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What is Art? Toward a Legal Definition

by

LEONARD D. DUBoFF*

Introduction

In order to understand and deal with the numerous issues arising in the relatively new field of art law, it is important to develop a legal definition for "art." To accomplish this goal, several areas of the law where the definition has traditionally been important, such as copyright, customs, state and federal moral and economic rights statutes, and state consignment statutes will be surveyed.

It will be demonstrated that in the areas of copyright, customs, and state consignment statutes the legal definition of art is quite broad, encompassing a wide variety of works and requiring very little originality or creativity. The common thread running through these areas, particularly in copyright and customs, is a requirement that objects being claimed as art have some minimal amount of original authorship attached to them.

In copyright, this requirement branches out into a definitional criterion which is very expansive for non-useful objects, but which becomes more restrictive when useful objects are involved. Relatively recent case law in the California and New York courts has further expanded what will be considered a work of art for copyright purposes when dealing with a useful object.

The customs definition of art has been substantially expanded by the new Harmonized Tariff System. These areas of expansion will be critically evaluated and the probable effect of the expansion on future litigation will be considered.

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State consignment statutes will be summarized from a definitional perspective. This Article will show that most of these statutes contain an expansive definition of art.

The area of artists' moral and economic rights presents a definitional double-edged sword. On the one hand, the statutes can be seen as a welcome new addition to the field, protecting and articulating rights for artists which were once only present in countries such as France. On the other hand, the statutes tend to take an extremely cautious and restrictive approach to defining art, which is probably attributable to the newness of the field.

I

The Copyright Definition

A. Introduction

Property has been described as consisting of a “bundle of rights.” For the visual artist, one of the most important parts of that “bundle” is undoubtedly the copyright. Copyright protection allows a creator to profit economically from his or her investment of time, skill, and energy by giving a limited monopoly in his or her work.

Copyright protection extends to “original works of authorship fixed in any tangible medium of expression.” The Copyright Act (Title 17, U.S.C. section 102) includes visual art under its umbrella of protection. The legislative history of the Copyright Act indicates that its protection is extended to to “pictorial, graphic, and sculptural works” which encompass “graphic art and illustration, art reproductions, . . . maps, charts, globes, and other cartographic works for use in advertising and commerce, and ‘applied art.’” “Applied art” includes all “pictorial, graphic, or sculptural work . . . embodied in useful articles, regardless of factors such as mass production, commercial exploitation and the potential availability of design protection.”

Additionally, section 102 makes a distinction between works of applied art which are eligible for copyright protection and works of industrial design which may be patented, but are not available for copyright protection. House Report Number 94-1476 set forth the distinction that “‘pictorial, graphic and sculptural works’ include ‘works of artistic

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2. Id.
5. Id.
6. Id.
craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned.\textsuperscript{7} The now-familiar test, which has become the focal point of much litigation, is stated in the House Report as follows:

\begin{quote}
[T]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.\textsuperscript{8}
\end{quote}

Consequently, because the Copyright Act only extends protection to original works of authorship fixed in a tangible medium and encompasses works of applied art but not works of industrial design, it is crucial to establish: (1) exactly what is an original creation for copyright purposes, and (2) if the work is a useful article, whether it is protectible applied art or unprotectible as an industrial design under copyright law.

In attempting to reach a legal definition of art for copyright purposes, the courts have focused on two basic issues:

1. \textit{Originality}. A completely non-useful work will be granted a copyright if a minimal amount of originality is demonstrated. If, however, the piece is a derivative work, then a “substantial” amount of originality will be required in order to gain a copyright.

2. \textit{Separability}. If the work is a useful article, the court will look at whether or not it is applied art or industrial design. As will be demonstrated later, the separability test has traditionally discriminated against certain “modern” designs. Recent case law in New York and California, however, has demonstrated an effort by the courts to eliminate or lessen that discrimination by looking to the creator’s intent, rather than simply looking to the end product.

As will be illustrated later, the courts are constantly walking a tightrope. On the one hand, the courts attempt to grant copyright protection to creations which are original and, if part of a useful object, separable. While on the other hand, they try to avoid extending copyright protection to a creation that is nothing more than a copy, which would stifle independent creativity.

B. The Originality Requirement

In a copyright sense, “originality” is not synonymous with the “novelty” requirement for patent protection. The originality requirement in copyright means that the work must be independently created. Simply put, this means that the work must not have been copied from another work. The originality requirement does not mandate that the work be unique. In other words, a work will not be denied copyright protection

\textsuperscript{7} Id.
\textsuperscript{8} Id.
merely because it is substantially similar to a work previously created, so long as the work has not been copied from the earlier work.  

1. Non-derivative Works

If the work for which copyright protection is sought is non-derivative, then the Copyright Office will require only a minimal amount of originality. However, as Atari Games Corp. v. Oman demonstrates, it is sometimes difficult to meet even the minimal amount of originality required. In that case, a video game company brought an action challenging the Register of Copyrights' decision not to grant it a copyright on its video game BREAKOUT. The Copyright Office refused to register the copyright, claiming that the work did not contain the requisite minimal amount of originality. The court had to determine whether the video game was a work of authorship, or just the result of the minimally required amount of creative expression. The court stated that "whether a particular work reflects a sufficient quantum of creativity to satisfy the copyright laws is not susceptible to bright line rules or broad principles." The decision on originality "requires the exercise of informed discretion" and, consequently, deference must be given to the Copyright Office's decision on these matters. For this reason, the court determined that the standard of review in such cases is whether or not the Copyright Office has abused its discretion.

The video game which Atari attempted to copyright was a form of "ball and paddle game" on a video screen much like ping-pong or tennis. Atari sought to have the audiovisual display registered for copyright protection. The court pointed out that "the BREAKOUT display consists of common geometric shapes, four bands of colored rectangles, and three tones heard when the 'ball' strikes various objects on the screen." The court noted that a sequence of images might contain so little in the way of a particularized form of expression as to be only an abstract idea portrayed in a non-copyrightable form.

Thus, the court concluded that BREAKOUT was little more than a stock description of a paddle and ball game, inseparable in any principle manner from the idea which it embodied: "This is quite distinct from video games which feature expressive and artistically creative renditions

9. NUTSHELL, supra note 1, at 198.
11. Id. at 1205.
12. Id.
13. Id.
14. Id. at 1206.
15. Id. at 1206-07.
of an idea and which thereby merit copyright protection."\textsuperscript{16} The court mentioned in passing that the fact that the game was profitable and popular was irrelevant. The court stated that the copyrightability of a work is defined "not by its financial returns or public favor, but rather by its originality and creativity."\textsuperscript{17}

\textit{Atari} stands for the proposition that a common design devoid of any expressive or artistic creativity will be denied a copyright on the ground that it is merely an abstract idea in a non-copyrightable form. Rejection of the copyrightability of a rearranged common design indicates a desire on the part of the courts not to discourage innovation and creativity by granting a copyright on too broad a category of objects.

This "common design" test for originality was utilized in \textit{Towle Mfg. Co. v. Godinger Silver Art Co., Ltd.}\textsuperscript{18} The controversy arose in this case over a decorative mouth-blown, hand-cut crystal baby bottle. The defendant manufactured a pressed glass, machine-made decorative baby bottle which the plaintiff alleged had infringed the plaintiff's copyright in their "Galway" baby bottle, a hand-cut crystal item. In discussing the originality requirement, the court stated that "although independent creation is necessary to establish originality, 'there need not be invention in the sense of striking uniqueness, ingeniousness, or novelty,' the degree of originality required has been described as 'modest,' 'minimal,' and at a 'low threshold.' "\textsuperscript{19}

The plaintiff, in designing its baby bottle with preexisting cutting designs which were in the public domain, failed to meet the modicum of originality necessary to obtain a copyright: "The numerous exhibits presented at trial make it clear that each of the five glassware cuttings utilized by Galway in its baby bottle design is in common usage in the glassware and crystal industries, and each has apparently been so for a long period of time."\textsuperscript{20} The court stated, however, that "the mere borrowing of elements from previous works will not defeat copyrightability as long as the author has devised a new version of the work or has otherwise rearranged or transformed it so as to have made an original contribution."\textsuperscript{21} The court concluded that the plaintiff had not utilized preexisting design elements in a sufficiently original manner to warrant copyright protection, but "merely had placed a number of common glassware cuttings on its bottle in an apparently common configuration

\textsuperscript{16} Id. at 1207.
\textsuperscript{17} Id. at 1207-08.
\textsuperscript{19} Id. at 991 (quoting L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489-90 (2d Cir. 1976); Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 910 (2d Cir. 1980)).
\textsuperscript{20} Id. at 991-92.
\textsuperscript{21} Id. at 992.
without significant changes or additions.\textsuperscript{22} The Towle court made an important distinction concerning minimal originality by stating that borrowed elements will not defeat copyrightability as long as the author has devised a new version of the work or has rearranged it in an original manner.

The Towle court, although denying the copyright, seemed to employ a more lenient originality test in deciding what constituted an original work by stating that a mere rearrangement and transformation may be enough to obtain copyright protection, as long as an original contribution is made. If the Towle rearrangement test were applied to the Atari facts, it is possible that the Atari court would have granted copyright protection for the ball and paddle game by finding that the requisite minimal amount of artistic originality existed.

A sweater design became the focal point of the originality inquiry in \textit{In Design v. Lynch Knitting Mills, Inc}.\textsuperscript{23} The plaintiff alleged that the defendant infringed its copyright in a sweater design, an argyle pattern connected by smaller black diamonds. The defendant responded that the sweater design was not copyrightable due to its lack of originality. The court began its analysis by stating that the originality test for copyright purposes has a very low threshold.\textsuperscript{24} The court concluded that the defendants had failed to prove a lack of originality on the plaintiff’s part:

\begin{quote}
The meager evidence introduced by defendants to show that the “Aperture” design was not the product of some independent creation consisted only of the contention of their expert witness that it [was] a mere variation of a standard argyle pattern. The only actual examples of argyle patterns placed in evidence in this case were introduced by [the plaintiff], and the “Aperture” pattern is clearly not a copy of any of them.\textsuperscript{25}
\end{quote}

Thus, Lynch appears to impart an even lower threshold of originality than either Atari or Towle. The case suggests that the reason the sweater design was deemed original enough for copyright protection was due merely to the fact that the defendant failed to prove that it was not the product of independent creation. The court seems to be saying that as long as the design is clearly not a copy of another design, the originality requirement will be satisfied.

A work with an even lower level of originality than the sweater design in Lynch was granted copyright protection in \textit{Haan Crafts Corp. v.}

\begin{footnotes}
\item 22. \textit{Id.}
\item 24. \textit{Id.} at 178.
\item 25. \textit{Id.} at 179. Lynch also demonstrates that when a copyrighted item is challenged on the basis of originality, the burden of proof is clearly on the challenging party to present adequate evidence demonstrating lack of originality.
\end{footnotes}
Craft Masters, Inc.\textsuperscript{26} The plaintiff designed, manufactured and sold sewing kits to junior and senior high schools for home economics classes. Most of the sewing kits contained patterns used to make stuffed animals, stuffed balls, sweat outfits, jackets and athletic bags. The plaintiff sued a former employee for copyright infringement on the designs.\textsuperscript{27}

Initially, the court noted that there was no question the plaintiffs themselves copied extensively: "Ideas for many kits come initially from scrutinizing patterns already on the market or by taking apart various store-bought items and figuring out how they are made."\textsuperscript{28} However, the court stated that "the work need not be novel, but must embody some modest amount of intellectual labor."\textsuperscript{29} Lacking substantial evidence to the contrary, the court concluded that there was some likelihood that the plaintiff could show originality under the Seventh Circuit minimal originality criteria. Consequently, the copyright was found valid.\textsuperscript{30}

Thus, unlike Lynch, Atari, and Towle, Haan almost completely eliminated any threshold originality requirement. The Haan court concluded that the plaintiff copied extensively from other items on the market, but found the practice was acceptable so long as a "modest amount of intellectual labor" was involved. For the purpose of defining art based on a modicum of originality, the Haan test is the epitome of minimalism.

A different approach was used to test originality in Gund, Inc. v. Smile Int'l, Inc.\textsuperscript{31} The plaintiff brought an action claiming that the defendant had infringed the plaintiff's copyright in a stuffed toy dog called "Muttsy." Muttsy was designed without rigid parts and, therefore, "flopped" on the floor and rested with its nose touching the ground. The defendant's product was similar, but did have some different qualities.\textsuperscript{32} The court denied the plaintiff copyright protection, stating that "the law will not grant an author a monopoly over the unparticularized expression of an idea at such a level of abstraction or generality as to unduly inhibit independent creation by others."\textsuperscript{33} The court went on to say that although there were similarities between the two stuffed animals, the "features that might cause an ordinary observer to regard the aesthetic

\textsuperscript{26} 683 F. Supp. 1234 (N.D. Ind. 1988).
\textsuperscript{27} Id. at 1237-38. These kits also contained pre-selected materials to be used in creating the finished articles.
\textsuperscript{28} Id. at 1238.
\textsuperscript{29} Id. at 1243.
\textsuperscript{30} Id.
\textsuperscript{31} 691 F. Supp. 642 (E.D.N.Y. 1988).
\textsuperscript{32} Id. at 643.
\textsuperscript{33} Id. at 644.
appeal as similar, if not quite the same, are the very features so generalized as not to be the subject of copyright protection." 34

Gund uses an "ordinary observer" test to determine originality. This test concludes that if an ordinary observer would view the aesthetic appeal of the works as being substantially similar, then the originality requirement has not been met. Defining art in terms of what an ordinary observer would deem "original" is in sharp contrast to the Haan and Lynch tests. Those cases concentrated on the amount of originality present in the creation as determined by the extent of copying from another work. Gund presents a new test involving the ordinary observer and, by doing so, adds a new criterion to the legal definition of art for copyright purposes.

This ordinary observer test was implicitly applied in Cory Van Rijn v. California Raisin Advisory Bd. 35 The plaintiffs argued that the defendants' use of "claymatic raisin" characters in their advertising constituted copyright and trademark infringement of their "raisin people." The defendants, on the other hand, claimed that a humanized raisin figure is nothing more than a common idea, incapable of copyright protection, and that the plaintiff was attempting to copyright features which were necessarily common to all humanized raisin characters. The district court stated that the idea and the expression will coincide when the expression provides nothing new or additional to the overall idea: "This is not a case where the idea is indistinguishable as a matter of law from the expression of that idea. . . . The characters each have developed personalities and particular ways of interacting with one another and their environment. The physical setting also has several unique features." 36 The court concluded that the plaintiff was attempting to claim copyright protection for the idea of a "humanized raisin" and that idea was too general: "[T]he two works do not in any way look alike beyond the raisin bodies, . . . the images projected are completely different" and the idea is too general to warrant copyright protection. 37

It was important to the California Raisin court that, while both plaintiff and defendant used similar raisin characters, the defendant's raisin character contained several unique physical features and thus satisfied the originality requirement of the Copyright Act. Consequently, the California Raisin court, by implication, applied the same test that Gund explicitly applied.

34. Id. at 645.
36. Id. at 1140.
37. Id. at 1145.
The legal definition of art for copyright analysis therefore requires that the work in question have at least a modicum of originality. As discussed above, the courts have interpreted the originality requirement as having a very low threshold, asking the following questions when testing originality:

1. Is the work a common design? (Atari)
2. Is the design commonly used in the trade? If so, has the design been rearranged in a manner that exhibits a minimal amount of originality? (Towle)
3. Was the work copied? (Lynch) If so, is there a minimal amount of intellectual labor involved? (Haan)
4. Would an ordinary observer viewing the two objects conclude that the two items are substantially similar? (California Raisin) If so, is the substantially similar feature one that is so generalized as to be deemed an unoriginal expression and, therefore, non-copyrightable? (Gund)

Various courts emphasize different elements of the originality test. Case law addressing originality in the legal definition of art for the purposes of copyright protection demonstrates that courts have generally defined originality at a very low threshold. The next section will address how the courts purport to apply a higher standard of originality to derivative works. This higher standard molds the legal definition of art into a slightly different form, but a form which is very similar to the low threshold for non-derivative works.

2. Derivative Works

Unlike the minimal originality test for non-derivative works, most courts have held that if a copyright is sought for a derivative work (i.e., a work based on an earlier work), a substantial amount of originality is required. In Durham Indus., Inc. v. Tomy Corp., the plaintiffs claimed to hold a copyright on three wind-up plastic figures, recognizable as the Disney characters Mickey Mouse, Donald Duck, and Pluto.

The court pointed out that neither party had contested the fact that Walt Disney created the three characters. The plaintiff also acknowledged Disney’s ownership of the copyrights on the characters, and conceded that without a license from Disney, the plaintiff’s publication of the characters would constitute infringement. Furthermore, the court stated that “derivative works are explicitly included in the subject matter of copyright as defined by the Copyright Act [but,] to support a copy-

40. 630 F.2d 905 (2d Cir. 1980).
41. Id. at 909.
right the original aspects of a derivative work must be more than trivial."

The copyright originality requirement, the court stated, cannot be satisfied by merely reproducing a work of art in a different medium, nor by the demonstration of some physical, as opposed to artistic, skill. Consequently, the court concluded that the plaintiff's characters were exact duplicates of the Disney characters and were not copyrightable:

"Our concern is with carrying out the statutory command that protection of a derivative work not affect the scope of copyright protection in an underlying work. If we were to recognize Tomy's derivative copyrights in its figures, those who, like Durham, have obtained from Disney the right to copy Disney's own characters would, as a practical matter, have to make substantial changes in those characters in order to avoid infringing Tomy's rights."

Thus, the Durham court forcefully stated the public policy rationale behind requiring more than a minimal amount of artistic creativity in order to grant copyright protection to a derivative work. It may be difficult, however, as a practical matter, to distinguish between a physical skill and an artistic creation. The Durham court implied that if the skill is merely a manufacturing skill, this would not be enough. The line drawn between manufacturing skill and artistic creation is a difficult one to discern.

Although the Durham court purports to apply the higher standard of "substantial originality" for derivative works, it is difficult to avoid the conclusion that this test is very similar to the originality test used for non-derivative works. By requiring the work to be an artistic creation, as opposed to a mere manufacturing skill, isn't the court merely restating the test for minimal originality? Durham seems to be stating, in effect, that as long as some form of artistic originality is demonstrated, a copyright may be granted. This sounds similar to the test enunciated in cases such as Lynch, where an extremely low threshold of originality was the rule.

The similarity between the definitions for derivative and non-derivative works was demonstrated in Sherry Mfg. Co. v. Towel King of Florida, Inc. The suit involved a silk-screened beach towel with an ocean beach scene. The scene was an original design that was not copyrighted. One of the plaintiff's artists later redesigned the towel by making several dimensional changes in the various elements of the beach scene. Subsequently, when the defendant's towel appeared on the market, and was

42. Id.
43. Id. at 910.
44. Id. at 910-11.
45. 753 F.2d 1565 (11th Cir. 1985).
substantially similar to the plaintiff's towel, the plaintiff sued for copyright infringement.

The court stated that it was "well settled that in order to qualify for a separate copyright, a derivative work must contain a substantial degree of originality."46 "[T]he one indispensable element of authorship," the court opined, is "originality [and one] who has slavishly or mechanically copied from others may not claim authorship."47 The court denied copyright protection to the plaintiff, stating that a side-by-side comparison of the works in question showed that the contributions made by the plaintiff's artist were simply too trivial and too insubstantial to justify copyright protection: "Our conclusion . . . is influenced by the obvious fact that the majority of those distinguishing details are so minor that they are virtually unnoticeable upon a cursory comparison of the two towels."48

Again, as in Durham, the Sherry court purportedly applied a higher standard of originality for derivative works than for non-derivative works. The court, however, used a test for originality which consisted of placing the two designs side-by-side and asking whether an ordinary observer would notice a difference between the works. This sounds exactly like the "ordinary observer" test used in Gund and California Raisin. The similarity of these two tests casts suspicion on the distinction the court attempts to make between derivative and non-derivative works.

Consequently, for purposes of the legal definition of art, the originality tests which courts apply to both derivative and non-derivative works in order to determine whether or not to grant copyright protection appear to require a very low level of originality.49

C. The Separability Requirement

The separability requirement becomes important in deciding whether a work is an industrial design or whether it is applied art. The copyright statute makes the distinction between works of applied art,
which are eligible for copyright protection and works of industrial design, which may be patented but may not be copyrighted.\textsuperscript{50} The present test finds that a useful article's design will be "considered a pictorial, graphic or sculptural work [and, therefore, copyrightable] if, and only to the extent that, such design incorporates pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."\textsuperscript{51}

Traditionally, this separability requirement has discriminated against "modern" designs such as the light fixture in \textit{Esquire v. Ringer}.\textsuperscript{52} In that case, the plaintiff unsuccessfully attempted to register a copyright for a geometrically designed parking lot light. Recent case law in New York and California, however, has substantially broadened the concept of separability, allowing the inclusion of objects such as the \textit{Esquire} light if the intent of the artist was to create a work of applied art. The cases, therefore, have centered on defining art for copyright purposes based on the nature and use of the work.\textsuperscript{53}

1. \textit{The Usefulness Test}

If the design which is sought to be copyrighted is not part of a useful object, then the "applied art" test does not arise. It therefore becomes important to discern whether or not the design is, in fact, part of a useful object.

The generally accepted definition of a "useful object," for purposes of the Copyright Act, was articulated in \textit{Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.}\textsuperscript{54} The plaintiff copyrighted the design of an eyeglass display case. The defendant argued that the eyeglass case was an industrial design and, therefore, was uncopyrightable. The case was a box-like structure containing a curving, free-form sculpture which created a scalloped effect—an aesthetically pleasing feature.

The court began by stating that the display case had been copyrighted as a sculptural work under section 102(a)(5) of the Copyright Act.\textsuperscript{55} The court went on to define "useful article:" "a 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An arti-

\textsuperscript{50} 17 U.S.C. § 102 (1988) (citing Historical and Revision Notes, H.R. REP. NO. 1476, 94th Cong.).

\textsuperscript{51} Id.

\textsuperscript{52} 591 F.2d. 796 (D.C. Cir. 1976), cert. denied, 440 U.S. 908, reh'g denied, 441 U.S. 917 (1979).

\textsuperscript{53} NUTSHELL, supra note 1, at 202-03.

\textsuperscript{54} 95 F.R.D. 95 (D.C. Del. 1982).

\textsuperscript{55} Id. at 96.
icle that is normally part of a useful article is considered a ‘useful article.’”

It was clear to the court that the eyeglass case constituted a useful object and, therefore, the issue of separability needed to be addressed. The Nyman court pointed out that, in deciding whether or not the artistic design is separable from the utilitarian aspect of the article, a controversy arises as to whether mere conceptual separability is sufficient, or if actual physical separability is required:

The Second Circuit has held, contrary to Esquire, that “conceptual separability” of a useful article’s sculptural and utilitarian features is sufficient to sustain copyright registrability. . . . The Second Circuit rejected the assertion that the conceptual separability of a sculptural element from a useful article was inadequate to support copyright [stating that] “this assertion flies in the face of legislative intent as expressed in the House Report, which specifically refers to elements that ‘physically or conceptually can be identified as separable from the utilitarian aspects of’ a useful article.” “[A] useful article that is ‘conceptually, though not physically, separable from its utilitarian elements is copyrightable.”

Thus, the Nyman opinion made two important points concerning the legal definition of art:

1. If an article has an intrinsic utilitarian function that does more than merely portray the article or convey information, it will be classified as a useful article.
2. If the article is utilitarian, the artistic expression must be conceptually separate from its utilitarian aspects in order to obtain copyright protection.

The importance of this two-part analysis is that it strictly limits what will be classified as art for copyright purposes when a utilitarian object is being scrutinized by the courts. If the court can find no conceptually separable elements, it will deny copyright protection on the grounds that what it is viewing is not applied art but rather, industrial design.

Most courts have followed this conceptual separability analysis and do not require physical separability. A good example of a court interpreting the useful article requirement is illustrated in Poe v. Missing Persons. The defendant filed a claim seeking damages for the copying of an article he created, which he described as art work in the soft sculpture medium entitled Aquatint #5. The work was a rendering of an article of clothing. The artist developed and originated this piece as a work of art to stand by itself. When the defendant used the article of clothing in a

56. Id. at 97 n.4 (citing 17 U.S.C. § 101).
57. Id. at 98-99 (citing Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980)).
58. 745 F.2d 1238 (9th Cir. 1984).
photograph, the plaintiff sued. The defendant claimed that the article
was not copyrightable because it was a purely functional piece of
clothing.

The Ninth Circuit found that the defendant presented no evidence
to support the trial court's finding that the article could be used as an
actual piece of clothing. The court stated that the plaintiff was at-
tempting to create nothing more than a work of art and therefore, the
piece was merely the portrayal of an article of clothing, and not an actual
article of clothing.

In its decision, the court laid out four bases on which a trier of fact
should rely in deciding the question of usefulness:

1. Expert evidence concerning the usefulness of the article, and
whether any apparently functional aspects could be separated from the
artistic aspects.
2. Evidence of the plaintiff's intent in designing the article is relevant
in determining whether or not it has a utilitarian function.
3. Testimony concerning custom and usage within the art world and
the clothing trade is relevant where objects such as this are at issue.
4. The admissibility of evidence concerning the article's marketabil-
ity as work of art.

The Poe court foreshadowed the later "intent of the creator" test
used in discussing the separability requirement by applying that test to
the usefulness requirement. Although a test which looks to the creator's
intent is initially attractive, especially in relation to the separability re-
quirement, it can be difficult to apply, absent a substantial amount of
independent evidence.

The "marketability" test used in Poe also has its problems. It ap-
pears to discriminate against lesser-known artists whose works are not
well established and, thus, are not as marketable as the works of better-
known artists. Undoubtedly, this result was not contemplated by the
Copyright Act. Therefore, trade custom and usage may be a more equi-
table sign-post for the usefulness requirement. It allows the court to de-
termine what is and is not art based on the artistic communities' own
judgment.

59. Id. at 1241.
60. Id. at 1242.
61. Id. at 1243. It should be noted that articles such as toys are never classified as useful
sued the defendant for copying the plaintiff's designs for various toy airplanes. In a short
opinion, the Sixth Circuit flatly denied that toys in general were useful articles:

But the statutory definition of "useful article" suggests that toys are copyrightable.
To be a "useful article" the item must have an intrinsic utilitarian function that is not
merely to portray the appearance of the article. . . . The function of toys is much
more similar to that of works of art than it is to the "intrinsic utilitarian function" of
industrial products.
As Nyman and Poe demonstrate, the question of utility becomes crucial where the defendant in a copyright infringement suit asserts that the copyright is invalid because it is for a strictly utilitarian article. This utilitarian issue can result in the court focusing on a definition of art which may deny copyright protection to an article which meets the originality requirement discussed earlier, but is purely a utilitarian article with no artistic attributes.

2. Separability Test

Once the court has established that it is considering a utilitarian object, the court will not automatically deny copyright protection if the party seeking protection can demonstrate that the artistic expression is conceptually separable from the utilitarian nature of the object. The legal definition of art has been expanded to include artistic expressions which are part of a utilitarian object provided that the expression is separable. One of the first battle lines drawn regarding this issue was over the question of which type of separability, physical or conceptual, was to be the applicable yardstick.

This issue was specifically addressed in Norris Indus., Inc. v. Int'l Tel. & Tel. Corp., where the plaintiff created a design for automobile wheel covers that simulated a wire wheel, and applied to the Copyright Office for registration. The Copyright Office rejected the design as non-copyrightable. Later, the plaintiff instituted a suit against ITT alleging copyright and patent infringement. In response, ITT filed a suit against the plaintiff for a declaratory judgment concerning the validity of the copyright and patents. ITT's main argument regarding the copyright issue was that the wire wheel design was purely a part of the utilitarian function of the wheel cover.

The Eleventh Circuit agreed with ITT, stating that the "wheel covers [were] utilitarian articles serving as hubcaps to protect the lug-nuts, brakes, wheels, and axles." The court addressed the separation requirement, stating that:

[T]he record indicates that Norris sought copyright registration for the entire wheel cover. Even if the arrangement of spokes could be identified separately, however, they are incapable of existing independently. . . . "Physical separability would presumably mean that after removal of those features which are necessary for the utilitarian functions of the article, the artistic features would nevertheless remain intact."

62. 696 F.2d 918 (11th Cir. 1983).
63. Id. at 922.
64. Id. at 923 (citing 1 M. Nimmer, Nimmer on Copyright § 2.08[B][3], at 2-96 (1984)).
The plaintiff logically argued that conceptual separability, rather than physical separability, was the relevant test. The Eleventh Circuit rejected this argument, stating that this case was different from a situation where the conceptual elements are purely ornamental, superfluous designs contained within a useful object. The court concluded that functional components of useful articles, no matter how artistically designed they may be, have generally been denied copyright protection unless they are physically separable from the useful article.\(^6\)

The court went on to state that if the design is the subject of traditional copyright protection, such as the jewelry in *Kieselstein-Cord*, then it would be copyrightable.\(^6\) In that case, the plaintiff sought to copyright an abstract-shaped belt buckle.

The logical conclusion to be drawn from *Norris* is that if the spokes on the wheel had served no functional purpose whatsoever, but had been merely put there as an ornamental design, they would have been copyrightable as being conceptually separate. This appears to be a somewhat dubious distinction in light of the fact that most wheel cover designs seem to do more than function simply as utilitarian reinforcers of wheel covers. The court's idea that traditional copyright protection should be looked to when making these decisions also seems odd. The point of the separability requirement is not to simply look to prior copyright law, especially when dealing with an area as dynamic as artistic creation. One cannot help but conclude that the *Norris* analysis leaves much to be desired.\(^6\)

The Eleventh Circuit's physical separability test seems to have been rejected by most courts as being too restrictive. In view of recent Second

\(^6\) Id. at 923-24.

\(^6\) Id. at 924 (citing *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980)).

\(^6\) See also *Act Young Imports, Inc. v. B & E Sales Co.*, 667 F. Supp. 85 (S.D.N.Y. 1986), in which the plaintiff claimed that after being shown samples of copyrighted animal-shaped children's backpacks in plaintiff's showroom, the defendant went to Asia and had copies of the plaintiff's product made by the same manufacturer. The defendant claimed that the backpacks were not copyrightable. The court quickly disposed of the defendant's arguments, stating that "[e]xamination of the backpacks yields the conclusion . . . that the artistic aspect of the backpack, that is the animal image, is separate from the useful function of the packs. Therefore, the backpacks are copyrightable." *Id.* at 87.

In *Sunset Lamp Corp. v. Alsy Corp.*, 698 F. Supp. 1146 (S.D.N.Y. 1988), the plaintiff sued for alleged infringement of its banana leaf lamp design. The design was based on an artist's rendering of a banana leaf plant which she saw from the window of her sister's house. The leaves in the design were somewhat elongated versions of natural banana leaves, intertwined in a fashion not found in nature. The court found that the design was clearly conceptually separable from the utilitarian object on which it had appeared. *Id.* at 1151. This decision is important because the court rejected the defendant's argument that the design was a mere imitation of nature and, therefore, not copyrightable. The court stated that the leaves of
and Ninth Circuit decisions, the legal definition of art for copyright purposes in the area of utilitarian objects has taken on a broader scope.

In *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, the plaintiff designed a bicycle rack called the Ribbon Rack. It originated from a wire sculpture and was made of bent tubing. The issue in the case revolved around the conceptual separability of such a utilitarian item from the artistic aspects of the design. The Second Circuit began by reiterating that conceptual separability was alive and well in the Second Circuit but stated further that the problem was in determining what conceptual separability is and how it is to be applied.

The court considered a law review article by Professor Denicola, stating that:

Denicola argues that the “statutory directive requires a distinction between works of industrial design and works whose origins lie outside the design process, despite the utilitarian environment in which they appear.” He views the statutory limitation of copyrightability as “an attempt to identify elements whose form and appearance reflect the unconstrained perspective of the artist,” such features not being the product of industrial design. (citation omitted) “Copyrightability, therefore, should turn on the relationship between the proffered work and the process of industrial design.” (citation omitted) He suggests that “the dominant characteristic of industrial design is the influence of non-aesthetic utilitarian concerns” and hence concludes that copyrightability “ultimately should depend on the extent to which the work reflects artistic expression uninhibited by function considerations.” (footnote and citations omitted) To state the Denicola test in the language of conceptual separability, if design elements reflect the merger of aesthetic and functional considerations, the artistic aspects of a work cannot be said to be conceptually separable from the utilitarian elements. Conversely, where design elements can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences, conceptual separability exists.

The *Brandir* court embraced Denicola’s analysis, stating that his emphasis on the influence of utilitarian concerns in the design process may help to alleviate the de facto discrimination against non-representational art that has regrettably accompanied much of the current analysis.

The “imitation of nature” test appears to be an offshoot of the originality test. If the artist has merely copied from nature, apparently this is not original enough to obtain a copyright. However, if the design is not merely a copy but demonstrates some originality on the part of the artist, it will be considered copyrightable. Thus, in a situation where a copyright is sought for a design on a useful article, the design must be both original and conceptually separable.

68. 834 F.2d 1142 (2d Cir. 1987).
69. *Id.* at 1144.
70. *Id.* at 1145.
71. *Id.*
The court applied Denicola's test to the Ribbon Rack and found that the rack was not copyrightable. The court concluded that the form of the rack was significantly influenced by utilitarian concerns, on the basis of evidence that utilitarian alterations were made in the design. The court further noted that had the plaintiff merely used one of the existing sculptures as a bicycle rack, neither the application to a utilitarian end, nor commercialization of that use, would have caused the object to forfeit its copyright protection. In creating the rack, however, the designer clearly adapted the original aesthetic elements to accommodate and further a utilitarian purpose. Thus, any aesthetic elements could not be said to be conceptually separable from the utilitarian elements.

The Brandir court articulated a new approach to testing conceptual separability, an approach quite different from the one taken in Esquire v. Ringer. In both the Second and Ninth Circuits, the intent of the designer becomes an all-important aspect of the analysis. Consequently, the distinction emphasized in Esquire between the functional design and the aesthetic nature of the object becomes less important. This new analysis eliminates the Esquire bias against modern design, which contains little or no decorative quality separate from its function. In this respect, the Brandir approach clearly expands the legal definition of art for copyright purposes.

In National Theme Productions, Inc. v. Jerry B. Beck, Inc., the Ninth Circuit substantially agreed with the analysis set forth in Brandir. In Beck, the plaintiff attempted to enforce a copyright on masquerade costumes which the defendant alleged were not copyrightable because they were purely utilitarian. The court stated that costumes have an intrinsically utilitarian function and, thus, cannot be copyrighted as costumes. However, the court ruled that the features need only be conceptually separable from the utilitarian function of the garment in order to gain protection under the Copyright Act. Agreeing with the Brandir analysis, the court stated that:

It concur[red] with the Second Circuit's adoption of the Denicola test to the extent it requires one to look to an artist's or designer's creative process, and the decisions going into that process, in creating a useful article. To the extent that the decision in Brandir relies upon the sequences of actions or decisions made in putting together an article, the Court believes the Second Circuit improperly applied the Denicola test.

72. Id. at 1148.
73. Id. at 1147.
76. Id. at 1352.
77. Id.
test. As this Court reads the Denicola article, sequentially and chronologically dependent results go beyond Denicola's intent and will cause decisions to turn upon largely fortuitous circumstances occurring during the creative process.78

The court held that the costume designs were copyrightable since they were the result of the artist's arbitrary conceptions.79

A close reading of Beck reveals that it grants broader copyright protection than that granted by the Brandir test. Beck discards the idea articulated in Brandir that altering an artist's work subsequent to its creation can destroy the work's copyright protection. Beck implies that this sort of analysis is inconsistent with the Denicola thesis. However, the Beck court does not go on to explain why it is inconsistent, but merely restates the Denicola test and adopts its own interpretation of that test. In any event, Beck seems to imply that the litmus test for separability, at least in the Southern District of California, revolves around the designer's intent and whether that intent was to create an industrial design or an artistic design.

Legally defining art for copyright purposes thus becomes a two-step analysis:

1. If the work is completely non-useful, such as a toy, it is clearly copyrightable if a minimal amount of originality is demonstrated. If the work is derivative, the courts purport to apply a test which requires a substantial amount of originality. Case law reveals, however, that this test is really not very different from the basic minimal originality test.

2. If the work is a useful article, then the court must determine whether it is a work of applied art or industrial design. At this point, the court will determine whether or not the design is conceptually separable from the useful article.

D. Copyright Summary

The legal definition of art in the copyright field appears to have grown broader in recent years. Cases such as Atari, which consider whether or not the expression is a common design, have been tempered by such decisions as Towle and Lynch. These later cases seem to stand for the proposition that a design will be accorded copyright protection as long as there is some sort of originality displayed, even if that originality is merely rearranging a common design in a creative fashion. The Haan court's discussion of a "modest amount of intellectual labor" also points to a low threshold requirement for courts to consider what constitutes art for copyright purposes.

78. Id. at 1353.
79. Id.
When courts are faced with a useful object, the legal definition of art becomes a bit more restricted; minimal originality is not the only test. The creator must also demonstrate that the artistic expression is separable from the utilitarian object. This requirement narrows the legal definition of art by putting an additional burden on the creator not only to demonstrate originality, but to show that a work of applied art and not industrial design has been created.

As Brandir and Beck suggest, the legal definition of art as applied to artistic expressions in utilitarian objects has been broadened considerably since Esquire v. Ringer. In Esquire, the court looked only to the end product to determine separability. Whereas, both the Brandir and Beck courts embraced, to some extent, the Denicola analysis which looks to the intent of the creator to determine separability.

At first glance, the Denicola test appears to be too subjective, allowing creators to manufacture artistic intent where none really exists. The Brandir court, however, not only looked to the creator’s subjective intent, but also to the creator’s actions. In determining that Brandir made a physical utilitarian-based change in the bike rack’s design, the court exposed his non-artistic intent. This appears to be a useful approach. It allows the court to determine the true intent of the creator while avoiding the pitfalls of Esquire, which resulted in the discrimination against modern “truth of function” objects. Thus, if courts follow the approach articulated in Brandir, the legal definition of art for copyright purposes will be substantially expanded.

II
The Customs Definition

A. Introduction

The legal definition of art in customs law is crucial since certain items, if classified as works of art, enter the United States duty-free. The author will illustrate later how the new Harmonized Tariff System80 changes the legal definition of art, making it much easier for importers to identify objects that may enter the United States as duty-free art.

The customs courts have been grappling with the definition of art for customs regulation purposes for decades. Much of the customs definition has stemmed from the classification of particular goods under tariff schedules. The tariff rates levied on specific goods were originally

intended, in part, to equalize the difference between the cost of producing the item in a foreign country and its introduction into the United States marketplace, and the cost of producing and selling like or similar articles in the United States. Tariff laws, to protect domestic producers, are only appropriate when foreign goods compete directly with domestic items. If a foreign produced item is unique and no domestically produced substitute exists, then there appears to be no justification for taxing the article upon its importation. The imposition of a tariff upon a unique foreign good has the effect of increasing the price to domestic consumers for an otherwise unavailable article.

Consequently, when determining whether an item is to be given duty-free status as a work of art, customs law looks to see whether the imported piece will directly compete with American-made goods. Theoretically, works of art are unique to their creator and when they are not interchangeable with American-made goods, they are generally accorded duty-free status.

One prong of the modern definition of art for customs purposes was articulated in Brancusi v. United States. In Brancusi, the importer attempted to import an artist’s impressionistic bronze sculptures of a bird in flight. The court examined the workmanship of the piece and the reputation of its creator, and concluded that the object was indeed a work of art, despite the fact that the court felt it did not resemble a bird. The Brancusi decision, therefore, expanded the Customs definition of art to include “modern” art.

More than 30 years after Brancusi, a more liberal definition of art received legislative recognition when the 1959 Customs Law Amendments resolved some of the problems that had surfaced in the case law. The language “in any other media” was added to the definition of fine art in order to expand its scope to include collages, lithographs, prints and original mosaics, as well as other forms of modern art.

B. The Tariff Schedules of the United States and the Harmonized System

The modern approach to classifying works of art for customs purposes is to levy the applicable rate of duty established in a tariff schedule.

81. Customs duties were also imposed for the purpose of generating revenue. See DuBoff, Changing Art Customs: Removing the Tariff Barriers, 10 COLUM. J.L. & ARTS 45 (1985).
82. Id.
83. Id. at 48.
84. 54 Treas. Dec. 428 (Cust. Ct. 1928).
85. Id. at 430-31.
Prior to 1989, the Tariff Schedules of the United States ("TSUS") were used to determine the proper duty rate. These schedules consisted of lists of product categories identified by item number and accompanied by a description and corresponding duty fee. When a product was imported into the United States, it was matched to the appropriate category on the tariff schedule and assessed the corresponding duty.  

In 1989 the Harmonized Commodity Description and Coding System (the "Harmonized System") was implemented, and the Harmonized Tariff Schedule replaced the TSUS. The Harmonized System was developed over a ten-year period by the Customs Cooperation Council. The Harmonized System was designed to serve internationally "as a standard system of classifying goods for customs, statistical, and transport documentation purposes."  

The Harmonized System imposes a single task upon those who import into nations which have implemented the system. To determine the customs duty on an item in any of those nations, the importer need only identify the appropriate classification number of the item in question. That number will be the same in all countries utilizing the Harmonized System. Prior to the adoption of this system, an importer had to determine the appropriate commodity description and corresponding classification number for each individual nation to which the particular item was to be sent.  

The Harmonized System went into effect on January 1, 1989, and consequently there is not yet any case law interpreting the new system. The Harmonized System has redefined the legal definition of art for customs purposes.  

1. Sculpture  

In the area of sculpture, the TSUS appears to have been substantially altered by the Harmonized System, which eliminates the requirement that the work be produced by a professional sculptor.
Heading 9703 of the Harmonized Tariff Schedule confers duty-free status on "original sculptures and statuary, in any material." Item 765.15 of the TSUS provided for duty-free importation of "original sculptures and statuary . . . made in any form from any material as professional productions of sculptors only."92 This TSUS requirement had been interpreted to mean that in order to qualify as a duty-free work of art under the "professional productions" standard, a sculpture must have been created by an artist who was "a graduate of a course in sculpture at a recognized school of art (fine art, not industrial art), . . . or [was] recognized in art circles as a professional sculptor by the acceptance of his works in public exhibitions limited to the fine arts."93 The purpose of the professional productions standard, and the test used to apply that standard, was to enable U.S. Customs officials to distinguish between works of bona fide artists and the works of so-called artisans.94

The application of this rule is illustrated in *Mayers, Osterwald and Muhlfeld, Inc. v. E.F. Bendler*,95 where the court concluded that a cut diamond was the product of an artisan rather than an artist, because there was no mental concept resulting in an aesthetic expression of the cutter in the cutting of the stone. Another example of the rule's application is *United States v. Oberlaender*96 in which the court found that hand-painted porcelain plates were works of artisans, since the plates could have been made according to explicit instructions from the purchaser.

The discriminating effect of this rule was clear. The professional productions standard did much more than "exclude objects crafted by non-artists; it also excluded works of primitive sculptors. Primitive sculptors usually acquire their artistic skills as apprentices rather than at art schools, and live where there are few museums or art galleries through which they may become 'established.' "97

Under the new Harmonized System, the professional sculptor requirement has been eliminated: "This heading covers original sculptures and statuary, ancient or modern. They may be in any material . . . in the round, in relief or in intaglio."98 There is absolutely no requirement in the body, the headnotes or the annotations to heading 9703 of the Harmonized Tariff Schedule that the producer of the sculpture be a professional. This puts sculpture on an equal footing with paintings, drawings

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92. TSUS ANN., supra note 91, at item 765.15.
94. Id.
95. 18 C.C.P.A. 117 (1930).
96. 25 C.C.P.A. 24 (1937).
97. DuBoff, supra note 81, at 58.
98. HARMONIZED TARIFF SCHEDULE, supra note 80, at hdg. 9703.00.00.
and other forms of art where a professional production requirement has never been imposed. This could lead to duty-free status being granted more broadly to sculptural pieces previously denied entry on the grounds that they were not professionally produced works of art.

2. Utility and Industrial Use Exclusions

Another area of customs law where the New Harmonized System has greatly liberalized the definition of art is in the area of utilitarian objects and objects of industrial use. Under the TSUS, articles of utility or industrial use were excluded from duty-free status as works of art.

This classification created problems in situations such as the one involved in *T.D. Downing Co. v. United States.* In *Downing,* the plaintiff imported six carved door panels which originally had been removed from a pair of doors in a Vermont church. The panels were shipped to a sculptor in England to be carved, after which they were to be returned to the church and reinstalled in the doors. The court found that since doors were ordinarily articles of utility, and because the panels in question were an integral part of the church doors, without which they would not be able to function properly, the panels were utilitarian and, therefore, excluded from the class of art accorded free entry under the tariff schedules.

The distinction between functional fine art and non-functional fine art is unfortunate. The result of such a distinction is best illustrated by the fact that door panels, otherwise skillfully created works of bas relief sculpture by a recognized artist, were denied free entry merely because they served a functional purpose. Such a result does nothing to enhance the protection of domestic producers from foreign competition. The usefulness of a work of art is irrelevant to its competitive effect. The expense and effort the church builders underwent to send the panels to England demonstrates that they did not simply desire carved door panels, but rather it illustrated their desire to have the panels carved by a particular artist. Taxing the panels upon their return to the United States "only nominally increased the government's revenues by the amount of tariff imposed, and did not protect American industry."  

99. Interview with Harvey Steele, Supervising Import Specialist for U.S. Customs (Apr. 20, 1989). Mr. Steele confirmed this conclusion, stating that, for all practical purposes, customs officials consider the professional sculptor requirement to be eliminated by the new Harmonized System.
100. TSUS ANN., supra note 91, at subpt. A, headnote (1)(iv).
102. Id. at 1040.
103. DuBoff, supra note 81, at 63.
The exclusion of the panels from receiving duty-free status did little to serve the purposes of the customs laws in protecting U.S. industry. It is likely that the owners of the panels would have had the panels carved overseas, regardless of the dutiable rate applied upon reimportation. \textit{Downing} clearly had restrictive effects on the legal definition of art. Such cases made it virtually impossible to classify anything as an art object for import purposes if that object was utilitarian in nature. This rather arbitrary exclusion seems to bear little relationship to the main thrust of customs duties, which is theoretically to protect American-made goods from directly competing with foreign made goods.

A wall hanging was considered in \textit{Kobata v. United States}. Customs agents classified hand-painted wooden Japanese screens as dutiable panels, used chiefly for concealing objects or dividing rooms rather than as works of art. The importer argued that the screens were to be hung as paintings and, thus, should be duty-free. The court agreed with the importer, concluding that the screens were chiefly intended to be used as wall hangings, not as room dividers, since they had hanging devices attached to them.

In conjunction with \textit{Downing}, the \textit{Kobata} decision created the definition of art for customs purposes under the TSUS when utilitarian items were at issue. In the two cases, the conjunction with customs courts seemed to shift their attention from the issue of foreign competition to a greater concern for utility. The courts were obviously deferring to the legislative intent articulated in the tariff schedules to exclude utilitarian goods. It is difficult, however, to comprehend the rationale for this exclusion. Why would the door carvings in \textit{Downing} be more likely to harm U.S. industry than the \textit{Kobata} panels?

Conceivably, the \textit{Downing} court could have adopted the copyright approach of conceptual separability by holding that the artistic craftsmanship was separate from the utilitarian object, and, therefore, the doors would have been granted duty-free status. It does not appear, however, that this approach was considered.

The industrial use exclusion of the TSUS also operated to strictly limit the definition of art, excluding any article intended for industrial use from duty-free status. In \textit{United States v. J.E. Bernard & Co.}, the plaintiff imported an original oil painting by a recognized French painter for the purpose of reproducing the painting on the cover of a chemical manufacturer's trade magazine. The importer argued that, because the painting had not been created for design or reproduction, it did not fall

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105. \textit{Id.} at 1407.
106. 33 C.C.P.A. 166 (1946).
\end{flushleft}
within the industrial use exclusion. The court, however, held that Congress had intended to make the dutiable status of such objects dependent upon the intended use after importation, rather than upon the nature of the object itself.\textsuperscript{107} Apparently, "the painting was taxed because it was presumed to be competing directly with domestically-produced magazine cover illustrations. Yet, it seems more likely that the work was reproduced on the cover of the magazine to be admired for its artistic merit, since its content had nothing to do with the chemical industry."\textsuperscript{108}

The new Harmonized System completely eliminates any general reference to exclusions of utility or industrial use. Consequently, it seems possible that the door panels in \textit{Downing} could be imported duty-free under the heading for original engravings; that the Japanese screens in \textit{Kobata} would certainly be imported duty-free as paintings; and that the oil painting imported in \textit{J.E. Bernard} would be duty-free simply as an oil painting. The fact that the painting was used for an industrial or utilitarian purpose would be irrelevant.

Under the Harmonized System, courts will presumably not be required to deal with the utilitarian and industrial use issues which the courts grappled with in \textit{Kobata}, \textit{Bernard} and \textit{Downing}. The new Harmonized System should simplify the importation of works of art and make it easier for importers to establish duty-free status for works of art which also serve utilitarian and industrial purposes.

This expanded view considerably changes the legal definition of art in the customs area. The courts will no longer be required to follow the restrictive guidelines articulated in \textit{Kobata}, \textit{Bernard}, and \textit{Downing}, and are likely to include works of utility and industrial use within the definition of art, assuming that they are sufficiently unique so as not to compete with American-made goods.

\textbf{3. Ethnographic Objects}

Another area of the TSUS which restricted what was classified as "art" was the section dealing with ethnographic objects of a utilitarian nature. Under the TSUS, if primitive sculpture was less than fifty years old and utilitarian, it was excluded.

However, under heading 9705 of the Harmonized Tariff Schedule, duty-free status is conferred upon "collections and collector's pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, paleontological, ethnographic or numismatic interest."\textsuperscript{109} The annotations to heading 9705 explain that the section applies to articles which

\begin{itemize}
  \item \textsuperscript{107} \textit{Id.} at 169-70.
  \item \textsuperscript{108} Duboff, \textit{supra} note 81, at 65-66.
  \item \textsuperscript{109} \textit{HARMONIZED TARIFF SCHEDULE, supra} note 80, at hdg. 9705.00.00.
\end{itemize}
are very often of little intrinsic value, but derive their value from their rarity, their grouping or their presentation. This would cover articles having a bearing on the study of the activities, manners, customs and characteristics of contemporary primitive peoples, for example, tools, weapons, or objects of worship.

Consequently, heading 9705 seems to eliminate the problem of the exclusion of primitive sculpture less than fifty years old from duty-free status. This development, coupled with the elimination of the professional sculptor requirement of the TSUS, makes it much easier for importers to obtain duty-free status for utilitarian objects less than fifty years old, which are produced by contemporary primitive peoples. This new approach greatly expands what customs officials view as works of art since it is no longer necessary for an importer to go through intellectual gymnastics to prove that the imported piece is non-utilitarian, or made by a professional sculptor.

4. Antique Exception

Antiques is one area where the new Harmonized System has not changed the customs definition of art. Heading 9706 of the Harmonized Tariff Schedule confers duty-free status on any antiques which exceed 100 years of age.\footnote{110} The TSUS also imposed this requirement. Under both systems, pieces 100 years old or older obtain duty-free status provided that they retain their original character; this also includes antique items which have been repaired or restored.\footnote{111} Two recent cases, although decided under the TSUS, demonstrate the workings of the antiques section.

In \textit{Elkins v. United States},\footnote{112} a dispute arose over the classification of three imported carvings, one of coral and two of jade. The importer claimed that the articles were entitled to enter duty-free as antiques made prior to 100 years before their date of entry under item 766.25 of the TSUS or alternatively, as original sculptures under item 765.15 or original works of the free fine arts under item 765.25. All of the items were imported from Singapore and were classified under item 520.61 of the TSUS as "\textit{other articles not specially provided for, or of semiprecious stones.}" The coral carving was assessed at the rate of 21% ad valorem, while the jade pieces were assessed at the rate of 50% ad valorem under item 520.61, which deals with precious and semiprecious stones.

The issue was tried by a confrontation of expert testimony. The importer’s expert analyzed the style and workmanship of the pieces and

\footnotesize
\begin{itemize}
\item \textit{Id.} at hdg. 9706.00.00.
\item \textit{Id.}
\item 83 Cust. Ct. 132 (1979).
\end{itemize}
"dated the coral carving as 'mid-19th century,' the jade bird carving as late 18th to early 19th century, and the jade vase as early 19th century."\textsuperscript{113} The customs expert argued that there were modern tool marks on the right hand of one of the ladies in the coral bird carving. The court rejected this argument, however, finding that the modern tool marks "were attributable to restorers employed to grind down the sharp broken tail of one of the birds."\textsuperscript{114} The court found that because the testimony of the importer's expert was much more persuasive than the expert testimony of the government, the pieces were indeed "made prior to 100 years before their date of entry."\textsuperscript{115}

\textit{Elkins} demonstrates the extremely important role of expert witnesses in cases involving antiques. Had the importer not hired an expert of such high caliber, the modern tool mark accusation made by the government might well have gone unchallenged. In addition, \textit{Elkins} simply states the general rule for antiques that if the object is more than 100 years old, duty-free status automatically attaches. This rule creates an interesting result. Presumably, an object of little artistic merit would be excluded from duty-free status if it were 99 years, 364 days old. However, upon its 100th birthday, it would automatically obtain duty-free status.

The rationale for such a result is obviously the consequence of determining what constitutes duty-free art strictly from an economic point of view. The Customs Service is not as interested in aesthetic considerations as it is in avoiding damage to U.S. industry from cheap foreign goods. Presumably, the 100-year rule assumes that once an object becomes that old, it is unlikely that it will compete with a product produced in the United States. That is not necessarily true. If faced with the choice of an antique clock from England or an identical modern American reproduction, a consumer is faced with the choice of comparing the price and aesthetics of a foreign-made product to an American-made product. Objects do not automatically lose their ability to compete with American-made goods simply because they are 100 or more years old. Consequently, while the antique exception may make some sense economically, it is difficult to see how the object is more artistically acceptable simply because it happens to be 100 years old.

Another area of the antique section where the definition of art plays an important role is in deciding whether an imported object has been substantially altered, changing its basic character. The requirement that the essential character of the piece remain intact operates to limit both

\textsuperscript{113} Id. at 134.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
the antique exception and what the Customs Service considers to be a duty-free work of art. The operation of this concept was demonstrated in *Fisher Galleries v. United States.*

The *Fisher Galleries* controversy involved the classification of embroidered silk and tapestry remnants imported from the People's Republic of China. The importer contested the denial of a timely protest filed with respect to the embroidered goods. The merchandise was classified by the Customs Service under items 365.91 of the TSUS and assessed a duty rate of 90% ad valorem, plus 25% ad valorem under item 766.30. The importer claimed that the items were antiques of the age prescribed by items 766.20 and 766.25 of the TSUS and, therefore, should be admitted duty-free, even though they were repaired or renovated.

The imported merchandise consisted of both antique embroidered remnants more than 100 years old and non-antique borders and backings which were attached to the remnants. The issue before the court was whether or not the addition of the non-antique borders and backings had so changed the character and identity of the remnants that they would now be excluded from their duty-free classification as antiques. The court carefully dissected the facts of the case, noting that upon arrival in the plaintiff's gallery, the merchandise would be displayed with the newer borders and backings apparently attached to protect the remnants from damage during handling. When the sale of the remnant was realized, the borders and backings would be removed and the remnants set in either a new border or a special double frame.

The court proceeded to apply the doctrine of the entireties under which:

> [A]rticles are dutiable in their condition as imported and . . . the actual nature of the article of commerce must be taken as the determinant. Under the doctrine of entireties, where an article is imported as a unit, but the components retain their individual identities and are not subordinated to the identity of the combination, duty will be imposed on the individual entities of the combination as though they had been imported separately.\(^\text{117}\)

The court concluded that the objects should be imported duty-free, stating that:

> [T]he merchandise involved herein forms no new article having a character and identity different from either of its parts. . . . The record indicates the 'envelopes' are put on with single-stitch sewing and/or water-soluble glue; that the material for the borders and backings is selected without regard to artistic enhancement; that all of the borders and backings which can be accounted for are routinely discarded when the remnants are mounted and the monetary value of this material is


\(^{117}\) Id. at 439.
negligible. . . . Logic dictates the character and identity of articles ranging in value from $350.00 to $5,000.00 are not changed or altered by the addition of material having a maximum value of $6.00.\textsuperscript{118}

_Fisher Galleries_ demonstrates how the doctrine of the entireties applies to the duty-free status of imported antiques. _Fisher Galleries_ also points out that the Customs Service finds maintenance of the artistic integrity of the original item to be important if an importer seeks duty-free status for an item as a work of art. If newer materials are added to the work, which materially alters its character, then the doctrine of the entireties will bar the object from obtaining duty-free status.

5. _Other Harmonized System Changes_

Other changes under the new Harmonized System also tend to expand the legal definition of art to include more objects than the TSUS included.

Heading 9701, which covers paintings, drawings and pastels, now includes collages and similar decorative plaques, categories previously not provided for under the TSUS.\textsuperscript{119} The collage section covers usage of bits and pieces of various animal, vegetable or other materials assembled so as to form a picture or decorative design or motif, but does not include articles consisting of just a single piece of material, even if mounted or glued on a backing which may be specifically included in other headings of the nomenclature such as "ornaments" of plastics, wood, base metal, or other similar materials. Such articles are classified under their appropriate headings.\textsuperscript{120}

The Harmonized Tariff Schedule narrows duty-free status in one area under heading 9701. Unlike the TSUS, it provides that "[f]rames around paintings, drawing, pastels, collages or similar decorative plaques . . . are to be treated as forming part of those articles" and classified with them in this heading only if "they are of a kind and a value normal to those articles."\textsuperscript{121} This heading is apparently intended to avoid the problem which arose under the TSUS where importers would import expensive frames surrounding inexpensive pieces of art in order to obtain duty-free status. Heading 9701 demonstrates that, where abuses of the duty-free classification for art are discovered, the Customs Service will not hesitate to act.

Addressing sculptures, heading 9703 allows to be imported "[twelve] castings, replicas or reproductions made from a sculptor’s orig-

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\textsuperscript{118} Id. at 439-40.
\textsuperscript{119} HARMONIZED TARIFF SCHEDULE, supra note 80, at hdg. 9701.00.00.
\textsuperscript{120} See generally HARMONIZED TARIFF SCHEDULE, supra note 80.
\textsuperscript{121} Id. at ch. 97, note 5.
inal work or model, by the sculptor himself or by another artist, with or without a change in scale and whether or not the sculptor is alive at the time the castings, replicas or reproductions are completed." 122 In comparison, the TSUS section allowed only ten "castings, replicas or reproductions" 123 to be imported duty-free.

It seems clear that the Harmonized System was designed to simplify the importation of goods. 124 It has also expanded the definition of art for purposes of importing items duty-free. The elimination of the professional sculptor requirement makes it less cumbersome for importers to prove that a sculpture is a bona fide work of art which should obtain duty-free status. The elimination of the utility and industrial use exclusions has reduced problems arising from cases such as Downing, Kobata, and Bernard. Finally, the Harmonized System has eliminated the problems of importing ethnographic utilitarian objects less than fifty years old by simply not requiring that the article be non-utilitarian or non-industrial.

III
State Statutes

In addition to federal legislation and case law on copyright and Customs Service regulations, several states have enacted laws specifically intended to protect art and artists. The various state statutes define the term "art" in different ways.

A. Moral Rights Statutes

The doctrine of droit moral, which is the basis for many state moral rights statutes, is a civil law concept that was first developed in France. 125 Since France adopted this law, more than sixty-three nations

122. Id. at ch. 97, Additional U.S. note 1.
123. TSUS ANN., supra note 91, at subpt. A, item 765.15.
124. The Harmonized Tariff Schedule permits duty-free entry for some collectibles, as well as art. For example, heading 9704 confers duty-free status on "postage or revenue stamps . . . used or if unused not of current or new issue in the country to which they are destined." Thus, for purposes of the customs definition of art, the definition apparently has been expanded to include postage stamps for collectors. HARMONIZED TARIFF SCHEDULE, supra note 80, at hdg. 9704.00.00.
have recognized the doctrine of *droit moral*.  

Under the *droit moral*, an author has rights over his or her creation, which generally fall into four classes. The first is the right to create. The artist has the right "to be the sole judge of whether his work is worthy and ready to be placed before the public." The second is deciding whether or not to disclose a work to the public. This right includes the right to dispose of a piece of work. Thus, the artist has full control over the creation and may prevent another from publishing a piece that the artist has discarded. The third is the right to withdraw a work after publication. This is applicable, however, only to works published under contract. The fourth right is name attribution. As of the date of this Article, eight states have enacted legislation concerning moral rights: California, New York,  

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126. *See Comment, Copyright: Moral Rights — A Proposal*, 43 *Fordham L. Rev.* 793, 797 n.47 (1975); copyright statutes found in UNESCO, *COPYRIGHT LAWS AND TREATIES OF THE WORLD* (Supp. 1984-86): *Argentina*, art. 52 (1973) (see art. 83); *Australia*, §§ 19-21, 57, 68 (1982); *Belgium*, art. 8 (1958); *Brazil*, arts. 25, 80-81 (1983); *Bulgaria*, §§ 3-4 (1972); *Canada*, § 12(7) (1971); *Czechoslovakia*, §§ 12, 14 (1965); *Denmark*, § 3 (1977); *Egypt*, art. 9 (1954); *Ethiopia*, arts. 1647, 1665, 1671, 1674(2) (1960); *Finland*, art. 3 (1986) (see also arts. 26, 51-52); *Federal Republic of Germany*, arts. 13-14 (1985); *Greece*, art. 15 (1943); *Hungary*, arts. 8-11 (1978); *Italy*, art. 20 (1981) (see also arts. 21-24, 48, 63); *Korea*, arts. 14-19 (1957); *Mexico*, art. 2 (1981) (see also art. 32); *Netherlands*, arts. 23-25 (1985); *Norway*, §§ 3, 48 (1974); *Poland*, art. 52 (1975); *Portugal*, art. 56-62 (1985); *Romania*, art. 3.2, 4 (1968); *Sweden*, § 3 (1982); *Turkey*, arts. 14-17 (1951); *United Arab Republic*, art. 9 (1954); *Uruguay*, art. 12 (1938) (see also art. 37); *Venezuela*, arts. 20-21 (1962); *Yugoslavia*, art. 29 (1968) (see also arts. 97, 100).


129. *Id.*

130. *Id.* at 799.

131. *Id.* at 802.

132. *Id.*

133. *Id.*


Massachusetts, Massachusetts, Maine, Maine, Pennsylvania, Pennsylvania, Louisiana, Louisiana, New Jersey and Rhode Island.

1. The California Act

The California Art Preservation Act (the "California Act"), passed in 1979, was the first state legislation that offered some protection for artists' moral rights. The statute limited the definition of works of art to fine art, defining the term as "original painting, sculpture, or drawing of recognized quality." In 1982, the California Act was amended to include an "original work of art in glass," thus including craftspersons in this medium as producers of fine art for the first time in the United States. However, works produced under contract for commercial use were excluded, as well as the works of craftspersons who produced pottery, weaving or woodwork. The California Act defines "commercial use" as "fine art created under a work-for-hire arrangement for use in advertising, magazines, newspapers, or other print and electronic media."

The qualification of "recognized quality" in the original definition was an attempt by the legislature to limit the scope of the statute. This qualification raises obvious problems. The limitation calls for the exercise of judgment without any indication as to how or by what criteria, the judgment is to be made. The legislature's omission of works of general artistic craftsmanship has been explained as demonstrating the California "legislators' concern only for works embodying art in its highest form, usually represented by unique non-utilitarian works, the destruction of which would be a great loss to the cultural heritage of the State."

The California courts have strictly construed the California Act as applying only to fine art. In Robert H. Jacobs, Inc. v. West Oaks Realtors, Inc., Jacobs, an architect, agreed to two contracts with the realty company, providing architectural services for the construction of two homes on adjacent lots. Jacobs prepared tracings of his plans, filed for

143. Id. § 987(b)(2).
144. Id. (see Historical Note, 1982 amends.).
145. Id.
146. Id. § 987(b)(7).
city approval and applied for a city building permit. Several months later Jacobs “discovered that the homes were not being built according to his plans.”

Jacobs asserted that his architectural plans were a work of art and therefore were protected under section 987. The court denied Jacobs’ claim, concluding that architectural plans were not covered under section 987 of the Civil Code. The court stated that “although the French droit moral embraces architectural plans (citations omitted), Jacobs’ plans were copies of tracings prepared in a commercial context and are expressly excluded by section 987.” Jacobs reveals an important distinction between the California moral rights statute and French law—the California Act defines art more narrowly.

In contrast to the rather restrictive California definition, the French droit moral “applies to virtually all art forms.” While the French droit moral statute does not list those works which are protected, “the statutory explanations of the rights, interests and protections of droit moral indicate that its coverage is broad, extending to all tangible or realized expressions of the mind.” The statute applies to music, choreography, cinematography, drawing, painting, architecture, sculpture, engravings and lithography, maps, and photography, among other forms of expression.

As one commentator pointed out, the California Act, which strictly limits the definition to original paintings, sculptures, or drawings or original work in glass of recognized quality, “appears contrary to the spirit of droit moral” in that it fails to extend protection “to a broader range of visual arts, [i.e., photography], let alone all other creative efforts.”

Indeed, the California Act’s limitation to works of “recognized quality” may deprive certain paintings, sculptures, or drawings of protection. The California Act contemplates the use of expert testimony to determine the meaning of recognized quality, yet it has been correctly suggested that “placing so much weight on the testimony of art ‘experts,’ . . . may . . . discriminate in favor of a sometimes elitist art establishment.” The “recognized quality” requirement seems to bolster “insti-
tutionalized bias,” under which new and innovative art forms have always suffered disdain.\textsuperscript{157}

The narrow definition of art in the California Act suggests that only a limited class of art and artists is protected. While the California Act may be better than none at all, it is a feeble step in contrast to the all-encompassing French droit moral.

2. The New York Act

A New York statute protecting artists’ authorship rights was first enacted in 1983, then repealed and reenacted in 1984.\textsuperscript{158} Similar to the California Act, the New York statute only applies to certain works of art. The New York statute covers only those works which constitute “fine art.”\textsuperscript{159} In this context, “fine art” is defined as “a painting, sculpture, drawing, or work of graphic art, and print, but not multiples.”\textsuperscript{160} The New York statute does not cover works of “sequential imagery,” and, thus eliminates motion pictures from coverage.\textsuperscript{161} Unlike the California Act, the New York statute does not require a showing of “recognized quality.” This deletion avoids unnecessary and confusing categorizations by expert witnesses and is, therefore, a preferable formulation.

Another stark contrast to the California Act is the fact that the New York statute covers reproductions.\textsuperscript{162} The New York statute protects reproductions of fine art and photographic print or sculpture of limited edition multiples “of not more than 300 copies.”\textsuperscript{163} Consequently, while the New York statute excludes multiples from its definition of fine art, it effectively includes them under the protective authorship rights clause. However, the New York statute contains restrictive clauses that make it applicable to a narrower class of objects than those covered under the California Act. For example, the focus of the New York statute on public display is in sharp contrast to the California Act, which does not contain a display requirement.

The New York legislature’s principal purpose in enacting the Authorship Act was to protect the artist’s reputation. The narrowness of that purpose is demonstrated by the limitations on the law’s applicability. Even if a work fits within one of the defined categories of the Authorship Act, no protection is available unless the work is “knowingly displayed in a place accessible to the public, [and] published or reproduced in this state.” Similarly, the law’s protection against alteration

\textsuperscript{157} Id. at 49.
\textsuperscript{158} N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney Supp. 1990).
\textsuperscript{159} Id. § 14.03(3)(e).
\textsuperscript{160} Id. § 11.01(9).
\textsuperscript{161} Id. § 14.03(1).
\textsuperscript{162} Id.
\textsuperscript{163} Id. §§ 11.01(10), (17), 14.01, 14.03(3)(e).
or mutilation only applies when "damage to the artist's reputation is reasonably likely to result." In addition, if an altered or mutilated work is not identified as the artist's, then a cause of action results only if "it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom." 164

The limitation of the New York statute was recently demonstrated in Tracy v. Skate Key, Inc. 165 In Tracy, the plaintiff sued under both the Copyright Act and the Lanham Act, as well as the New York authorship rights statute. The plaintiff contended that the defendants had infringed his copyright in a logo he had designed for them while under contract. The plaintiff was a graphic artist engaged by the defendants to paint a mural for their roller skating rink. The plaintiff contended that the defendants infringed his copyright in the mural by manufacturing and selling his design as a logo on its merchandise. After a lengthy discussion of the Copyright Act and the Lanham Act, the court concluded that the cause of action brought under the New York statute was preempted by the Copyright Act of 1976. 166 The court noted that "all equitable or legal rights that are equivalent to any of the exclusive rights within the general scope of copyright are governed exclusively by federal copyright law. . . . [Therefore], the New York Artists Authorship Rights law was preempted by the Copyright Act because it tracks the rights protected by the Copyright Act." 167

The Tracy court failed to explain exactly which rights under the New York statute were "tracked" by the federal legislation. Instead the court chose to cite a previous New York case which held that "when rights defined by the state law would be infringed by an act which, in and of itself, would infringe one of the rights protected by the Copyright Act, the state law is preempted." 168

A strong argument can be made that the federal district court's conclusion in Tracy was erroneous. While it is true that both the New York statute and the Copyright Act protect artists' rights, the New York statute goes further by protecting an artist's rights against the knowing public display of the artist's work in an altered, defaced, mutilated or modified form. This right under the New York statute does not depend on the artist owning a valid statutory copyright.

166. Id. at 751.
167. Id. at 750-51 (citing Roland Litoff, Ltd. v. American Express Co., 621 F. Supp. 981, 986 (S.D.N.Y. 1985)).
Consequently, the plaintiff in Tracy should have argued that the right defined by the New York statute, which prevents the defacement or modification and public display of an artist's work, is quite different from the right created by the Copyright Act. Not only does the New York statute track the rights given by the Copyright Act of 1976, it specifically provides for relief based on damage to the artist's reputation. The scope of this right, therefore, would seem to differ from the general scope of the Copyright Act, which does not directly address damage to an artist's reputation.

3. Other State Moral Rights Statutes

As previously noted, Massachusetts, Maine, New Jersey, Pennsylvania, Rhode Island, and Louisiana have enacted moral rights legislation. These state statutes are similarly worded and generally define art as a work of "fine art." The Massachusetts law is typical of these statutes, defining "fine art" as: "any original work of visual or graphic art of any media which shall include but not be limited to, any painting, print, drawing, sculpture, craft object, photograph, audio or visual tape, film, hologram or any combination thereof, of recognized quality."

All six states use the phrase "but not limited to" in their statutes in order to provide a broader scope of coverage. Pennsylvania and Louisiana include the "recognized quality" language in their moral rights statutes, thus leaving the door open for litigation to determine exactly what is meant by "recognized quality." The "recognized quality" requirement is similar to the provision in the California Act. This could create many of the same problems discussed under the section on California's moral rights statute. In contrast, Maine, New Jersey, and Rhode Island do not use the "recognized quality" language in their statutes. Presumably, artists in these states will not be required to prove the quality of their work before being granted protection.

These six statutes also differ in their treatment of motion pictures. The Massachusetts statute specifically includes film. In comparison, the Pennsylvania statute does not specifically mention film, but does state that "fine art" includes, but is not limited to, a painting, drawing, or

sculpture. Consequently, a broad reading of the Pennsylvania statute could result in the inclusion of movies.

Conversely, movies are specifically excluded from coverage in Maine, New Jersey, Rhode Island, and Louisiana. In states such as Massachusetts, it is foreseeable that the editing of a movie will be considered a violation of the artist's rights under the statute. Such an interpretation would almost certainly chill any motion picture industry activity in Massachusetts and possibly Pennsylvania. Perhaps one of the reasons states specifically exclude movies from the protection of their moral rights statutes is to encourage movie-making in their states.

State moral rights statutes also differ in the protection accorded to editioned works. For example, the Maine statute protects 300 copies of a limited edition. It provides that a "work of fine art [includes] . . . limited editions of no more than 300 copies." New Jersey, Rhode Island, and Louisiana also protect 300 copies. Massachusetts and Pennsylvania, however, do not mention limited edition copies.

Thus, an interesting but rather irrational pattern emerges regarding the scope of protection provided by the six states. While Massachusetts and Pennsylvania restrict the scope of their statutes by adding a "recognized quality" requirement and by not providing for editioned pieces, they may grant some additional protections for motion pictures. In contrast, Maine, New Jersey, and Rhode Island appear to take a broader definitional approach by eliminating the recognized quality language and protecting 300 limited edition copies. But these states specifically exclude motion pictures from moral rights protection. This probably results from the states recognizing that the motion picture industry has, in recent years, been quite active outside of California.

Louisiana specifically excludes movies and imposes the recognized quality requirement, but also gives protection to 300 limited edition copies. Consequently, Louisiana, like the other five states, broadens coverage in one area but narrows the definition by excluding movies and imposing the "recognized quality" requirement.

185. MASS. GEN. LAWS ANN. § 85S(b) (West Supp. 1989).
The fact that statutes such as Massachusetts' include works of sequential imagery (i.e., motion pictures) creates some interesting litigious possibilities. In Pennsylvania, where the definition could be interpreted to include motion pictures but also limits protection to works of "recognized quality," the courts may become embroiled in viewing motion pictures and be forced to make value judgments regarding a film's artistic merit. The difficulty of this task is best illustrated by the U.S. Supreme Court's attempts to define what is and is not obscenity in the motion picture industry.

Open-ended statutory terms such as Pennsylvania's, when coupled with recognized quality specifications, are at best unfortunate because they require the courts to make artistic value judgments. At worst, they appear to be an intentional avoidance of responsibility by the legislatures, thus leaving the hard decision to the judiciary as to what should and should not be protected.

B. The California Resale Royalty Act

California is still the only state to enact a statewide Resale Royalty Act188 which requires sellers to pay the artist five percent of the amount obtained from the sale of any work covered by the Act.189 However, the statute does not apply to the initial sale by an artist or to resale at any amount less than either the original purchase price or $1,000.190 In addition, the Resale Royalty Act's coverage extends for twenty years after the artist's death, with the royalties to be paid to the artist's heirs.191

Like the Art Preservation Act,192 the Resale Royalty Act applies only to works of fine art.193 The Resale Royalty Act, however, does not include the "recognized quality" limitation. This is appropriate considering the embarrassment that the artist's heirs might suffer if they had to prove that the artist's work fulfilled the recognized quality requirement before qualifying under the Resale Royalty Act.

C. State Consignment Statutes

Another area of state legislation where the legal definition of art has become important is gallery consignment statutes. More than 20 states

189. Id. § 986(a).
190. Id. § 986(b)(1), (2).
191. Id. § 986(a)(7).
192. See supra note 142 and accompanying text.
193. Id. § 986(a).
have adopted consignment statutes which establish a fiduciary relationship between an artist and an art dealer.  

For consignment purposes, state legislation generally uses a broader definition of art, unlike the moral rights and resale royalty statutes. The liberal definition used in the consignment statutes is probably due to a recognition that legislatures and courts are more familiar with consignment sales than with questions arising out of the relatively new moral rights statutes. A consignment statute presents the courts with familiar questions of contract and agency law. The moral rights statutes, on the other hand, perhaps define art more narrowly because legislatures were being very cautious about extending moral rights beyond a few well-defined categories. The extremely narrow definitions in the California moral rights statute have been attributed to the newness of the concept: “Obviously, the law cannot suddenly afford a special status to fine arts without providing the means to delimit its boundaries. The Act’s narrow definition prevents the abuse of newly created moral rights by discouraging those who would be tempted to pursue purely frivolous or self-promotional claims.”  

There are several formats for the definition of art for purposes of gallery consignment laws, but two states in particular, Oregon and New York, stand out as having unique definitions.

1. The Five-Part Rule

The five-part definition, by far the most common statutory scheme, is typified by Oregon Revised Statute section 359.200(6) which states: “Fine art means: (a) an original work of visual art such as a painting, sculpture, drawing, mosaic or photograph; (b) a work of calligraphy; (c) a work of original graphic art such as an etching, lithograph, offset print, silk screen or other work of similar nature; (d) a craft work in materials including but not limited to clay, textile, fiber, wood, metal, plastic, glass or similar materials; or (e) a work in mixed media such as


a collage or any combination of the art media described in this subsection.\textsuperscript{197}

Arizona,\textsuperscript{198} Colorado,\textsuperscript{199} Connecticut,\textsuperscript{200} Iowa,\textsuperscript{201} Massachusetts,\textsuperscript{202} Montana,\textsuperscript{203} New Hampshire,\textsuperscript{204} North Carolina,\textsuperscript{205} Tennessee,\textsuperscript{206} Washington\textsuperscript{207} and Wisconsin\textsuperscript{208} all have virtually identical definitions. The five-part definition of art for gallery consignment law purposes has the advantage of being relatively specific and reasonably comprehensive.

2. \textit{The New York Legislation}

The New York legislation takes a different approach and provides that "the term 'fine art' means a painting, sculpture, drawing, work of graphic art, photograph or craft work in materials including, but not limited to, clay, textile, paper, fibre, wood, tile, metal, plastic or glass."\textsuperscript{209}

The New York definition incorporates the use of the phrase "but not limited to," thus, applying a broad-brush approach to the definition. It should be pointed out that the language "but not limited to" appears to deal only with the materials involved in a work of art and not with the actual character of the work of art. Although the New York definition seems quite broad on its face, it in fact applies only to fine art in the specified areas and incorporates the "but not limited to" language only when discussing the materials used to create the work of art.

Comparing the New York definition to the five-part definition, the New York statute does not appear to cover works such as calligraphy, as do many of the five-part definition statutes. The five-part definition also appears to apply a very broad definition of "original graphic art," including works "similar in nature." Conversely, the New York statute contains no such language. Additionally, the New York statute does not particularly mention works in mixed media, although they are not specifically excluded.

The fact that the New York statute does not specifically include works in mixed media may indicate a desire by the legislature to exclude

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{201}] Iowa Code Ann. § 556D.1(2) (West Supp. 1989).
\item[\textsuperscript{208}] Wis. Stat. Ann. § 129.01(4) (West 1989).
\item[\textsuperscript{209}] N.Y. Arts & Cult. Aff. Law § 11.01 (McKinney 1984).
\end{enumerate}
\end{footnotesize}
these works. The language of the statute does not contain any "catch-all" phrases such as "but not limited to," except in relation to materials. This would seem to indicate that, unless works in mixed media can somehow be fit into one of the enumerated categories, the New York statute was intended to exclude these works from its coverage.

3. The Michigan Rule

The Michigan rule uses a simple and broad definition of art for its consignment statute. It states that "fine art means a painting, sculpture, drawing or work of graphic art."210 Whether this definition includes collages, calligraphy or mixed media is not clear. The Michigan definition is a good example of an unfortunately simple and imprecise definition of art. This type of definitional approach is not as precise as the five-part definition or New York definition and, therefore, leaves too much discretion to the courts in defining art for consignment purposes.

Minnesota applies a very similar definition to that applied in the Michigan statute. Minnesota defines art to mean "a painting, sculpture, drawing, work of graphic art, photograph, weaving or work of craft art."211 However, the Minnesota statute includes several areas of art which are not included in the Michigan statute, such as photographs, weaving and crafts.

4. The Florida Rule

The Florida statute is unique and states:

"Art" means a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame, quilt, print, photograph, or craft work executed in materials including but not limited to, clay, textile, paper, fiber, wood, tile, metal, plastic, or glass. The term shall also include a rare map which is offered as a limited edition or a map 80 years old or older; or a rare document or rare print which includes, but is not limited to, a print, engraving, etching, woodcut, lithograph, or serigraph which is offered as a limited edition, or one 80 years old or older.212

The inclusion of rare maps, rare documents or rare prints in the Florida statute is undoubtedly attributable to the large number of such objects in the Florida area which are apparently sold by dealers.

5. The Texas Rule

The Texas rule is also used by Arkansas and defines art for consignment purposes as "a painting, sculpture, drawing, work of graphic art, pottery, weaving, batik, macrame, quilt, or other commonly recognized

211. MINN. STAT. ANN. § 324.01, subdiv. 3 (West Supp. 1990).
art form." This "commonly recognized" definition is unique to Texas and Arkansas and appears to be similar to the "recognized quality" requirement found in the California moral rights statute.

The Texas consignment statute's definition of art has been narrowly interpreted by the courts. In *In re Arthur A. Everts Co.*, the plaintiffs, two jewelry wholesalers, filed a motion in the Bankruptcy Court to lift a stay against the debtor, a jewelry retailer. The plaintiffs also filed a complaint against a bank asserting that, as consigning suppliers to the debtor, they had a superior lien position to that held by the bank. The court disagreed and held that the merchandise consigned to the debtor did not fall under the definition of art as articulated by the Texas statute. The court stated that:

> There was insufficient proof of the uniqueness of the deliveries. Such jewelry was reproduced in varying forms by such suppliers. I find that Plaintiffs' deliveries did not constitute "art" as defined by Article 9018(2)(1). Furthermore, both of the suppliers were corporations and do not appear to meet the definition of "artists" in said Act. The Act appears to apply only to individuals, not to corporate suppliers. Additionally, the debtor, which is a jewelry retail store, does not meet the criteria of "art dealer" and thus, such suppliers fail to qualify under article 9018(3).

Consequently, the Texas court read "uniqueness" into the definition of art under article 9018. The court does not explain where that concept originated; it is not articulated in the statute. One can only conclude that the court, in reading the part of article 9018 which states that art means "other commonly recognized" art forms, interpreted it to mean that an art form is not commonly recognized unless it is unique. *Everts* demonstrates that even when a statute does not contain limitations such as a uniqueness requirement, some courts will assume that in order to constitute a work of art an object must somehow be considered "unique."

Although it is unclear exactly why the jewelry in *Everts* was not considered as "[an]other commonly recognized art form," the case does point out a major defect in such a broad and vaguely worded definition. By leaving it up to the court to determine what is "commonly recognized," the Texas legislature created two problems. First, there is no suggestion how the court should decide what is a "commonly recognized" art form. This creates the same problem that was discussed concerning the "recognized quality" section of the California Art Preservation Law. The use of experts may create a bias against innovative works on the one extreme, and somewhat mundane works *(i.e., costume*

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215. Id. at 707.
jewelry) on the other. Secondly, open-ended and vaguely worded legislation is likely to create more litigation than would be created by a more precisely worded statute, such as Oregon’s law.

Of the five basic methods used to define art for the purposes of consignment legislation, the five-part rule is the most comprehensive. It is very specific regarding the types of objects covered, and does not include ambiguous phrases such as “other commonly recognized art forms.” This sort of specifically worded statute also avoids excessive and unnecessary litigation. The Texas statute, on the other hand, which includes the ambiguous language of “other commonly recognized art forms,” seems to encourage disagreement over what is commonly recognized and therefore may encourage litigation, as evidenced by Everts.216

216. Other state statutes beyond the scope of this study define art in extremely broad language. Several states have defined art in relation specifically to the duties of the state art commission. Generally, these statutes tend to be extremely broad in scope. Three good examples are Oregon, North Carolina and Minnesota.

The Oregon Arts Commission’s definition of art is much broader than the fine art definition of the consignment statute, stating that:

“Arts” includes, but is not limited to, instrumental and vocal music; dance, drama, folk art, creative writing and poetry; architecture and landscaping design and the fields allied to them; painting, sculpture, photography; graphic and craft arts; industrial design; costume and fashion design; motion picture, television, radio; tape and sound recordings; the history, criticism, theory, and practice of the arts; and the arts related to the presentation, performance, execution, and exhibition of such art forms.

OR. REV. STAT. § 359.010 (1987). Obviously geared toward a different purpose from the consignment statute, the Arts Commission statute clearly attempts to encompass every aspect of artistic expression in the community including television and radio.

The North Carolina statute, although not as comprehensively specific as the Oregon statute, is worded almost identically and states that “the term art includes but is not limited to: music, dance, drama, creative writing, architecture and allied fields, painting, sculpture, photography, crafts, television, radio and the execution and exhibition of such major art forms.”


The Minnesota statute has perhaps the most all-encompassing definition, stating that “‘arts’ means activities resulting in the artistic creation or artistic performance of works of the imagination.”

MINN. STAT. ANN. § 139.07(a) (West 1979).

In passing it should be noted that state Percent for Arts Acts and Public Art Acts contain very broad and all-encompassing language as do the art commission statutes. Statutes such as Vermont (VT. STAT. ANN. tit 29, § 42(9) (Supp. 1989)), Maine (ME. REV. STAT. ANN. tit 27, § 4526 (1988)), Rhode Island (R.I. GEN. LAWS § 42-75.2-3(a) (1988)), Michigan (MICH. COMP. LAWS § 53.517(51)(a) (1985)), Georgia (GA. CODE ANN. § 91-503(c)(4) (Harrison Supp. 1989)), and the District of Columbia (D.C. CODE ANN. § 31-2002(4) (1981)) all contain phrases such as “but is not limited to” or “but not restricted to,” which tend to make the legal definition of art for purposes of these laws extremely broad.
Proposed Federal Legislation: The Kennedy Bill

Senator Edward Kennedy (D-Mass.) introduced S. 1619 (the "Kennedy Bill") in the summer of 1987. The Kennedy Bill proposed to amend the Copyright Act to include a provision protecting artists' moral rights and providing for artists' resale royalty rights.

The Kennedy Bill recognized "the implicit originality of individual works of fine art, the public benefit of encouraging a creative working environment for artists, [and] the national responsibility to enrich and enliven our cultural heritage." The Kennedy Bill required a "showing of grossly negligent or intentional conduct resulting in 'the significant or substantial distortion, mutilation, or other alteration' of a publicly displayed work." In this respect, the Kennedy Bill was very similar to the New York moral rights statute which requires a public display before a cause of action arises. However, under the Kennedy Bill the public display requirement was not necessary if the work was actually destroyed. This aspect of the Kennedy Bill was similar to the California statute, which also does not require a public display in order for a cause of action to arise.

It should be noted that the Kennedy Bill only applied to works of "fine art" and, like the California statute, the quality determination was left to the trier of fact. That determination would apparently be "based upon the 'opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers, curators of fine art,' " and other professionals. Additionally the Kennedy Bill contained the quality limitation of the California Act and the public display limitation (except for destruction) of the New York statute. The bill was obviously a good faith effort on the part of Senator Kennedy to protect artists' moral and economic rights. The "recognized quality" and "public display" requirements, however, are both unnecessary impediments to successful litigation by aggrieved artists. The Kennedy Bill died in Committee before the end of the legislative session.

On June 16, 1989, Senator Kennedy introduced S. 1198 (the "1989 Kennedy Bill"), a revision of his previous bill, S. 1619. Four days
later, Representative Kastenmeier (D-Wis.) introduced a companion bill, H.R. 2690. While the two bills contain similar provisions, there are several differences between them and their predecessor. The resale royalty provision of the Kennedy Bill is not included in either S. 1198 or H.R. 2690. However, both bills mandate a study to determine the feasibility of a federal resale royalty. Both bills contain two important components of moral rights: the right of attribution and the right of integrity. Both bills provide a limited right of integrity for those who create works of visual art which have been incorporated into or made part of a building.

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228. S. 1198 and H.R. 2690, supra notes 224-25, § 3(a). Traditionally, what has been considered to be the right to paternity was composed of: (1) the right to be credited as the author of one's own work; (2) the right not to have one's name attached to a work which one does not acknowledge to be one's own, and (3) the right to enjoin a third person from substituting his or her name for that of the creator. See Deskbook of Art Law, supra note 125, at 802-03. The 1989 Kennedy and Kastenmeier Bills provide the author of a "visual work of art" with the right: (1) to claim authorship of their works; (2) "to prevent the use of his or her name as the author of any work of visual art which he or she did not create;" and (3) "the right to prevent the use of his or her name as the author of a work of visual art in the event of a distortion, mutilation or other modification of [the] work." S. 1198 and H.R. 2690, supra notes 224-25, § 3(a)(1), (2). The bills also cover the right of integrity. Noticeably lacking from these rights are the rights to enjoin third parties from claiming authorship of the author's work and to disclaim authorship of a work created by him or her but not acknowledged as such. U.S. courts have provided some protection against both through use of the doctrine of unjust enrichment. See Leiser & Spiessback, supra note 227, at 21-25. Further, the buyer of a work which has been falsely attributed to a third party may also bring an action against the seller. See Deskbook of Art Law, supra note 125, ch. XI.
229. S. 1198 and H.R. 2670, supra notes 224-25, § 3(a)(3). The right of integrity contained in both bills provides an author of a work of visual art "the right to prevent any destruction, distortion, mutilation, or other modification" of either (1) a work that "would be prejudicial to his or her honor or reputation," or (2) "a work of recognized stature." S. 1198, supra note 224, § 3(a)(3)(A), (B); H.R. 2690, supra note 225, § 3(a)(3). While the 1989 Kennedy Bill has a separate subsection defining when a work is of recognized stature, the Kastenmeier Bill provides that destruction or mutilation or any other modification of a work of recognized stature constitutes prejudice to the honor and reputation of the author of that work. Furthermore, the 1989 Kennedy Bill provides that "any intentional or grossly negligent distortion, mutilation, or modification of the work is a violation of the right," while the Kastenmeier Bill deems "any such destruction, distortion, mutilation, or modification of [the] work . . . a violation of the right" without regard to fault. S. 1198, supra note 224, § 3(a)(3)(B); H.R. 2690, supra note 225, § 3(a)(3). Both bills provide that changes in a work of visual art due to the mere passage of time or conservation efforts are not considered mutilation, destruction or modification of the work. S. 1198 and H.R. 2690, supra notes 224-25, § 3(c)(1), (2).
230. S. 1198 and H.R. 2690, supra notes 224-25, § 4. The right to integrity does not apply to art which "has been incorporated into or made part of a building" if both the artist and owner of the building have "consented to the installation of the work in the building" in a written agreement signed by both parties, and the art is not removable without some destruc-
To be considered as a work of visual art under either of the bills, three criteria must be met: first, the work must be a "painting, drawing, print, sculpture, or still photographic image;" second, the work must be "produced for exhibition purposes only;" and third, the work must exist "in a single copy, in a limited edition of 200 copies or fewer, or in the case of a sculpture, in multiple-cast[ings] . . . of 200 or fewer." If a work meets all of these requirements and does not fall into a number of exceptions, the artist is entitled to the rights set forth in the bills.

The bills contain a definition of "works of visual art" because preceding bills contained less precise definitions, and due to the desire to limit the Bill's application to those "artists whose works of art have been allowed to fall through the existing gaps in our copyright laws." The bills also cover the "fine art of photography, a very limited class of still photographic images produced for exhibition purposes in galleries and museums." The bills further provide that evidence of commercial exploitation of a work does not exclude the work from the protection afforded to works produced "for exhibition purposes."

The definition of "work of visual art" contained in both bills has several express exceptions. The first reiterates the number requirement for copies or limited editions. The second exception is a laundry list of items which will not be considered works of visual art. Any work
made for hire is excluded from the definition of work of visual art under the third exception. The fourth exception excludes any work derived from a work outside of the statutory definition. Finally, the bills exclude “any work not subject to copyright protection under section 102” of the Copyright Act. The exceptions to the definition of works of visual art were added to the present bills to reinforce the objective of not granting such rights to works which are “not subject to copyright protection under title 17 of the United States Code.” Unfortunately, the legal definition of art contained in both bills is narrower than that found in the Copyright Act. Thus, some artists who may have copyright protection for their works will not enjoy the benefits of the moral rights of attribution and integrity if these bills are enacted.

V
Conclusion

As the case law and statutes clearly indicate, the legal definition of art greatly depends upon who is doing the defining. The copyright definition results from a concern over conferring only enough protection so as not to stifle economic competition and the free flow of trade. Distinct from that definition is the customs approach which seeks to insure that duty-free status is not conferred on objects that might actively compete with American-made goods.

The state moral rights laws express a concern for the protection of artists’ rights. This concern results in a definition which emphasizes the protection of bona fide works of “fine art.” However, some states also

238. Id. § 2(3). The Copyright Act defines a work made for hire as either a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audio visual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.


239. S. 1198 and R.R. 2690, supra notes 224-25; § 2(4). Exception (4) excludes “any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in paragraph (1), (2), or (3).” Id.

240. Id. § 2(5).

impose the dubious "recognized quality" test. Some states, such as Massachusetts, cover moving pictures, while others specifically exclude this type of work from their statutory definition. Very little definitional common ground can be found in this broad body of legal subject matter. A few common threads do, however, exist.

First, all of the legislation requires some sort of originality on the part of the creator before the work will be considered art. For the copyright definition, this requirement takes on the guise of "minimal originality." For customs purposes, the originality requirement is couched in terms of "uniqueness," which prevents competition with domestically created goods. Most of the state moral rights statutes use the word "original" or its equivalent in order to assure that they are protecting a bona fide work of art. State consignment statutes also use the originality test, as Everts demonstrates, to prevent people such as jewelry wholesalers from claiming that their wares are works of art.

Second, the legal definitions applied by the various laws all express concern over the breadth of the definition of art. Requirements such as "minimal originality," "conceptual separability," "fine art," and "recognized quality" all point to one conclusion. When copyright, customs, and state statutes confer a special status on works of art, the primary goal has been to narrowly limit what objects fall into the protected categories to prevent the law from being used for unintended purposes. For example, the California Art Preservation Act, which protects some moral rights of artists, provides a narrow definition of what is covered. If the definition were an extremely broad one, as in France, one could foresee a situation where a lawsuit would be brought because graffiti is removed from a restroom wall. This is probably not a desired goal of a moral rights statute.

Such concerns, on the other hand, have led some definitional approaches, such as the customs approach under the TSUS, to make some dubious distinctions concerning what is art. Why a beautifully engraved door, such as the one in Downing, is not a work of art is difficult to explain. Hopefully, the new Harmonized System's elimination of the utilitarian and industrial use exclusion from the duty-free status requirements will eliminate this problem.

A universal legal definition of art probably cannot go much further than stating that a work of art is an original expression of the creator, embodying a creative process in which the creation is distinctively the work of that creator. A more precise definition, although desirable, would not do justice to the diverse interests involved.