous issues were often placed in periodicals less accessible, even to specialists. I am therefore very grateful for having had access to several specialized repositories and the privately archived odd issue. As a member of the Academy of Fine Arts in Düsseldorf, I was fortunate to make many personal contacts through my dear friend Professor Nan Hoover. My starting point was her and Franziska Megert's personal archives and library. I was greatly helped by the director and staff of the Kunst- und Museumsbibliothek der Stadt Köln (Museum Ludwig, Cologne), the library of the Museum of Modern Art (New York), the library of the Whitney Museum of American Art (New York), and the library of the Zentrum für Kunstgeschichte (Munich) in my search for likely publications of artists working with electronic aids. Since 1972 the indexing system of *ARTbibliographies MODERN*, with its abstracts of so-called gray literature, has under several subject headings been listing useful material, which, however, had to be located and searched through. Only written pieces which addressed the issues of authorship and the artwork concept and expressed personal views of the work's author could be considered. In the end I had a sizable collection of material and since not all of it could be mentioned in my text, I have provided the reader with an extensive list of sources in the bibliography.

When I began this project, I had decided to make 1992 the cutting off date and to go back about a generation. Developments since my cut off date have had to remain for other scholars to explore. I hope that the present study may provide an historical perspective for further investigations.

In approaching the legal side of the issue, I got my head start through the generous help of the director of VG Bild-Kunst (Bonn), Gerhard Pfennig RA, whose collection of material on the question of what constitutes the "original" helped to focus my attention. I could hardly have realized this project without the six month leave granted by the Academy of Fine Arts

in Düsseldorf and spent working primarily at the Max-Planck-Institute for Foreign and International Patent, Copyright, and Competition Law (Munich). The Institute's wealth of material, conversations with their fellows and associates, and the aid of the personnel helped me enormously. At the Institute I not only gained access to most articles on the subject of fine arts and the electronic environment, regardless of the language of origin, but I also discovered how the connotations embedded in the very language used by those quoted here were conditioned by the respective cultural and legal heritage, an aspect discussed in chapter three.

This list would not be complete without special mention of the kind help I received in procuring articles from Professor Zentauro Kitagawa, Otto Piene, Steina and Woody Vasulka, Bill Viola and the libraries of the Harvard Law School and the University of Boston. My warmest thanks go to the early encouragement I received from Professor Dr. Heinz Althöfer and Professor Dr. Hans Ost, the professional and the moral support of Professor Dr. Hans Körner, Professor Dr. Roland Kanz, Dr. Sylvia Neysters, PD. Dr. Martina Sitt and Marie-Louis Syring as well as the interest and encouragement of my colleagues. Special thanks go to Dr. Lora Palladino and Leonore Araki; without their patience and help this study, it seemed to me, would never have reached the present book form. Finally, to the unwavering personal and moral support of Dr. Oskar Blumtritt I owe more thanks than words can express. An earlier manuscript of this material in English was completed in 1996, a German translation followed in 1997, and some copies are still in the hands of people I had consulted about publishing it in that form. The basis for this book was my post-doctoral thesis which I submitted to the Carl-von-Ossietzky University, Oldenburg (Germany) in 1999. The present version has been completely reworked and represents an attempt to address a larger, less specialized readership. Where further reading and a general definition of legal terms seemed advisable, I have provided the reader with additional information in the notes. I can only hope that in the course of rewriting it, I have been able to communicate the essence of my findings.

An interdisciplinary approach inevitably represents compromises in the rigors of a specialist field. In accommodating these presumably selective readers, I have allowed for some redundancy, which will hopefully not distract the general reader, but rather serve to reinforce the bridge between legal and art world discourses. The issue at hand remains a timely one as new publications confirm. I have included in my bibliography as many of these as have come to my attention, and apologize for any I may have missed. In addition, I have felt it desirable to include in the notes accompanying my text more specific citations and recommended sources for legal scholars and the art specialist alike. Here they will find newer studies on electronically aided art, such as interactive and internet art.

Introduction

The impact of electronically aided art (e.g. video- and computer art) on such basic and interdependent concepts as that of "authors' (moral) rights" [1] and what constitutes a work of art is the focus of the present study. Interpreting the author [2] as artist, and saying that this artist meant her or his work to be a work of art, means that the artist deems this work

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1 In the *Glossary of Terms of the Law of Copyright and Neighboring Rights* published by World Intellectual Property Organization in 1980 (hereafter referred to as *Glossary*, W.I.P.O., 1980), which provides in English, French and Spanish definitions of key terms (* = refers to other terms in the glossary) and their first or most important statutory mention, the following definition is given:
Copyright Generally considered to be the *exclusive right granted by law to the *author of a *work to *disclose it as his own *creation, to reproduce it and to distribute or disseminate it to the public in any manner or by any means, and also to authorize others to use the work in specified ways. Most *copyright laws distinguish between economic and *moral rights, which together constitute copyright. There are usually *limitations made by the law as to the kind of *works eligible for protection and as to the exercise of the *rights of authors comprised in the copyright. In accordance with international usage, the traditional term *"copyright" is sometimes replaced in modern English by the more adequate expression "author's rights." Berne, Art. 2 (3) / Universal, Art. I / Rome, Art. 1 / Phonograms, Art. 3 / Tunis Model, Sec. 11 (2) / Rome Model, Sec. 7. **Rights of authors** Under *copyright law, the cumulative components of the *copyright in a *work in relation to various methods or aspects of the use of the work. They specify the copyright in regard to the most important acts against which the *copyright owner should be protected. Through the exercise of these rights, he may exploit the work himself or *authorize other persons to do so. Besides the *economic and *moral rights proper, there are also rights relating to both of these categories, such as the rights of *adaptation and of *translation, reflecting the moral interests related to the integrity of the original work and the economic interests concerning the *exploitation thereof also in amended *forms. Berne Art. 1 / Universal, Art. I. **Moral rights** These rights comprise the right to decide on *disclosure of the *work; the right to claim *authorship thereof (to have the name of the author or the *title of the work mentioned in connection with the use of the work); the right to prevent the mention of the author's name if the author of the work wishes to remain *anonymous; the right to choose a *pseudonym in connection with the use of the work; the right to object to unauthorized *modification of the work, to *mutilation thereof and to any *derogatory action in relation thereto; the right of *withdrawal of the work from public use against payment of compensation for damages caused to any person who has previously received proper *authorization to use the work. Most of the *copyright laws recognize moral rights as an inalienable part of the copyright, distinct from the so-called *"economic rights." Some laws also provide for moral rights of *performers to protect them against distortion of their *performances and grant them the right to claim the mention of their name in connection with their performances. Berne, Art. 11 *bis* (2) / Tunis Model, Sec. 5.

2 *Glossary*, W.I.P.O., 1980:
Author A person who creates a *work. Berne, Arts. 1;2(6); Universal, Arts. I; V (2) (e); Phonograms, Art. 6; Satellites, Art. 6; Tunis Model, Sec. 1(1).

to be an expression of artistic purpose. This does not imply a judgment of the quality of the work, but it does indeed lay claim to artistic status for this work. Where artistic means are called into question and the aesthetic premises are rejected, the protecting system of values surrounding an artwork are likely to be denied. The ultimate judgment on the issue of artistic merit is not the task of the lawyer or the judge, but both are nevertheless active in the regime of rewards and denials that constitute legal encouragement of the arts for the benefit of society. The task of aiming for true and equitable intellectual property rights [3] in a global culture is a formidable one. [4] Electronically aided art presents new features largely missed where analogies based on older technologies are applied. If the ideal, moral, and economic artists' rights in their works are to be upheld, the various players have to be mindful of their status and functions as these shift within the changing environment. By devising adequate means for the notification and terms of ownership in copyright, both the artist and the legal expert play formative roles in establishing standards that operate in determining sufficient recognition of independent works of art in the electronic environment. How information, whether conceived as aesthetic or otherwise, can be contained within existing legal structures and identified in works of artistic creation is thus an issue of central importance in the debate covered in this study.

The inter- or transnational character of the electronic environment requires a representative choice of largely national territories. In terms of numbers, American artists (i.e. working in America) and German speaking artists constituted the largest groups. Among other groups comparable in number – these are not statistical numbers, of course – I chose to focus on the French and Japanese speaking because they were about equal in number and their copyright and cultural traditions offer a wider range of territorial differences. The English copyright law would have been equally interesting and historically significant, but since the first U.S. copyright clause was based almost verbatim on English copyright law and the French represented a meaningful contrast for our focus of attention, I have confined my references to the English system to its contributions (as opposed to a closer look at its heritage). What is new; what is old in the arguments of each group; where are the

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3 The World Intellectual Property Organization's convention of 1968 included as article 2. a definition of **Intellectual Property Rights** as those relating to: "literary, artistic and scientific works, – performances of performing artists, phonograms, and broadcasts, – inventions in all fields of human endeavor, – scientific discoveries, – industrial designs, – trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

4 See for example Thomas Streeter, "Broadcast Copyright and the Bureaucratization of Property" in *The Construction of Authorship,* Martha Woodmansee and Peter Jaszi, editors, Durham: Duke University Press, pp. 303-326, 1993.

correspondences; where are the contradictions. These are the most basic questions which I will bring to bear on the discourse of each group as it evolves through singular events and dynamic exchanges.

The methodological presumption used throughout this study is based on structural and post-structural findings in discourse analysis. Theories of the media are properly a concern of media studies. Media studies have, however, also concerned the artists themselves and, as we shall see, have some bearing on their writings. Although the present study is not a linguistic one, it does profit from concepts developed within discourse analysis in its stricter form. Central to this study is the idea of displacement in meaning through processes of differentiation and their formative character and contribution to change.

As a rule currently available anthologies and books on the subject of electronically aided art single out one support technology to concentrate on (such as video-art, computer-art, holographic-art...).[5] This gives the impression of a new artistic discipline, rather than permutations. In some cases an overriding framework, such as in *Art in the Electronic Age* by Frank Popper (1993), is chosen, or general practices are contained within a specific discourse, such as in Margot Lovejoy's *Postmodern Currents* (1989). My study differs in at least two major aspects. It does not assume that electronically aided art can be divided into tool/device-sectors, nor do I feel that it is an "electronic age", but rather an electronic environment in which art's functions may be changed, if not challenged. An environment as understood here concerns a specific working space and conceptual framework of artistic practices, rather than the look and feel of art in post-mechanical industry.

The question of how to properly balance order and anarchy in this new electronic environment had become an issue by the mid-eighties. For artists working with electronic means the art world context had since the late fifties and early sixties begun to provide their works with marginal exposure, and had thus preserved a certain order. It has, however, been necessary for the artist working with electronic aids to access production facilities and seek institutional affiliations and collaboration with specialists outside the field of art. Moreover, the places of distribution and presentation have not necessarily been within the art world context. But with the advent of delocalized network distribution, presentation, accessibility,

5 See Further Reference Literature in the Bibliography below.

and use, the problem of how we are to insure a balance between the freedom of the arts, the users' interests, [6] and the several rights of the producers [7] takes on new dimensions. [8]

Found objects, Multiples, Concept Art, Performance Art, Total Art and many ritualized forms of the art-into-life movement, though not in need of electronic aid, can be reproduced and copied in an act of reenactment and/or documentation, or concretion in an Environment or Installation work. (Those who feel that these types of works are borderline

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6 *Glossary*, W.I.P.O., 1980:
Fair dealing According to most of the *copyright laws which follow the Anglo-Saxon legal approach, a general exception to *copyright protection concerning uses of *works for certain purposes determined by law (e.g., Australia, Secs. 40 to 42; Canada, Sec. 17 (2) (a): India, Sec. 52 (1) (a); UK, Sec. 6 (1) to (3); etc.). Generally it is understood as meaning kinds of use not conflicting with a normal exploitation of the work and not unreasonably prejudicing the copyright *owner's legitimate interests. Fair dealing, as provided for in the respective laws, is free of any payment and is not subject to *authorization. In the United States of America, a similar general exception is provided for in the case of "fair-use." **Fair use** Constitutes, in the Copyright Law of the United States of America, in addition to special exceptions, a general *limitation on the *exclusive right of the *owner of copyright. It evolved as a judicial doctrine and was given statutory recognition in Section 107 of the new Copyright Law of 1976. Fair use is allowed for purposes such as criticism, commentary, news reporting, teaching, scholarship or research. It is to be determined by considering factors such as whether the use is of a commercial nature or is for non-profit educational purposes, the nature of the *work protected by *copyright, the amount and substantiality of the portion used in relation to the work as a whole, and the effect of the use upon the Potential market for, or value of, the work. Fair use is a sort of *free use of the work. Tunis Model sec. 7. **Personal use** Such use of a *work is generally understood as making a *reproduction, *translation, *adaptation, *Arrangement or other *transformation of another's work in a single copy, exclusively for one's own individual use in such cases as personal research, learning or amusement. As a rule, it is regarded as *free use. **Private use** Generally understood in relation to a *published work as making a *reproduction, *translation, *adaptation or other *transformation of it, in one or several *copies, not exclusively for individual use by a single person as in the case of so-called *"personal use," but also for a common purpose by a specific circle of persons. Private use can also be arranged by a legal entity. Copies reproduced for private use must not be made available to the public. Private use is regarded in most countries as *free use. Tunis Model sec. 7. (i) (a).

7 *Glossary*, W.I.P.O., 1980:
Producer Generally understood as meaning the person who organizes or finances and organizes stage *performances, the production of *cinematographic works, the *broadcasting of *radiophonic works or the production of *phonograms. Usually, it is the producer who is responsible for the respect of *copyright and *neighboring rights in *works and other contributions used for the production. Sometimes the producer of a cinematographic work is also understood as being the director of the same.

8 See also Dawn Leach, "Defining Intellectual Property in Digital Works of Art within International and Foreign Legal Traditions", lecture given at the XXX. International Congress of the History of Art, London 2000, www.unites.uqam.ca /AHWA/ (AHWA – Art History Webmasters Association – Association des webmestres en histoire de l'art).

cases might be surprised to learn that tests have proven that abstract art has remained less understandable to the ordinary observer than computer graphics have come to be.) [9]

Statutory law on intellectual property rights has reacted to changes in the technology of reproduction and commercial competition. For example, current developments in statutory law avoid restrictive lists, although they may still list examples (such as paintings, sculptures, etc.). [10] Thus they will presumably be able to embrace newer art forms not anticipated when the language in which the law was codified went into effect. Yet questions concerning uniqueness and authenticity when context acts as a contributing factor, that is to say, when site and temporality are operating factors of artistic expression, still pose problems. These immaterial aspects of the artistic concept – aspects not fixed in the material itself – also occur in the realm of intellectual property rights when structural features impacting on the "program-as-behavior" aspect, rather than the "program-as-text" aspect of software, are involved. Whereas the "program-as-text" as a "written" form soon enjoyed the copyright status of protection, the "program-as-behavior" has not been recognized as a constitutive factor (except where display features in their "look and feel" [11] have been considered suf-

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9 See Meyer Schapiro, *Modern Art, 19th and 20th Centuries: Selected Papers,* New York, p. 252, 1979 and Thomas Dreier, "Creation and Investment: Artistic and Legal Implications of Computer-generated Works", in *Wege zum japanischen Recht: Festschrift für Zentaro Kitagawa*, Hans G. Lesser and Tamotsu Isomura, editors, Berlin: Duncker und Humblot, p. 877, 1992. Dreier sees in the easy access to hard- and software tools for making art a new disruption to computer art's gaining recognition as art. This is a replication of the rejection of abstract art: namely, on the presumption that a child could make a work of abstract art.

10 *Glossary,* W.I.P.O., 1980:
Works eligible for *copyright *protection are as a rule all *original *intellectual creations expressed in a reproducible *form. Many *copyright laws distinguish between *literary, *artistic and *scientific works. The actual scope of these categories is, however, generally understood in the broadest possible sense, as usually demonstrated by an illustrative enumeration of the different sorts of works in national copyright laws and as interpreted by the jurisprudence in many countries. The work is protected irrespective of the quality thereof and also when it has very little in common with literature, art or science, such as purely technical guides, engineering *drawings or *computer programs for accounting purposes. Exceptions to the general rule are made in the copyright laws by exhaustive enumeration; thus laws and official decisions or mere *news of the day are generally excluded from copyright protection. *Mental outputs* not developed in a specific form of expression, such as *mere ideas or methods*, are not works. Berne, Arts. 1; 2 / Universal, Art. 1 / Rome, Art. 1 / Phonograms, Art. 6 / Tunis-Model, Sec. 1 / Rome Model, Sec. 1 (iii)". (italics are my emphasis. These criteria represent a major conflict in defining minimal and conceptual art forms as works.

11 See Randall Davis, "The Assumptions are Broken", in *WIPO Worldwide Symposium on the Intellectual Property Aspects of Artificial Intelligence*, Arpad Bogsch, editor, (general director of W.I.P.O.) W.I.P.O. Worldwide Symposium on the Intellectual Property Aspects of Artificial Intelligence, Stanford University, Stanford, California (U.S.A.), 25-27 March, 1991, Geneva: WIPO Publ. No. 698 E, pp. 101-119, 1991. Especially p. 102 and p. 115 where he makes clear that in the case *Whelan v. Jaslow* [1986 3rd Cir. 797 F.2d 1222] by stating that the terms SSO (structure, sequence, and

ficiently individual). I had assumed, therefore, that the question of authenticity, always a matter of uneasy consensus regarding the work itself and particularly its special relationship to its maker as well as the time in which, and the materials with which it was made, was at the heart of the problem.

The incorporeal properties of visual arts have to be contended with. The "romantic" image of the artist is another major contributing factor. Contributive authorship [12] is a problem in a society where individual responsibility is at the very foundation of our social order. Technical skills and scientific knowledge were bound, I suspected, to upset the notions about physical and emotional attributes of the fine artist. Were those few artists working outside the traditional boundaries of fine art practice in a dilemma (looking for a new position somewhere between the prestige of the intellectual disciplines and the intuitive, sensual attributes of the artist as genius), I asked myself. The written and printed word, humankind's most basic social technology, governs social intercourse; writings are expressions of intellectual achievements and intellectual work. These are conceived of as products of a natural person's mind and spirit. Pictorial expression, on the other hand, is usually considered reliant on a person's skill, the ability to visualize ideas, beliefs, and desires. As a social technology pictorial expression exists in our inherent aptitude to decipher icons. Culturally it is conditioned by inherited pictorial constructs, i.e. visual thinking, but is quite often aligned to the emotional side of knowledge and believed to be largely intuitive in nature and a gift of nature.

Because it is generally recognized that a certain displacement of aesthetic assumptions

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organization) are used interchangeably when referring to computer programs as the decision expressly states, the decision was technically wrong! Davis argued the dual nature of the structure of a software program: "The static structure is the organization of the program as a textual document (the program-as-text view); the dynamic structure is its behavior, what it does when it actually runs (the program-as-behavior view)." (p. 113) He went on to make the point that the text in relation to the behavior was a loose one, i.e. its text could be changed in sequence and not be affected in its behavior (as a result of the practice of dividing programs into independent subroutines). Concerning the "look and feel" argument, see the last section in the chapter on technological impact.

12 *Glossary,* W.I.P.O., 1980:

Joint authorship Generally understood as interdependent *authorship of two or more *authors of a *joint work. Joint authors are also sometimes called *co-authors. In consideration of the peculiarities inherent in the creation of a joint work, some aspects of the protection of the *rights of the authors in that work are usually governed by special rules. According to most *copyright laws, joint authors can *authorize the *use of the *work only jointly and the terms of protection of rights to be measured from the death of the author are computed from the death of the last surviving author. The *moral rights, in so far as granted by the applicable law, pertain to each of the joint authors individually and can also be exercised separately. Berne, Art. *7 bis* / Model Law, Sec. 11 (1).

was forthcoming with the introduction of photography as a visual recording technology, it seemed reasonable to expect the same of digital imagery.[13] I was greatly encouraged in this direction when consulting Gerhard Plumpe's findings concerning the discourse on photography during the time of Realism.[14] His discussion of the legal reactions to photography provides a good picture of the inherent problems. Moreover, he foresees similar problems concerning the computer. The tool or instrument question has historical precedence in the history of the acceptance of photography as an artistic means of expression. The intervention of the apparatus between the creator and the created, or the inception of a creative idea with mechanical means, were suspect for most legal experts when photography began reproducing images on paper. Guided by aesthetics of the 18th century, they could not recognize more than ingenuity being at work here. These circumstances suggested a diminished personal effort, since the photomechanical process, it was felt, could only impersonate creations of the mind and spirit of a natural person. Computer-generated works, or the use of commercial software, can readily be imagined to suffer the same measure of resistance until criteria for discriminating between decorative, imitative, documentary, and the artistic are eventually established for this new picture-making technology.

From the last third of the 19th century up until the present a great deal of change has occurred in jurisdiction and the subsequent legal codification has gradually made accommodations for distinctions which allow for a measure of originality[15] to determine the du-

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13 *Glossary,* W.I.P.O., 1980:
Photographic work An image of objects, of reality produced on surfaces sensitive to light or other radiation. Such works may be protected by *copyright as *artistic works provided that the composition, selection or way of capturing the chosen object shows *originality. A shorter *term of protection is usually provided for photographic works than for other artistic works; this term should last, however, at least 25 years from the making of such a work according to the Berne Convention, and 10 years according to the Universal Copyright Convention. Some *copyright laws protect photographs subject to certain formalities such as the mention of the year of *first publication on published copies. Berne Art. 2 (1) / Universal, Art. IV (3) / Tunis Model, Sec. 1 (2) (viii).

14 Gerhard Plumpe, *Der tote Blick: Zum Diskurs der Photographie in der Zeit des Realismus*, Munich: Fink, 1990.

15 *Glossary,* W.I.P.O., 1980:
Originality in relation to a *work means that it is the *author's own *creation and is not copied totally or essentially from another work. Originality is required by *copyright law for the composition of the contents as well as the *form of their *expression but not in relation to mere ideas, information or methods embodied in the work. Originality is not to be confused with novelty; the pre-existence of a similar work unknown to the author does not affect the originality of an independent creation. In the case of a *derivative work, originality resides in the individual method of *adaptation of the *pre-existing work as referred to, among others, in Article 9 of the Mexican Law. The requirement of originality as a condition of *copyright protection is expressed in many

ration and extent of legal protection. It is not difficult to see why judicial and legislative adjustments were needed to accommodate the mechanization of manufacturing and transportation since they represented vital national economic interests. That these changes would also have effects on cultural traditions, however, did not seem inevitable. Today most legal writers are likely to agree that photography caught the legal institution off its guard.[16] Resistance to correlative adjustments uncovered the desire to safeguard ideals epitomized in exceptional acts of creation of mind over matter and the presumption of a divine source. Positivist legal thinking at that time found that the use of the camera to record light impressions taken from the world-at-large lacked any evidence of independent, personal activity of artistic merit. Where natural law thinking premised natural processes as exempt from incorporeal property rights, how could a work resulting from photographic means be a form of personal creation? Where was the imprint of the personality of the author?[17]

Added to this underlying conceptual difficulty was the equally difficult procedural problem of identifying what should be considered the original and what the copy.[18] It was only gradually that originality came to denote an individual creative effort detached from the labor of the body. Along with this development, artistic expression came under copyright statutes. Schemes of differentiation and normal observer's tests had to be devised in order to distinguish these new work forms from traditional ones.

Even now photography remains a questionable form of artistic expression.[19] There are categories, of course, and to which one a particular photograph belongs may be subject to debate. For the art world photographic processes incorporated into the creative process as

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national copyright laws by qualifying protectable works as an "original" (e.g., Egypt. Art. l; France, Art. 5; lndia, Sec. 13 (a); Nigeria, Sec. 1 (2) (a); Senegal Art- 1; UK, Sec. 2(l); USA, Sec. 102; etc.). This sense of the attribute an "original"- should not be confused with the meaning of the term when used to oppose *original works as pre-existing works to derivative works. Which may be different in differing systems, some requiring a high degree of underived endeavor in order to satisfy the criteria of original (not in the meaning of first, but rather as underived).

16 Op. cit. footnote 14; particularly his chapter devoted to the judiciary aesthetic.

17 For an example of an historical debate among photographers see D. Leach, »Zur Emanzipation der Fotografie zur Kunstgattung: Legitimationsstrategien der britischen Fotografen H.P. Robinson und P.H. Emerson« to be published in *Fotogeschichte*.

18 *Glossary,* W.I.P.O., 1980:
Original work A term often used in contrast with *derivative works. In this context it means that the *work is not an adaptation, *translation or *arrangement of a *pre-existing work; its *originality is entirely first-hand and not merely supplementary as in cases of works derived from other works. This notion should not be confused either with the meaning of the same expression when it refers to the originality of *intellectual creation in general or with the *original copy of a work. Berne, Art. 2 (3), U.C.C., Art. 1V *bis* (1),Tunis Model, Sec. 2(1).

19 Op. cit. footnote 14: Introduction.

tools have wider acceptance when they are combined with more traditional art forms. Put in terms of information aesthetics: the ratio of redundant to innovative elements is optimized. The acceptance of abstraction – both pictorial and conceptual – in art released works by photographic means from imitative functions. Increased familiarity with the aesthetic appeal of the photographic means of artistic expression furthered the powers of discrimination on the part of the viewer. Similarly, the distinction between technically sophisticated scientific models and scientific visualizations with computer technology on the one hand and artistic propositions of perhaps more experimental and technologically less complex solutions on the other requires a new evaluation of artistic premises.

This study aims to provide a basis for understanding the implications new technology has brought to our time-honored concept of an art work as a coherent work, or body of work, created by an individual artistic personality. The use of these technologies are not the source of aesthetic changes which bring about diluted or multiple forms of creative activity. Their coincidence with these changes, however, raises conceptual problems. Therefore, the first chapter of this study begins with conceptual problems in discerning originality in the composition of the content and in the form of expression of a work. These controversial issues and intermedia participants' positions (cross-overs between fine art disciplines) may be indications of new aesthetic practices which are still emerging. Thus, the chapter Breaking the Mold singles out three contributing factors. The first concerns intermedia as concept and practice. The second contributing factor takes into account the massive influence of the mass media on our viewing habits and how artists recognize and react to this new phenomenon. The last section deals with shifts in formal and conceptual structures of newer time-based art. Here is where new aesthetic features become more important in the discussion.

It is submitted that the aleotoric and minimal form, or presentational mode (i.e. interventions), present challenges for intellectual property rights. The fact that electronic aid is potentially active in just these areas of artistic practice, the Minimal and the Aleotoric, is not inherent to the problem. Throwing a dice to determine an artistic procedure (as with John Cage) or documenting a transient form of expression to represent the original composition of content (such as in Land Art, Performance, or Happenings) conflict with the conceptual framework of intellectual property rights. The concepts of the art world as institution and the conceptualization of the terms original and authentic, as well as authorship and authorial functions are dealt with briefly here, because they are central to the conflict.

The focus of attention in the first chapter ends with the emerging field of electronically aided art practices as authentic artistic concerns that are largely within the mainstream of new aesthetic premises and artistic practices. Nevertheless, conceptualizing electronic

means as "a medium (storage and delivery devices) for artistic expression" can be different than looking at the issue as primarily a matter of "tool" or "instrument" (the latter being tainted by association with operations and the largely mechanical, e.g. preexisting computer applications and therefore not quite up to being a creative act). Conceived as "medium" can mean that the strictures of the technology, rather than the artistic concerns and their realization, dominate the legal decision-making policies. By the mid-eighties digital support (understood as distribution media, i.e. either of the category of physical device or communication channel) and digital tools were fast becoming part of the more widely recognized discipline of the independent art video.

With the following chapter (chapter 2), the context is enlarged to encompass formative influences from outside the traditional domains of art and intellectual property rights. Conflicts inherent in non-electronic art propositions and the dogma of intellectual property rights are in this larger sphere of influences compounded by a certain mutual aversion to apparatus and procedures traditionally used outside the artistic field for scientific knowledge and its expression (i.e. visualization and comprehensibility). The contamination of those artistic premises that were operable in a non-electronic environment, coupled with an expansion of categories of potentially protected intellectual property as well as the inherent problem of borderline works and degrees of protection, brought new complications. To illustrate this, chapter 2 takes recourse to propositions brought forth by Herbert W. Franke (spokesman for these new developments and their promotion) and Max Kummer (who systematically addresses contemporary art practices and their implications for copyright decisions). They represent two theoretical positions radical enough to highlight the disturbance in received wisdom. Their respective fields of expertise, however, are treated separately, because the impact of scientific theory and its new technology affects each in different ways.

The Art and Science Movement sets the stage for exploratory behavior which includes collaborations that bring the problems of defining new devices and information technologies in connection with the presumptions concerning the hitherto only marginally important visual and plastic domains of the fine arts. The cultural influence of the media together with new bodies of thought concerning creative activity, apperception, communication, information, and cybernetics contribute to making the intellectual property waters muddy. For the discourses in both the fine arts and law domains, assessing these influences and assimilating some of their features, or merely their concepts or terms, became important. There is also the pragmatic concern of technology access and the acquisition of new skills. The fact that the professional standing of an independent artist working in this area has met up with industrial interests and economics scaled to meet this sector's needs becomes more

evident when reviewing the recommended measures for legislative action given by the U.S. Office of Technology Assessment. This bureau's 1986 report on *Intellectual Property Rights in an Age of Electronics and Information* has often been cited in legal discussions. In other words, it has influenced the international legal discourse.

The extension of copyright to include related rights expands the legal professional's decision-making problems. Because these effects cannot yet be fully understood in their technical, economic, and sociological repercussions, they tend to produce discursive strategies of adaptation and speculation rather than new theories.

In this expanded field of intellectual property rights related issues, there are difficulties in determining when terms of protection [20] should be the highest (for a work of art), lesser in measure (for example, in cases of design [21] where only certain aspects may be involved) or minimal (as in related rights). The technology itself has been examined by some legal writers, in particular, Ethan Katsh, in its very effects on the law profession and the legitimization of the letter of the law.

The economic rights in copy are in this new electronic environment subject to troubling linguistic problems. To estimate the linguistic impact on economic rights in copy, the problem already perceived in the case of cinematographic works is examined here. Recordings,

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20 *Glossary,* W.I.P.O., 1980:
Term of protection In the field of *copyright, the time during which copyright in a *work is recognized by law (term of copyright). Expiry of the term of *protection means as a rule extinction of copyright. Some *copyright laws, however, provide for the perpetual existence of the *moral rights, laying down special rules for the safeguard of the cultural interests relating to the work after the termination of the corresponding *economic rights. The general term of protection extends in most countries to the lifetime of the *author and a certain number of years thereafter – in the majority of cases 50 years and in some other countries more or less than 50 years – to be computed as a rule from the beginning of the first calendar year following the year of the author's death. Special rules in most countries govern the duration of protection for *cinematographic works, works published anonymously or under a *pseudonym and works of *joint authorship; shorter protection is given in many countries to all or some kinds of *photographic works and works of *applied art. In some of these special cases, the term of protection generally runs from the year of *first publication, *disclosure or making of the work, respectively. In the case of the so-called *"neighboring rights," the term of protection is shorter in most countries than for copyright; it is usually computed from the year in which the *performance or the *fixation thereof took place, or the *phonogram was made or published, or the *broadcast took place. Berne, Arts. 5 (4) (a), 7 / Universal, Art. III (5) / Rome, Art. 14 / Tunis Model, Sec. 13 (6)." The duration has changed since this publication: See the following footnotes.

21 *Glossary,* W.I.P.O., 1980:
Design Understood in the broadest sense of the concept as meaning all arrangements of the elements constituting an * artistic work and also preliminary sketches of * works to be accomplished. As a rule, however, in * copyright laws this term refers to * industrial designs in the proper sense of the word. Berne, Art. 2 (7).

broadcast, and transmission, which can be seen as comparable to the exhibition and distribution of an artwork in digital form, pose problems for the natural, non-technical language of copyright. Terminology and analogies based on older technologies and on a romantic image of the artist lack the vocabulary and conceptual framework needed for making precise distinctions. This is the point at which new terms of differentiation come into play. Since it has become evident that different artists envision different forms of collaborative art [22] , I shall again take recourse to legal solutions in the area of cinematographic works to review some of the possible distinctions in assigning rights. Using the cinematographic work as model, I will argue, points to the complexity of attribution in the realm of digital work and global distribution capabilities.

Chapter 3 widens the discursive field to encompass the view of society-at-large. In this larger context the status of art is relative to its perceived contour. As such the art-into-life movement poses new problems. Again these are not problems exclusive to electronically aided art. Rather, pervasiveness and the question of the exclusivity of art as previously understood are at issue here. The focus is on three areas where artistic practice is developing into what I have termed the new social skills, which some of the experimental work that helped to break the mold had already envisioned. The artist who sees her- or himself as communicator has radically expanded the action radius and import of artistic activity. The female artist in particular takes on new issues and helps establish new social perspectives. Finally, collective authorship and the image of the artist in society as a whole present radical challenges to traditional thinking.

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22 *Glossary,* W.I.P.O., 1980:

Joint work A joint work or work of *joint authorship is generally understood as meaning a *work created by two or more *authors in direct collaboration or at least having regard to one another's contributions, which may not be separated from each other and considered as independent *creations. Examples of the most common type of joint works may be *dramatico-musical compositions, *musical works with *lyrics, manuals written by several authors or *computer programs created by a team. The authors of such a work are called joint authors or *co-authors and their *copyright in the whole unitary work is subject to special rules of *copyright law. Joint works are not to be confused with either *composite or *collective works or *collections. **Collective work** Generally understood as meaning a *work prepared by a person from the contributions of *authors participating in its development by creating them for that purpose (e.g., France, Art. 9; Iraq, Art. 77; Libya, Art. 27; USA, Sec. 101). In some *copyright laws the category of collective works includes also works in which *pre-existing works of different authors are assembled into a collective whole, but without the personal participation of these authors (e.g., Canada, Sec. 2 (e)).The common denominator of both of these concepts of collective work as opposed to *joint work consists of the emphasis placed on the role of the person who determines the purpose of the work and selects, coordinates and edits the contributions to it. That person alone is regarded as being the author of the collective work, without prejudice, however, to the *copyright in each contribution.

Through technology transfer ours is potentially a global society, in which, however, culturally distinct traditions are maintained. Therefore, we need to look more closely at implications that arose in both the legal community and in the self-consciousness of the artist in the international arena. [23] We will for obvious reasons again focus on the issues brought up in the previous two chapters and expand on such global aspects as global artworks, carriers, transmission, and distribution. Within this context, trade-related issues and what this might mean for legally (re)framing individual and mass rights are relevant. Since the beginning of the nineties developments have accelerated to the point where closing words rather than a conclusion seemed appropriate.

Mindful of the ongoing problems, I would now like to acquaint the reader with those developments in statutory law within international agreements and territorial examples singled out for closer characterization. I ask the reader to note that even the 1980 definitions given by the World Intellectual Property Organization (founded in 1967) are in terms of protection and fine points of distinction between categories subject to revisions. This is a crucial point, since it underlines the ongoing nature of the situation. True to the restriction of the legal and art-related themes under examination here, only copyright case examples will be referred to. At the end of the Introduction three cases are reviewed in order to alert the reader to the basic procedures and issues of jurisdiction. Naturally, a far greater number would be needed for a jurisdictional analysis; where appropriate the reader is directed to these in the notes.

International Agreements

There are a number of bilateral and multilateral agreements concerning industrial and trade-related issues that are encompassed by the general term "intellectual property rights". We will, for the moment, restrict our perspective to traditional arts-related matters. At the onset of the period under consideration here, there are two major international conventions: the Berne Convention (International Agreement for the Protection of Literature and Art, 1886) and the Universal Copyright Convention (U.C.C., 1952). The U.S. had been represented at the Berne Union meetings, but only to report, not to sign an agreement. When the government finally took the initiative in the international arena it was to bring about the

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23 See Adam Thierer and Clyde Wayne Crews Jr., editors, *Copy Fights: The Future of Intellectual Property in the Information Age*, Washington D.C.: Cato Institute, 2002; Adam D. Moore, *Intellectual Property & Information Control: Philosophic Foundations and Contemporary Issues,* New Brunswick, N.J.: Transaction Publishers, 2001; Simon Stokes, *Art and Copyright.* Oxford and Portland, Oregon: Hart Publishing, 2001; and Costas Douzinas and Lynda Nead, editors, *Law and the Image: The Authority of Art and the Aesthetics of Law,* Chicago and London: The University of Chicago Press, 1999.

Universal Copyright Convention (1952) which was to simplify formal requirements and establish a universal standard to which developing countries could also agree. From its inception the Universal Copyright Convention provided weaker authors' rights protection than in the agreement of the Berne Union. It was mainly for the practical advantages of multinational agreements [24] that the United States became a founding member of the Universal Copyright Convention. France, West Germany, and Japan all became members of the U.C.C. in 1955 to insure multilateral agreements with its members.

The Rome Agreement (1961) brought some unity concerning neighboring rights. [25] Since they were nearly always in derivative works, a signee of the Rome convention already had to safeguard authors' rights either through the ratification of the U.C.C. or the Berne Convention. The view was held that performers', phonogram producers', and broadcasters' rights were inter-linked, and thus fair and equitable balance between them could only be achieved in one legal instrument.

The Berne Union met in 1967 for a revisions session in Stockholm. At this session articles 1-20 received general revisions and were confirmed. The radical changes proposed to article 21 and the protocol concerning special considerations for developing countries were unacceptable to industrialized nations due to the resultant lowering of standards (e.g. the terms for compulsory licensing) and therefore did not receive the required number of ratifications. The issue of developing countries was a subject of heavy discussion and was taken

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24 As Barbara Ringer explains, all foreign agreements had to be signed by the president, a highly cumbersome administration of bilateral copyright agreements. See Barbara Ringer, "The Role of the United States in International Copyright – Past, Present, and Future", in *The Georgetown Law Journal,* 56:6, pp. 1050-1079, June 1968.

25 *Glossary*, W.I.P.O., 1980:

Neighboring rights Usually understood as meaning rights granted in an increasing number of countries to protect the interests of *performers, *producers of phonograms and *broadcasting organizations in relation to their activities in connection with the public use of *authors' *works, all kinds of artists' presentations or the communication to the public of events, information, and any sounds or images. The most important categories are: the right of *performers to prevent *fixation and direct *broadcasting or *communication to the public of their *performances without their consent; the right of *producers of phonograms to authorize or prohibit *reproduction of their *phonograms and the import and *distribution of unauthorized *duplicates thereof; the right of broadcasting organizations to authorize or prohibit *rebroadcasting, fixation and reproduction of their broadcasts. An increasing number of countries already protect some or all of these rights by appropriate rules, codified mainly within the framework of their *copyright laws. Several countries also grant a sort of *moral right to performers. Some countries are also prepared to protect the interests of broadcasting organizations to the extent of preventing the *distribution on or from their territory of any *programme carrying signal by a *distributor for whom the signal emitted to or passing through a *satellite is not intended. No *protection of any *neighboring right can be interpreted as limiting or prejudicing the protection secured to authors or beneficiaries of other neighboring rights under a national law or an international convention.

up again in 1971 in Paris and in a modified form appended to the convention revision. A coordination between these two multilateral conventions took place in 1971 in so far as the Universal Copyright Convention included a Berne Clause, which excluded countries from the Universal Copyright Convention if they had withdrawn from the Berne Convention to join the Universal Copyright Convention. The United States did not join the Berne Copyright Union before 1989. (All four countries discussed here have since ratified the 1971 revision.)

In the 1971 Berne Convention revision, ten major rights were accorded the author of literary and artistic works (neighboring rights had already been included in the 1961 Rome agreement). They are: 1. *droit moral* (the rights of divulgence, of paternity and of respect of the work but not the distribution right, whereby an author could stipulate in which countries a work may not be published) [article 6 *bis*] ; 2. reproduction rights [article 9]; 3. translation rights [article 8]; 4. public performance rights [article 11]; 5. public recitation rights [article 11 ter]; 6. broadcasting rights [article 11 *bis*]; 7. right of adaptation [26] [article 12]; 8. recording rights [article 13]; 9. film rights [article 14]; and 10. *droit de suite* (rights of proceeds, or sales royalty rights) [article 14 ter]. [27] Important for derivative uses are the rights of authors of pre-existing works that may be involved at seven different stages: 1. adaptation right; 2. right to record or act and play (synchronization); 3. right to offer film for exhibition i.e. distribution; 4. right to public performance in a cinema; 5. right to communicate by wire (Cable T.V.); 6. right to broadcasting (T.V.); 7. right to subtitling and dubbing texts. [28] In the same year the U.C.C. also met in Paris to harmonize both conventions by introducing a developing countries clause.

Another outcome of the Stockholm agreement was the creation of the World Organization of Intellectual Property (W.I.P.O.). It has since been instrumental in providing official

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26 *Glossary*, W.I.P.O., 1980:
Adaptation Generally understood as the *modification of a *pre-existing work from one genre of *work to another, such as *cinematographic adaptations of novels or musical works may also consist in altering same genre to make it suitable for different conditions of exploitation: novels for a juvenile *edition. Adaptation also involves altering the original work, unlike *translation, which transforms only the *form of expression of another's work protected by *copyright law is subject to the *assigned *owner of the copyright in the work. Berne, Art. 2(3);Tunis Model, Sec. 2(1)(i).

27 The French terms are frequently used in legal writing because of their specific historical purport and inclusiveness. See also Michael Fröhlich, "Les notions clés du droit d'auteur à l'épreuve des réseaux" (*1997)* http://membres.lycos.fr/mifr/droit/auteur/memoire/mem_noframe.htm#top (Accessed 14 March 2003).

28 See Stephen M. Stewart, *International Copyright and Neighboring Rights*, London: Butterworth, 1983. See also Greg Lisby, "Framing as an Unauthorized Derivative Work: Re-conceptualizing Traditional Approaches to Defining Copyright Infringement" (1999) http://gsulaw.gsu.edu/lawand/papers/fa99/lisby/ (Accessed 14 March 2003).

translations of national statutory law as well as a glossary of legal terminology (in English, French, and Spanish), and has provided a forum for international discussion in symposia. It has held a number of symposia exploring questions of new technology developments and intellectual property rights. However, because international agreements have to work on the territorial rather than universal model, they are still far from meeting the spirit of the new technology, which is delocalized in character.

France

As early as 1957, France brought its legal instruments up to date with its law on literary and artistic property. By the eighties this law, too, needed amending. Adjudication had largely determined courses of action and legislation was therefore broadly conceived to cover a range of right-holders, as the title itself indicates: Law on Authors' Rights and on the Rights of Performers, Producers of Phonograms and Videograms and Audiovisual Communication Enterprises (1985). In the 1985 code "cinematographic works and other works consisting of animated sequences of images, with or without sound, [are] together referred to as audiovisual works." Further consideration including newer media was forthcoming in a 1990 amendment: Rights Neighboring on Copyright of Performers Engaged for the Making of an Audiovisual Work. A sweeping consolidation and renumbering was effected by the legislation on the Law of the Intellectual Property Code in 1992, which covers artistic and literary property as well as patents, trademarks, and other aspects of industrial property.[29]

The French have the most strongly formulated moral rights of authors. These include, in addition to those already mentioned above in connection with the Berne Convention, the right of retraction, while making provision for compensation [art. 32, 1957]. The moral rights of paternity are granted in perpetuity, in contrast to U.S. and German law. The Japanese have also stated no limit to *post mortem auctoris* (p.m.a.). But they have a modified perpetuity which is covered in article 60: Even after the death of the author, no person who offers or makes available a work to the public may commit an act which would be prejudicial to the moral rights of the author if he were alive; provided, however, that such act is permitted if it is deemed not to be against the will of the author in the light of the nature and extent of the act as well as a change in social situation and other conditions. In France moral rights are not only perpetual but also inalienable and imprescribable; that is

29 Even this was amended in 1994 when some of the penal provisions were repealed. See *W.I.P.O. Copyright Laws and Treaties* (1980- single sheet updates) and Thomas H. Reynolds and Arthuro A. Flores, *Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World,* Colorado: Fred B. Rotham & Co., AALL American Association of Law Libraries. Publ. Series No. 33, 1991. (single sheet update).

to say, all transfers of any economic rights must be stated clearly in writing which specifies exactly the extent, purpose, place, and duration of the transfer [article 31 (3) 1957 Code].

The definition of works of intellectual property is very wide in scope and is otherwise vague about originality. It stipulates that "by the mere fact of creation" the author's rights are secured [book 1, title 1, chapter 1] and that "all works of the mind regardless of genre, form of expression, merit or use are protected works" [book 1, title 1, chapter 2]. The only exception to this vagueness is found in article 5, where the title of a work is protected only "where it is of an original character". [30]

Sufficient originality is expected of parodies, pastiches, and caricatures when they are improvised, i.e. not fixed. Otherwise (i.e. when fixed), the effect of a caricature, or an effect wholly different, must be obtained. Similarly, for "artistic photographic work" a measure of originality is implicit, in counter-distinction to documentation for news purposes.

Generally speaking the original is well protected under the extensive rights accorded the author. Yet what constitutes an original is, as already mentioned, broadly defined. Take for example the stipulation regarding transformation; textbooks and court decisions have established that copies in means other than purely mechanical processes are presumed to involve the personality of its maker. Thus in the case of a copy, say for example a painting after a painting, the permission of the author of the original work of art must be obtained if the copy is intended for identical use [article 41 (2)].

West Germany

Germany's 1907 Art Copyrights Law was, with the exception of an amendment (1940) increasing the duration of the protection afforded photography from 10 to 25 years after publication, still in effect at the outset of 1962. [31] A list of acceptable works was still included and was extended to encompass the applied arts and photography. These two categories were very narrowly defined. (The present form of the law specifies only "in particular" that "artistic works, including architectural works and works of applied art and plans and sketches of such works" are protected.) Three years later a completely new law, which was

30 Henri Desbois has analyzed art. 4 and 14 of the 1957 code with a view to eliminating some of the vagueness as regards originality. See "La reprographie et le droit d' auteur en France", in: *Homo Creator: Festschrift für Alois Troller*. Paul Brügger, editor, Fribourg/Basel, pp. 167-179, 1976.

31 Applied arts, photography and buildings were included in the property rights on art works (a list of acceptable works was included) and specialists reports were required from a member of a professional association. The first and the last category were very narrowly defined and enjoyed less protection. This brought German law into line with the Berne Convention.

systematically organized and modernized, was passed (the abbreviation U.R.G. will be used in the following discussion).[32]

In the 1965 codification, which is still in effect the additional rights accorded the author were termed the "moral rights" of the author [Chapter IV, Article 2, § 13 and §14]. They encompass the right to be designated as the author, to determine the title of the work, and to "prohibit any distortion, any other mutilation of his work which would prejudice his lawful intellectual or personal interests in the work." Moreover, the consent of the author is required when an adaptation or transformation is created. These include the cinematographic adaptation and the execution of plans and sketches of an artistic work. An exception to this right occurs when an independent work is created by "free use" (such as parody). "Non-exclusive" or "exclusive" copyright licensing can be assigned only with the author's consent [Chapter V, Article 2]. This provision safeguards the author against granting license in respect to unknown means of utilization and any obligations with respect thereto by declaring them to have no legal effect. On the other hand, the author may not refuse consent in bad faith [§34]. Nor may the author refuse modifications made in good faith [§39]. The unwaivable right of revocation (compare *droite de repentir*) by reason of changed conviction is also included in this section [§42]. As a form of limitation to these rights a list of permissible uses follows. Excluded from these are any modifications beyond those necessitated by transposition requirements in reproduction methods [Chapter VI, § 62 (1-4), especially (3)].[33]

A significant amendment was made in 1972: § 46 pertaining to fair use required a fee paid the author for use in school, church, and instruction as well as by reproduction, and the share of resale rights of artists was enacted (also referred to as *droit de suite* after the French provision dating back to 1920). Like most countries it was not until the 1980's that it was decided to include computer programs into copyright legislation. This was possible as an amendment to the 1965 U.R.G. in 1985 because it had been found feasible to conceptualize computer programs as a form of writing and an amendment was a highly

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32 The new law protected works of art for 70 years after the death of the author and to a lesser term applied arts and newer technologies (§82 and §85 special laws governing the protection of related works). It did not come into force until 1 January 1966 and was effective with stipulations of protection application with a second part passed on 1 January 1968. It no longer required expertise. Just a few days later the Democratic Republic of Germany passed their new copyright law which provided protection for fifty years after death. No permission was required for broadcast but a fee had to be paid. For contracts with foreign parties an extra permission from the copyright bureau was required. Those contracts made in the Federal Republic of Germany without permission of the Democratic Republic of Germany's copyright bureau were nevertheless recognized.

33 In the case of art. 93 pertaining to cinematographic works, the limitation to a right against "gross distortions or other gross injuries" constitutes an exception to full moral rights of integrity.

more expedient legislative task.[34] Nevertheless, in 1990 it became necessary to attach a further amendment dissuading product piracy, particularly in illegal music and video tapes, but also in cinematography.[35]

Japan

Japan enacted a new copyright law in the late sixties, which officially came into effect in 1970.[36] In it the terms of protection were raised from 30 to 50 years (p.m.a.) and translation protection was extended to the same term.[37] As with the entirely new systematic of the West German copyright law, Japan's new law expanded the moral rights of the authors (i.e. the portrait was now no longer considered to be the exclusive property of the patron). Moral and neighboring rights (the latter were protected for 20 years) came under the protection of the Copyright Law as well. Although the old law had been revised with new paragraphs where necessary to meet the minimum protection required in all Berne Convention revisions, the new law was more than double the size, incorporating neighboring rights, moral rights, a commission for arbitration, and film. In all the harmonizing efforts of the Japanese no structural change to the law was necessary after 1970. Only in terms of the content of section 104 was it extended to form a separate chapter pertaining to "compensation for private recording".[38]

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34 Protection of computer programs and works of photographic art (70 years p.m.a., 50 years after publication of documentary photographs and 25 years for other photographs). Its central feature was a levy on recording equipment to provide for remuneration for private and personal use. Also included was a three year period for the government to make a report concerning the impact of new technology and to safeguard that remuneration kept up with eventual inflation. In addition, criminal sanctions were increased.

35 For more on the subject see John Chesterman and Andy Lipman, *The Electronic Pirates: DIY crime of the century,* London: Routledge, 1988. Penal sanctions were increased. Another interesting feature was that the term "*Immaterialgüterrecht*" was used (this represents a pragmatic reconciliation of conflicts about terminology which had occurred in 1896).

36 In a review by Hideo Tomiyama we have an indication of the needs of the Japanese artists in the 1949 established Japan Artists Association (Nihon Bijutsuka Remmei) "with the purpose of securing copyright protection for works of art, improving the quality of art materials and supplies, and protecting the livelihood of artists." Hideo Tomiyama, "Art in Postwar Japan 1945-1972", in *Art in Japan*, The Japan Foundation, p. 197, 1974.

37 Under the Universal Copyright Convention agreement [art. 5 § 2], however, Japan could resort to compulsory licensing after just 7 years. Japan had ratified this international agreement in 1956, while still not having ratified the Berne Convention revisions of Brussels 1948, Stockholm 1967, or the International Convention of Related Rights of Rome of 1961. In 1974 it ratified the Brussels 1948 revision and in 1975 the Paris revision of 1971. Japan fulfilled only the minimal terms of protection provided for in the Rome Convention of 1961 until this too was ratified in 1989.

38 This law was amended in 1978, 1981, 1983, 1984 (Public Lending Right), 1985 (computer programs),

U.S.A

The American Copyright Law of 1909 was still – with some amendments – in force in the U.S. in 1962. The debate about reforms of the old law went on for many years until a new Copyright Law was passed in 1976. Significant extensions were made in duration (50 years p.m.a.) and in what were termed "writings".[39] Visual artists had to wait for the Implementation Act of 1988, which then paved the way for the Visual Artists Rights Act of 1990 (which, however, excluded audiovisual works and waived acting on the issue of resale royalties for artists).[40] In the same year the Computer Software Rental Amendments were passed. Finally, an amendment effected in June 1991 includes the "rights of certain authors to attribution and integrity."[41] In the 1992 Register of Copyrights' report, the issue of resale royalties for artists was included.[42]

1986 (databases), 1988 (term of related rights protection was raised to 30 years), 1989, 1991 (term of related rights protection was now raised to 50 years) and in 1992.

39 Article I, section 8, clause 8 of the U.S. Constitution, authorizing the Congress to establish copyright protection, reads: "Congress shall have power . . . to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It should be noted that the term "science", as was used by the authors of the Constitution, was derived from the Latin "scientia", meaning knowledge.

40 The 1990 American Visual Artists Rights section 101 of title 17 was amended to the American Copyright Law of 1976. By inserting under definitions what "a work of visual art is" and what "a work of visual art does not include" [(A)(i)] a number of media which are used to fix an electronically aided art work: "audiovisual work, (. . .) data base, electronic information service and electronic publication or similar publication. . . " had been excluded. Here "Audiovisual works" are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." They belong, together with motion pictures, to a category apart from traditional fine art genre. See *Glossary,* W.I.P.O., 1980:

Audiovisual work A work which appeals at the same time to the ear and to the eye, and consists of a series of related images and accompanying sounds recorded on suitable material (*audiovisual fixation). to be performed by the use of appropriate devices. It can be made perceptible only in an identical *form, unlike the *performance of *dramatic works, which appeal to the eyes and the ears in ways depending on the actual stage production. Examples of audiovisual works are *cinematographic works with sound and all *works expressed by a process analogous to cinematography, such as television productions or any other production of images with sound fixed on magnetic tapes, discs. etc, Tunis Model,Sec.1(2)(vi). **Audiovisual fixation** The simultaneous *sound and *visual recording of scenes from life or a live *performance or *recitation of a *work in any appropriate durable material form permitting them to be made perceptible. Audiovisual fixation of a performed or recited work is usually considered to be a *reproduction of the same.

41 This is regulated in §106A, which is subject to limitation stated in section 113(d). It represents the minimal requirements of adherence to the Berne Convention.

42 For an analysis of this report see Shira Perlmutter, "Resale Royalties for Artists: An Analysis of the

Three Exemplary Cases

Much as the sound industry before it, audiovisual material is likely to be the subject of jurisdiction when larger investments are involved, as in the film and video industry. The issue of work integrity, however, brings up the question of whether audiovisual material should be considered a fine art.

The case of the film director, John Huston, is perhaps the most widely known and written about. [43] Since 1988 four trial courts in France have dealt with the moral rights infringement claim about the work integrity of John Huston's film, *Asphalt Jungle* (fig. 1). The case was brought to court by his heirs and the co-author of the script, Ben Maddow, against La Cinq (French T.V. channel 5), which had contracted to transmit the film as colorized by Turner Entertainment, which had already bought the rights from MGM, the owner by contract, and thus, as film producer, the designated author according to U.S. law. [44]

First of all, the actual or true authors of the cinematographic work had to be determined, then the application of moral rights to foreigners, who by the law of the "country of origin" and "first publication" were not the legally recognized authors, but rather were contracted on a "work made for hire" basis. [45]

Register of Copyrights' Report", in *Columbia – VLA Journal of Law & the Arts,* 16, pp. 395-425, 1992.

43 For analysis both of the debate and the decisions see Bernard Edelman, "Applicable Legislation Regarding Exploitation of Colourised U.S. Films in France: The *John Huston* Case", in *International Review of Industrial Property and Copyright Law,* 23:5, pp. 629-42, 1992. For a legal analysis see also Jane C. Ginsburg and Pierre Sirinelli, "Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy", in *Columbia -VLA Journal of Law & the Arts,* 15:135, pp. 135-159, 1991. For a review of the court decisions process within a comparative analysis of the two legal systems see Alain Strowel, "Das Urheberrecht: von der zeitgenössischen Kunst auf der Probe gestellt", in *Zeitschrift für Urheber- und Medienrecht,* 8/9, pp. 387-92, 1990. Concerning the legal problems pertaining to colorization see S. I. Schiller, "Black and White and Brilliant: Protecting Black and White Films from Color-Recording", 9. Comment. *Law Journal,* p. 524, 1987 and J. C. Ginsburg, "Colors in Conflicts: Moral Rights and Foreign Exploitation of Colorized U.S. Motion Pictures", in *Journal of the Copyright Society of the USA,* 36, p. 81, 1988.

44 *Glossary,* W.I.P.O., 1980:
Acquisition of copyright Generally understood as meaning the acquiring by *author of *copyright in his *work, by virtue of and through the creation of the work. Some *copyright laws provide for exceptional cases where copyright is originally vested in a body corporate or natural person commission in organizing the creation of the work. A few laws also require compliance with certification formalities as a condition of copyright; according to the Berne Convention, however, acquisition of copyright should not be subject to any formality.

45 *Glossary,* W.I.P.O., 1980:
Work made for hire According to the United States Copyright Law, a *work made by an *employed author within the scope of his employment and also a work specially ordered or commissioned for certain uses as enumerated by the law (among others as a contribution to a *collective

In the decision handed down by the French supreme court on 28 May 1991 it was decided that French law, with its absolute recognition of authors' moral rights, was applicable and compulsory. The traditional method of reconciling a conflict of laws and even most legal academics' preference for handling the public order regulations in a private international law context as a case of exception were cast aside. The Cour de Cassation chose to apply public order regulations (*loi de police*), thus giving the definition of the author and the creation its greatest possible range and raising them into the higher rank of fundamental legal principles of society. Bernhard Edelman comments on the court's summary interpretation with a statement which should help characterize the course of the debate: "Thus, the fundamentalists of authors' rights see their view of the cultural value of these rights confirmed. At least the so-called 'realists' who regard copyright as a trinket to soothe the sufferings of authors have been silenced – hopefully permanently. Simultaneously, the threat of the ambitious marketing of art and the slow decline of the authors' rights to mere copyright has also been banished, at least for the time being." [46]

In the conclusion of a joint article by Jane Ginsburg and Pierre Sirinelli (an American and a French legal scholar, respectively) the significance of the *Huston/Maddow v. La Cinq* decision is summarized as follows: "The breadth of the Huston decision raises the question whether French law also determines initial ownership of economic rights. Although at least one reading of the decision and the cited statutory texts supports an expansive view of the decision's scope, the more likely construction of the decision would limit its mandatory application of French law concepts of authorship to the moral rights of attribution and integrity." [47]

For the economic side of the issue of authors' rights and in view of the positive assessment of opportunities for small film and video producers made by the U.S. Office of Technology Assessment (O.T.A.), we turn to an article by Vincent A. Cesarani (1991) concerning the reality of a dilution of revenue by classical copyright infringements. This has implications for both video artists and legal professionals. As for the latter, it was made clear that the instances of infringement generally occurred in a legal void, since most of the persons involved (producer, infringer, local attorney, and judge) had little specialized knowledge at their command. [48] In the cases reviewed by Cesarani, one and the same independent pro-

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work, as a *translation, as any instructional text, as a part of a motion picture or other *audiovisual work, etc.) if the Parties have expressly agreed in writing that such a work would be regarded as a work made for hire (Sec. 101).

46 Op. cit. footnote 43, Edelmann, p. 639.

47 Op. cit. footnote 43, J. C. Ginsburg and P. Sirinelli, p. 158.

48 For more details of the case and the lack of training of professionals who could be involved, such

ducer's video, *Thundering Herd: 50 Years of Texas Longhorn Football* (1987), was involved. [49] In the first case the video was shown without the authorization of its producer in a nightclub in the target regional market and seen by 10,000 viewers. In the second case a sports special aired by a local T.V. station used vital pieces of footage of the video without the consent or knowledge of the producer, though attribution was correctly made. In the first case unauthorized public performance was involved, in the second case fair use (i.e. use limited either in duration or in the amount of the original which is reproduced) as news coverage was at issue. Enforcement and even knowledge of infringement, Cesarani concludes, are problems unique to small production businesses such as these. He suggests the following remedy: "The only solution seems to be a private copyright policing organization that protects the rights of intellectual property owners of films on videocassettes released for the home video market. This may seem farfetched, but Broadcast Music and ASCAP were probably once a figment of the imagination of countless angry individual composers, publishers, and recording artists who were unable to protect their rights in an efficient manner." [50]

Since the media artist often relies on teamwork and foreign production setups, her or his protection outside the art market will not necessarily be equal to that enjoyed by the studio artist working with traditional means. Moreover, as we have already noted, the digital format enables immediate and pervasive, delocalized distribution, which means that the artwork's very integrity is subject in more than one way to manipulation and, ultimately, destruction. There is no way of telling how authentic the work viewed is, and its credibility may also be effectively undermined as a result. Indeed, our traditional perspective on the difference between fine art and popular culture may be sliding, even if the visual artwork as unique possession has already secured its autonomous status. But when the art object actually only exists as a digitized entity, its integrity and thus authenticity is primarily a matter of enactment, not possession. Admittedly, the possession of the original recording means something in our world of duplication – a matter of exclusivity. Nevertheless, the premise of copyright rests on the inalienable right to derive financial sustenance from an original work of creation. Digital appropriation and misrepresentation are two of the most widespread infringements, which in the realm of electronically aided art production can mean enormous personal and financial loss, not to mention the additional loss of the in-

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as film and T.V. personnel and local courts – see Vincent A. Cesarani, "Public Performances and Pirates: The Home Video Producer's Need to Police Intellectual Property", in *Entertainment Publishing and the Arts Handbook,* pp. 77-90, 1991.

49 For the reader now tempted to suppose that (American) sports draw a wider interest than fine art ever would, I refer the reader to the statistics of the C.A.A. and A.A.M. which have shown that attendance at art centers and visits to museums and galleries are higher than to sports events.

50 Op. cit. footnote 48, p. 77. See definition of "fair use" as given in footnote 6 above.

centive to continue producing artistic goods. As such, derivative artworks [51] can become a major problem, challenging our concept of the original.

Appropriation Art is a case in point. Appropriation Art's conceptual basis rests largely upon the assumption that the pictorial iconography of the media is anonymous; so to say a product without an author. Work-made-for-hire schemes are probably responsible for this attitude. The appropriation artist's attempt to reveal this general aspect of mass culture usually constitutes minimal interventions either upon the original or its normal context. Nevertheless, authors' rights on the pre-existing work have to be considered, and as we shall see, are more easily upheld when commercially relevant.

A well-known case will serve to illustrate the fair use paragraph in action and appropriation in a legal context. [52] Art Rogers, a Californian photographer, brought charges of copyright infringement and unfair competition under Lanham Act's section 43(a) (Trademarks and unfair Trade practices) against Jeff Koons. The black and white photograph, *Puppies* (fig. 7), first shown as a work of a photographic art, then published as a greeting card in 1984, was, according to Rogers, subsequently copied by Koons in his wooden sculpture, *String of Puppies* (1988) (fig. 8).

The case was heard in the U.S. District Court for the Southern District of New York on 26 November 1990. [53] The first step taken was to determine Rogers' ownership of copyright, which entailed establishing him as the author and the photograph in question as eligible for copyright protection. His ownership was found valid and the photograph a product of artistic creation, "since plaintiff's inventive efforts in posing the subjects of the photograph, taking the picture, and printing the photograph satisfy criteria for original work of art". [54] The next questions to be decided were whether Koons had had access to the greeting card which reproduced the photograph, whether copying had taken place, and whether substantial similarity could be established. It seems Koons had, after removing the copyright notice, given the greeting card bearing Rogers' photograph to artisans in Italy. During the process of carving the wooden sculpture and painting its surface, the artisans were more

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51 *Glossary,* W.I.P.O., 1980*:*
Derivative work A *work based on another existing work: its *originality resides either in the making of an *adaptation of the *pre-existing work or in the creative elements of its *translation into a different language. A derivative work is protected without prejudice to the *copyright in the pre-existing work.

52 See for further reading Roger L. Zissu, "Fair Use: From Harper & Row to Acuff Rose: May 13, 1994", in *Journal of Copyright Society of the USA,* 41, pp. 7-17, 1994.

53 Martha Buskirk , "Appropriation Under the Gun", in *Art in America* 80:6, pp. 37-41, June 1992.

54 Judge Cardamone of the Appeals Court refers to the precedence case of the *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* (7 March 1991, 18 U.S.PQ 2d 1275) which set the norm for originality higher and against a "sweat of the brow" concept. The work involved was a compilation.

than once given written instructions by Koons, which emphasized that a copy of the photo was desired. They were instructed to follow the light and dark values as they appeared in the photo, to replicate the detailing in the fur of the puppies just as it appeared in the photo, and to make the girl's nose as large as it was in the photo.

It was important here to distinguish between the facts of the representation and the expression of them. Thus the features of light and dark, very much a part of the photographer's medial expression of the pictorial idea, would especially seem to indicate the intent of copying without permission. Moreover, as three of the four sculptures were sold, the use was also identical to that of the original in as far as it was commercial. The "ordinary observer test", which asks whether the average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work, was used to establish substantial similarity.

In all three counts evidence supported Rogers' contention. Koons' contention that his sculpture is a satire or parody of society-at-large, i.e. that it served a different artistic purpose, did not sway the court from terming it a copy and finding that the copying was greater than necessary even for parody. The relevant passage in the court summary reads as follows: "Defendant's production of infringing sculpture for sale as high-priced art militates against finding that copying of plaintiff's photograph was fair use since meaningful likelihood of future harm to market value of original work is presumed if use is intended for commercial gain; the fact that photograph was copied in a sculptural form is irrelevant, since defendant's use also harms market for derivative works."

The possible remedies were either monetary (apportionment of profit), damages (to Rogers' exclusive rights to making or licensing a derivative work, which would have to be ascertained), or statutory damages.

On 27 March 1991 the court "entered a permanent injunction enjoining Koons and Sonnabend Gallery from making, selling, lending or displaying any copies of or derivative works based on *Puppies* and, pursuant to 17 U.S.C. §503, requiring defendants to deliver all infringing articles to the plaintiff within 20 days, including the fourth or artist's copy of *String of Puppies*".[55]

Koons and Sonnabend appealed to the U.S. Court of Appeals. This court's recommendation for remedies (referred back to the district court for decision) were both equitable license fees and the possibility of "statutory damages in lieu of an award of actual damages and apportioned profits".

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55 This 'turn-over' order was not followed by Koons, who sent his artist's copy to a museum in Berlin nine days after the injunction order, whereupon he was found in contempt of court and given 20 days to comply or pay a daily fine.

Judge Cardamone's Court of Appeals discussion of the ownership of copyright in an original work of art and the "fair use" doctrine [17 U.S.A §107] are, in some instances, indicative of legal thinking. First of all, there are the "elements of originality in a photograph" which "may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved." Second, "parody or satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original. Under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law." Obviously, the evaluation of a society-at-large satire is less clear. The issue was addressed in the following: "It is the rule in this Circuit that though the satire need not be only of the copied work and may, as appellants urge of *String of Puppies*, also be a parody of modern society, the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work." "By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody. Of course, while our view of this matter does not necessarily prevent Koons' expression, although it may, it does recognize that any such exploitation must at least entail 'paying the customary price'." [56]

As to the remedies, Judge Cardamone conceded that Koons had the right to establish those "elements of profit attributable to factors other than the copyrighted work." These elements "may include Koons own notoriety and his related ability to command high prices for his work." The fact that Koons was found in contempt of court for shipping the artist's copy out of the country after the injunction upon it had taken place and his contention that "the trial judge uneducated in art, is not the appropriate decision-maker on issues of substantial similarity", may have brought on the closing recommendation: "In fact, given Koons' willful and egregious behavior, we think Rogers may be a good candidate for enhanced statutory damages pursuant to 17 U.S.C. § 504(c)(2)."

In her article "Appropriation Under the Gun" Martha Buskirk makes a comment which for our present concern should be noted: "the appeals court seemed actually offended by

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56 Ever since the *Maxton-Graham v. Burtchaell* case [803 F. 2nd. 1253, 231 U.S.P.Q. (2nd Cir. 1986), cert. denied, 481 U.S. 1059, 107 S. Ct. 2201, 95 L. Ed. 2d. 856 (1987)], asking for permission no longer constitutes the presumption of intended infringement. On the contrary, to ask and even be denied permission to parody now constitutes an action made in good faith.

Koons' art-world persona." [57] This remark is based on Judge Cardamone's opening paragraph of the decision, which reads in full as follows: "The key to this copyright infringement suit, brought by a plaintiff photographer against a defendant sculptor and the gallery representing him, is defendant's borrowing of plaintiff's expression of a typical American scene – a smiling husband and wife holding a litter of charming puppies. The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism." Buskirk quotes in this context from Koons' letter to the court of appeals, which certainly provoked the above quote:"... the extent to which a mass distributor of a rather mundane photographic note card can prevent a highly regarded artist from creating a limited edition, original, provocative and critical work of art." [58]

Martha Buskirk identifies another example where art world thinking and legal thinking diverge, namely in the district court's decision statement: "In copyright law, the medium is not the message, and a change in medium does not preclude infringement." [59] In Court, the substantial similarity, Buskirk points out, was not actually established between the brightly colored, life-sized sculpture and the card-sized black and white photograph, but rather was based on photographs of each work. [60] Apparently Koons' lawyer had argued that Rogers' copyright protection covered only the specifically photographic elements of his work, which might have brought about the comparison of photographs in court. [61] Furthermore, had Rogers planned a derivative use of the photographic image as sculpture, it is highly improbable that he would have elected to replicate the lights and darks of the photography as Koons admittedly strived to do. Had the originals (Rogers' photographic greeting card and Koons' polychromatic sculpture in carved wood) been presented to the court as the basis for judging the similarity, the defendant's plea to having produced a parody might have been recognized.

Martha Buskirk sees here a "fundamental critical strategy of postmodernism" being endangered. Koons, she points out, is only one of a number of artists "who responded to an increasingly image saturated society by taking pictures directly from the media, advertising or elsewhere." This is a widespread practice and "is generally understood as a method that

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57 Op. cit. footnote 53, p. 39.

58 Ibid. What Buskirk refers to as the "art-world persona", seems for judge Cardemone to be a matter of "art business", a view which lacks the romantic quality often attributed to the image of the artist.

59 Ibid. See for further discussion: Dawn M. Leach, "Art World Thinking *versus* Legal Thinking", in *Visual Resources*, 18:3, pp. 205-217, September 2002.

60 Ibid.

61 Ibid.

uses recontextualization as a critical strategy."[62] And she points to other artists who have been sued for copyright infringements, such as Andy Warhol, Robert Rauschenberg, and David Salle. She also notes that three further suits brought against Koons were pending.

These examples will hopefully alert the reader to some aspects of the problems which arose during the period under review here. The Huston case highlights some of the territorial conflicts involved in this area of the law. During the period under consideration here the United States of America had made major accommodations for the protection of the visual arts and some increases in moral rights above and beyond the freedom of speech appeal. But its copyright law is fundamentally different in origin, history, and application from that of France and Germany. The Japanese law [Cf. Art. 60], which was based in part on the previous three traditions, has displayed a feeling for continuity in change which in respect to the issues of the Huston case could have conceivably effected the breadth of permissible adjustment to the dominant current taste. The Huston case impacts not only on the integrity of a work of art and the artist's moral rights, but also on popular usage. The case discussed by Vincent A. Cesarani is indicative not only of the vulnerability of the small independent producer but also raises the issue of reimbursement management, which is, despite internet technology, not a new problem. The dimensions, however, may change, since image databank providers and other agents have started publishing online without regard to moral or property rights issues. The *Rogers v. Koons* case holds implications for adaptations, the most obvious being perhaps the difference between evaluations of appropriation as artistic practice and as fair business practices.

The issue of the authentic work and the issue of artistic autonomy appear to be fading in the electronic environment. Will these cultural inventions continue to exist as more than relics of the past? Can we devise and make operable finer distinctions for maintaining vital aspects of authenticity and artistic autonomy? By examining the changes perceived or imagined in two discursive fields where attempts to make adjustments in underlying goals and assumptions reveal prominent and formative features, whether they pertain to normative factors, such as aesthetic premises, or to artistic sensibilities, may bring us a clearer understanding of the effects of our electronic environment.

62 Op. cit. footnote 53, p. 37.