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SOME COPYRIGHT ASPECTS OF NEW ART: POP GOES THE EASEL

I. INTRODUCTION

Under the present Copyright Act, protection is afforded to artistic as well as to literary endeavors.[1] Although this coverage was originally limited to *fine* arts,[2] since 1909 it has involved a wider spectrum called "works of art."[3] In this category are included paintings, drawings and sculpture, the works traditionally associated with the fine arts, as well as areas of artistic craftsmanship.[4] In the past fifteen years, the Supreme Court has further expanded the coverage of the Act by the inclusion of utilitarian objects of artistic value.[5] Thus, copyright protection is now available for a wide variety of works, provided only that the requirements of the Copyright Act be complied with, and that there be some creative artistry involved.[6] In the past few years, however, a new art form has emerged which not only has revolutionized art, but also may create numerous problems under the copyright law.

This new form of art has been labeled "pop art."[7] For its subject matter it draws upon commercial artifacts and commonplace objects.[8] The specific materials depicted in pop art come from an assortment of sources reflective of contemporary culture; thus, artists have made paintings and three-dimensional works consisting entirely of such common objects as Campbell Soup cans and Brillo boxes,[9] comic strip frames,[10] road signs,[11] and bronzed beer cans.[12] All these works have in common the fact that they are adapted from previously existing subject matter which, because it is man-made and commercial in nature, may itself be protected by the copyright law. This comment will consider whether pop art may constitute an infringement of its commercial origin, pop's own potential copyrightability as art, and whether pop art can itself be infringed by the recent trend of major companies to market pop art objects commercially.

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[1] Copyright Act § 5, 17 U.S.C. § 5 (1964), provides that one of the classes of copyrightable materials includes works of art and models or designs for works of art.

[2] Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212.

[3] See Note, Protection for the Artistic Aspects of Articles of Utility, 72 Harv. L. Rev. 1520, 1524 (1959).

[4] 37 C.F.R. § 202.10(a) (1968).

[5] Id. See Mazer v. Stein, 347 U.S. 201 (1954).

[6] 37 C.F.R. § 202.10(b) (1968).

[7] "Pop art" is a British term, coined in reference to the sources of the art, rather that to its popular appeal. L.R. Lippard, Pop Art 79-80 (1966).

[8] See M. Amaya, Pop Art . . . And After 11 (1965).

[9] Works of Andy Warhol, in id. at 103.

[10] Works of Roy Lichtenstein, in J. Rublowsky, Pop Art 5 (1965).

[11] Works of Robert Indiana, in M. Amaya, supra note 8, at 45.

[12] Work of Jasper Johns, in Seckler, Folklore of the Banal, 50 Art in America 56, 58 (1962).

II. Pop Art as Infringement

Since pop art employs artificially produced objects, rather than natural subjects, much of the original material is eligible for copyright protection. For some pop art, such as oversized plastic hamburgers, no problem of infringement exists, as it is derived from uncopyrightable sources. Any use of *copyrighted* material, however, may constitute infringement, even though the use is for a legitimate artistic purpose. Unlike the charge of trademark infringement, where the test employed is actual or potential confusion, all that is required for copyright infringement is an improper copying or plagiarism of a substantial part of the copyrighted work.[13] Under the Copyright Act, protection is specifically afforded to such pop art subjects as commercial labels,[14] which artist Andy Warhol has depicted, and comic strips,[15] upon which artist Roy Lichtenstein bases much of his work. One example of such copying was an *exact* reproduction by Roy Lichtenstein of a diagram of a Cezanne painting which had been used in a text book for instructional purposes.[16] This precision of copying without any changes is also evident in Lichtenstein's comic strip frames.[17] Many other sources of pop art are also subject to copyright protection, so that the use of these objects in a pop work may well be an infringement.

Even though a particular pop work technically infringes a copyright of its source material, the artist's use may constitute a "fair use," and thereby provide a defense.[18] The doctrine of fair use arises from the essential nature of copyright protection. It is entirely equitable in nature, and thus defies concise definition. Because of his contribution, a copyright holder is granted the exclusive right to copy what he has created.[19] This right cannot be so exclusive, however, as to exclude others from using part of his contribution in the pursuit of further progress.[20] Ultimately, then, the protection provided by the copyright law must be balanced against the necessity for further ad-

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[13] See Derenberg, Commercial Prints And Labels: A Hybrid In Copyright Law, 49 Yale L.J. 1212, 1223 (1940). Contra, William Faehndrich, Inc. v. Wheeler Riddle Cheese Co., 34 F.2d 43, 44 (E.D.N.Y. 1929).

[14] Copyright Act § 5(k), 17 U.S.C. § 5(k) (1964).

[15] Id. § 5(g), 17 U.S.C. § 5(g) (1964).

[16] The artist who originally made the diagram for the textbook has complained that he never received any part of the $2000 which Lichtenstein obtained for the copy of it. See Loran, Pop artists or copy cats?, 62 Art News, Nov., 1963, at 48.

[17] See id. at 61, where the author reproduced two pictures, one a copy from William Overgard's *Steve Roper* of August 6, 1961, the other a virtually identical painting by Lichtenstein.

[18] Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 144 (S.D.N.Y. 1968); Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). See M. Nimmer, Copyright § 144 (1968).

[19] Copyright Act § 1, 17 U.S.C. § 1 (1964), provides that

> [a]ny person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work. . . .

[20] See Yankwich, What Is Fair Use? 22 U. Chi. L. Rev. 203, 215 (1954).

vancement of science or the arts.[21] As a result, what is technically infringing is allowed because of the reasonableness of the appropriation.[22]

The question whether a particular appropriation constitutes a fair use is dependent upon the facts of each case.[23] When the use is for a further development of the fine arts, the balancing in favor of progress results in the broadest possible scope for fair use.[24] Three major factors are considered in a fair use determination: the nature and purpose of the selection, the quantity and value of the materials used, and the degree in which the use may compete or interfere with the sale of the original work.[25] In pop art appropriation, the quantity of the original taken is substantial, but the other factors operate against any conclusion of infringement.[26] There is an absence of *any* competition or injurious effect resulting from the incorporation into pop art. In fact, the appropriation is probably beneficial to the original, in that it both glamorizes the product and provides free advertising. The purpose of the selection is to advance fine art, the very reason for allowing fair use as a defense.[27]

In view of the purpose of advancing the arts and of the absence of any adverse effect upon the original source, it is submitted that the incorporation of protected materials by pop artists is a legitimate fair use, and thus that pop art cannot be considered an infringement of its man-made origin.[28]

III. Copyrightability of Pop Art

As with other types of creative endeavors, the pop artist may wish to protect his work by copyrighting it. Any artistic work is entitled to protection if it meets the requirements of copyrightability for its class.[29] Thus

[21] See Sayre v. Moore (sittings after Hil. 1785, at Guildhall, cor. Lord Mansfield C.J.), reported in Cary v. Longman, 102 Eng. Rep. 139, 140 n.b (K.B. 1801).

[22] Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 174 (S.D. Cal. 1955), aff'd sub nom. Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), aff'd sub nom. Columbia Broadcasting Sys. v. Loew's Inc., 356 U.S. 43 (1958) (equally divided court).

[23] Karll v. Curtis Publishing Co., 39 F. Supp. 836, 837 (E.D. Wis. 1941).

[24] Loew's Inc. v. Columbia Broadcasting Sys., 131 F. Supp. 165, 175-76 (S.D. Cal. 1955), aff'd sub nom. Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), aff'd sub nom. Columbia Broadcasting Sys. v. Loew's Inc., 356 U.S. 43 (1958) (equally divided court). See Henry Holt & Co. ex rel. Felderman v. Liggett & Myers Tobacco Co., 23 F. Supp. 302, 304 (E.D. Pa. 1938).

[25] Karll v. Curtis Publishing Co., 39 F. Supp. 836, 837 (E.D. Wis. 1941); New York Tribune, Inc. v. Otis & Co., 39 F. Supp. 67 (S.D.N.Y. 1941). See also Yankwich, supra note 20, at 213.

[26] See American Institute of Architects v. Fenichel, 41 F. Supp. 146, 147 (S.D.N.Y. 1941).

[27] See 994 supra.

[28] Under the proposed Copyright Law Revision, there would be allowances for fair use in the statute itself. H.R. 2512, 90th Cong., 1st Sess. § 107 (1967). A definition of fair use is included, limiting it to purposes of criticism, comment, news reporting, teaching, scholarship, or research. Id. Under this definition, it is uncertain whether pop art usage would qualify as "scholarship" so as to allow fair use as a defense, even though the avowed purpose of the section is not to narrow the definition. See Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 145 (S.D.N.Y. 1968).

[29] See Copyright Act § 5(g), 17 U.S.C. § 5(g) (1964).

a pop art work, to be eligible for copyright, must, in addition to complying with statutory procedures, exhibit both creativity and originality.[30]

Creative authorship is necessary as a matter of legal definition to copyright works of art; without it, there *is* no work of art.[31] Conversely, if a particular work is capable of classification as a "work of art," then it should be able to satisfy the copyright requirement for creativity.[32] Under this standard for creativity, the courts have been very liberal in construing what can be classified as a work of art, and is thereby eligible for copyright protection. In *Rosenthal v. Stein*,[33] the court stated that a work of art is anything that "appears to be within the historical and ordinary conception of the term art."[34] When it first developed, pop art might not have qualified even under this broad guideline, as its status as art had been questioned by leading art authorities.[35] Now, however, it is generally recognized that pop art is a form of art,[36] though divergent opinions exist as to whether pop is a natural development from earlier art movements, such as abstract expressionism,[37] or is a complete rejection of the direction of all previous artistic development.[38] Its source should be irrelevant, however, as pop art unquestionably relates in some way, either positively or negatively, to the historical conception of the term art. Thus pop art, at least for copyright purposes, constitutes "art."

It is still conceivable that pop art may be denied copyright protection because of the lowly nature of its subject matter. The trend in the law towards definitional liberalization, however, minimizes this possibility. Relative artistic merit has been held to be immaterial in determining copyright eligibility.[39] In *Bleistein v. Donaldson Lithographing Co.*,[40] Justice Holmes stated that "[c]ertainly works are not the less connected with the fine arts because the pictorial quality attracts the crowds. . . ."[41] Justice Holmes also urged judicial restraint in questions of artistic merit:

> [i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation.[42]

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30 Trade Mark Cases, 100 U.S. 82 (1879). See M. Nimmer, Copyright § 19 (1968).

31 Gardenia Flowers, Inc. v. Joseph Markovitz, Inc., 280 F. Supp. 776, 781 (S.D.N.Y. 1968).

32 See M. Nimmer, Copyright § 19.1 (1968).

33 205 F.2d 633 (9th Cir. 1953).

34 Id. at 635. See United States v. Perry, 146 U.S. 71 (1892), where the Court attempted to define art.

35 See Loran, supra note 16; Hess, Pop And Public, 62 Art News, Nov., 1963, at 23.

36 Hess, supra note 35.

37 See J. Rublowsky, supra note 10, at 4; M. Amaya, supra note 8, at 45.

38 M. Amaya, supra note 8, at 45.

39 Trifari, Krussman & Fishel v. Charel Co., 134 F. Supp. 551, 552 (S.D.N.Y. 1955). In Pellegrini v. Allegrini, 2 F.2d 610, 611 (E.D. Pa. 1924), the court stated that art works may "have a high order of [artistic] merit, or none at all . . ." and still be entitled to copyright protection.

40 188 U.S. 239 (1903). This case involved circus posters.

41 Id. at 251.

42 Id.

The obvious limit mentioned was reached in *Bailie v. Fisher*,[43] when the court found that a cardboard star with two flaps which enabled it to stand was simply not a work of art.[44] Whatever artistic merit may inhere in pop art, it certainly exceeds that of a cardboard star, as it is clearly artistic in both thought and execution.[45] Because of this artistic nature, pop art should be able to satisfy the creativity requirements of the copyright law.

In addition to being creative, pop art must also be "original" to be eligible for copyright protection.[46] While creativity refers to the nature of the work itself, originality turns upon the artist's contribution to the work.[47] In this context, originality means simply that the artist has created it by his own skill, labor and judgment.[48] The necessary degree of orginality under this requirement is quite modest. Unlike patents, copyrights require no novelty or invention.[49] Instead, the test that has evolved for originality is merely a determination whether the work is the result of independent labor, or is merely a copy of the work of another.[50]

Since much of pop art is virtually an exact copy of existing material,[51] it is questionable whether pop is sufficiently original to be copyrightable. If originality were based solely upon the *material* content of the work, pop art simply would not qualify. In this respect, the direction taken by the law has created an impediment to protection of the art form. Though the statutory provisions of the Copyright Act make no specific mention of a material originality requirement,[52] the Register of Copyrights has created such a legal barrier in his regulations,[53] and the courts have accepted this as a legal prerequisite.[54] The concept of pop art, however, is based upon the precision of the copying and the fact that the use as art signifies something more than the simple representation of the object itself.[55] It is this aspect of pop art that makes it unique; it is original because of the *use* of copied, unoriginal material.[56]

This apparent conflict between law and art may be resolved under a

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[43] 258 F.2d 425 (D.C. Cir. 1958).

[44] Id. at 426.

[45] See Louis DeJonge & Co. v. Breuker & Kessler Co., 182 F. 150 (S.E.D. Pa. 1910), aff'd, 191 F. 35 (3d Cir. 1911), aff'd, 235 U.S. 33 (1914).

[46] Gardenia Flowers, Inc. v. Joseph Markovitz, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968); Surgical Supply Serv., Inc. v. Adler, 206 F. Supp. 564 (E.D. Pa. 1962), rev'd on other grounds, 321 F.2d 537 (3d Cir. 1963); Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940, 944 (S.D. Cal. 1961), aff'd, 304 F.2d 251 (9th Cir. 1962).

[47] See M. Nimmer, Copyright § 19.2 (1968).

[48] Alfred Bell & Co., v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951); Alva Studios, Inc. v. Winninger, 117 F. Supp. 265, 267 (S.D.N.Y. 1959).

[49] Wihtol v. Wells, 231 F.2d 550, 553 (7th Cir. 1956); Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2d Cir. 1927).

[50] Alva Studios, Inc. v. Winninger, 117 F. Supp. 265, 267 (S.D.N.Y. 1959); Jones Bros. Co. v. Underkoffer, 16 F. Supp. 729, 731 (M.D. Pa. 1936).

[51] See p. 993 supra.

[52] See Copyright Act § 4, 17 U.S.C. § 4 (1964).

[53] 37 C.F.R. § 202.10(b) (1968) provides that "[i]n order to be acceptable as a work of art, the work must embody some creative authorship in its delineation or form."

[54] See cases cited note 46 supra.

[55] M. Amaya, supra note 8, at 11; Hess, supra note 35.

[56] M. Amaya, supra note 8, at 18.

broad interpretation of originality. To a limited extent, orginality is already considered dependent upon the field of endeavor in which protection is sought.[57] In the field of art, originality should not be given a narrow interpretation based upon material content, but should include new forms of expression of existing subject matter.[58] Under this broadened definition, there could exist either creative originality for the first work of a kind, or mere resourcefulness for the derivation of the work from an original source.[59] Clearly the artist exercises more skill and judgment in the production of pop art than does the photographer in photographic production. Since a simple photograph is sufficiently original for copyright purposes,[60] the use of an object, even a copied object, as an art form should also qualify. In such an instance, the transformation of the object is the artist's idea, and his individual effort makes it art.

Perhaps the most difficult situation for finding pop art to be original arises from the works of Andy Warhol. His paintings are created by simple silk-screening of the design from commercial boxes and products, and by subsequent exact reproduction of the original.[61] This copying does involve originality, however, in that Warhol has made it into art, a status which it had not previously held. However, his practice of signing real Campbell Soup cans and selling them as art is even more troublesome.[62] In this instance, all the artist has added is his signature, a seemingly minimal quantum of originality. As viewed by the art critics, however, it is solely through this signature that an ordinary can is transformed into the work of art, in that the commonplace object thereby becomes the center of the viewer's attention.[63] As his signature makes this transformation occur, Warhol's minimal contribution is more than trivial. The variation from a can to a work of art, however accomplished, should be sufficient to meet the originality requirement of the copyright law.[64]

On the basis of the foregoing analysis, it is submitted that any form of pop art should meet both the creativity and originality requirements of the copyright law. Pop art as copyright material seems to be unique. Pop technically infringes its source, but is allowed as a fair use. It then qualifies for its own copyright protection. It is clearly creative art, yet may be an exact duplicate of a commonplace object or a commercial label. The artist may have added very little of his own, yet its *use* as art is original, and it is the artist who has accomplished this transformation.[65] Under the copyright def-

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[57] See Dworkin, Originality in the Law of Copyright, ASCAP Copyright Law Symposium Number Eleven 60, 71 (1962).

[58] See Silvers v. Russell, 113 F. Supp. 119, 123 (S.D. Cal. 1953).

[59] See Dworkin, supra note 57.

[60] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884); Pagano v. Chas. Beseler Co., 234 F. 963, 964 (S.D.N.Y. 1916).

[61] L. Lippard, supra note 7, at 82.

[62] Id.; Leonard, The Return of Andy Warhol, N.Y. Times, Nov. 10, 1968, § 6 (Magazine), at 32.

[63] Leonard, supra note 62.

[64] Cf. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 103 (2d Cir. 1951); Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945).

[65] See Hess, supra note 35.

inition, anything artistic and original is copyrightable; under the pop art definition, the sole requirement for a work of art is intent, so that anything can be art, whether truly original or not.[66]

IV. Infringement of Pop Art Copyrights

Since early 1968, pop art has been commercialized through the mass production and sale of household objects, such as pillows and china, with pop-type designs imprinted on them. These pop art objects fall generally into two categories, those involving the exact subject matter which has been displayed in pop art, and those which employ subject matter which has never been artistically treated.[67] If pop art is eligible for copyright protection,[68] this new, highly profitable business trend may constitute an infringement of the artist's copyright.

Whether "pop objects" are infringing any pop art copyright will depend upon the nature of the protection allowed. To show infringement, the artist must prove that there was copying from his work and that the copying involved an improper appropriation.[69] Pop art raises serious problems as to both elements necessary for infringement.

In the production of pillows and china employing a design used both on a commercial product, such as Campbell Soup cans, and in a work of pop art by Andy Warhol, it is unclear exactly what is being copied. There is no violation of artistic copyright simply because of similarity between the paintings and pop objects, as the similarity can result from the fact that both works deal with the same subject.[70] There must be some form of copying *of the copyrighted material* for there to be any infringement.[71] Others are not precluded by the copyright from copying the source of the copyrighted work.[72] Thus a pop object manufacturer might attempt to circumvent the copyright provisions by using the artist's original source as the model instead of copying the protected work itself. For example, in its production of "pop" Campbell Soup mugs and bowls, the manufacturer may simply copy from the can itself and ignore the Warhol painting of it. Yet this practice seems to be patently unfair, since the manufacturer is capitalizing upon Warhol's transformation of the object into art, rather than upon the nature of the can itself. Before pop art, there was no market for such objects; it was solely the pop art movement that made these objects marketable. In taking advantage of Warhol's development of their product, Campbell may be modeling their pop objects on their own can, but it is evident that they are "copying" the Warhol paint-

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66 Id.

67 The works copied have mostly been those of Andy Warhol. There have also been considerable sales of Roy Lichenstein's comic strip frames as posters.

68 See pp. 995-99 supra.

69 Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); Marcel Paper Mills, Inc. v. Scott Paper Co., 290 F. Supp. 43, 46-47 (D.N.J. 1968).

70 Affiliated Enterprises, Inc. v. Gruber, 86 F.2d 958 (1st Cir. 1936).

71 Mazer v. Stein, 347 U.S. 201, 218 (1954).

72 Contemporary Arts, Inc. v. F.W. Woolworth Co., 193 F.2d 162, 164 (1st Cir. 1951), aff'd, 344 U.S. 228 (1952).

ings. If copying of the art is indeed taking place, the availability of common sources will not be a defense to infringement.[73]

Copying need not be limited to an exact reproduction from the protected work. An infringing copy may be produced by memory from an original.[74] If Campbell had no can from which to work, and simply produced pop objects from memory of Warhol's works, it would clearly be infringing. Campbell's actual activity differs from this practice only in the respect that it uses one of its own cans as a model, because this practice makes the reproduction more accurate and avoids the technical necessity of copying Warhol's works. It is submitted that the production of such pop objects is still copying the pop art adaption. In *Gross v. Seligman*,[75] an artist took a photograph, copyrighted it, and sold all his rights in the work. Later the same artist placed the same model in a very similar pose, published the photograph thereby obtained. The owner of the first photograph filed suit, alleging that the artist had infringed his copyright. The court found that the photographs were not two separate versions of the same subject, but that the first photograph had been copied by the second.[76] The court concluded that it was irrelevant whether physical reproduction occurred through the use of the first photograph or the original model, as the artistic conception of the first photograph had been appropriated.[77]

The production of such objects as Campbell Soup mugs and bowls and Brillo Pillos (*sic*) presents an analogous situation. In commercial production of such pop objects, the manufacturer has appropriated the artistic conception of the original art works.[78] If the principles enunciated in *Gross v. Seligman* are still good law, then the pop objects are copies of the pop art, regardless of whether the model used was the art work itself or the original commercial source for the art.[79]

Even if the pop objects are considered to have been copied from the pop art, to constitute infringement there must still be an improper appropriation.[80] Possible justification for the appropriation may be the material difference in form between pop objects and pop art.

Copyright protection, unlike that for patents, does not extend to the idea of the work, but only to that mode of expression embodied in the particular work copyrighted.[81] While the treatment of the *particular* subject as art is protected, the idea of commonplace objects as ornamental cannot be.[82] This idea-expression distinction, however, fails to define conclusively the scope of copyright protection. In most areas, the protection has been found

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[73] Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959).

[74] Freudenthal v. Hebrew Publishing Co., 44 F. Supp. 754, 755 (S.D.N.Y. 1942).

[75] 212 F. 930 (2d Cir. 1914).

[76] Id. at 931. Cf. Champney v. Haag, 121 F. 944 (E.D. Pa. 1903).

[77] Gross v. Seligman, 212 F. 930, 931 (2d Cir. 1914).

[78] See Brooks v. Religious Tract Society, 45 W.R. 476 (1897), quoted in W. Copinger & F. Skone James, Copyright 179 (9th ed. 1958).

[79] Cf. Pellegrini v. Allegrini, 2 F.2d 610 (E.D. Pa. 1924).

[80] See cases cited note 69 supra.

[81] Mazer v. Stein, 347 U.S. 201, 217 (1954); Morrissey v. Procter & Gamble Co., 262 F. Supp. 737, 738 (D. Mass. 1967).

[82] Cf. King Features Syndicate v. Fleischer, 299 F. 533 (2d Cir. 1924).

to extend only to the concrete aspects of the expression, and not to the abstraction of the work.[83] In the application of such a standard to pop art, only the particular treatment of the subject would be protected from copying, and a different "pop" use of the same subject would probably not infringe.[84] In the field of artistic copyright, however, the protection seems to extend further into the abstraction of the expression than in other areas.[85] In *King Features Syndicate v. Fleischer*,[86] the court found that the concept of beauty, as expressed in the art work, was protected, since that aspect of the work was the conception of the artist's genius.[87] In one English case,[88] protection was allowed for the "feeling and artistic character" of the work, as distinguished from the figures as treated in the work itself.

This abstraction seems justified by the nature of the subject to be protected. The essential ingredient of art is the idea expressed. Under a narrow interpretation of the area of protection, the essence of the subject matter as art could easily be appropriated through the use of a similar theme. Under such circumstances, copyrighting a work of art will provide little practical benefit. If, on the other hand, a broad interpretation is employed for artistic protection, then copyrighting will prevent not only exact copying, but also any use of the subject matter that goes so far into the expression as to appropriate its essence.[89]

Nor should artistic protection be limited by the particular medium of expression of the art. The copyright holder should have the exclusive right to transform his work into any other medium.[90] Any copying of protected work in a different medium omits the artist's effort, but still appropriates his genius.[91] Since the Copyright Act was intended to protect the creation of the general form and its value in that form,[92] an original artistic work should be protected against copying in different media[93] and in different dimensions.[94] A change from painting on canvass to printing on china and pillows presents nothing more than a change in media, as it retains the essential form as art. Any such change would therefore be an improper appropriation, as it inter-

83 National Comics Publications, Inc. v. Fawcett Publications, 191 F.2d 594, 600 (2d Cir. 1951); Dunham v. General Mills, Inc., 116 F. Supp. 152, 153-54 (D. Mass. 1953).

84 Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1926).

85 See Bradbury v. Columbia Broadcasting Sys., 174 F. Supp. 733, 736 (S.D. Cal. 1959), modified, 287 F.2d 478 (9th Cir.), appeal dismissed, 368 U.S. 801 (1961).

86 299 F. 533 (2d Cir. 1924).

87 Id. at 536.

88 Brooks v. Religious Tract Society, 45 W.R. 476 (1897), quoted in W. Copinger & F. Skone James, Copyright 179 (9th ed. 1958).

89 See National Comics Publications, Inc. v. Fawcett Publications, 191 F.2d 594, 600 (2d Cir. 1951).

90 Note, Protection of the Artist and Sculptor Under the Law of Copyrights, 22 U. Pitt. L. Rev. 709, 718 (1961).

91 King Features Syndicate v. Fleischer, 299 F. 533, 535 (2d Cir. 1924).

92 Id. at 537.

93 Eisenschiml v. Fawcett Publications, Inc., 246 F.2d 598, 603 (7th Cir. 1957); M.J. Golden & Co. v. Pittsburgh Brewing Co., 137 F. Supp. 455 (W.D. Pa. 1956); Falk v. T.P. Howell & Co., 37 F. 202 (S.D.N.Y. 1888).

94 Fleischer Studios, Inc. v. Ralph A. Freundlich Inc., 5 F. Supp. 808 (S.D.N.Y.), aff'd, 73 F.2d 276 (2d Cir. 1934).

feres with the artist's exclusive right to produce the work in any manner or medium.[95]

Other factors may play an important role in the determination whether the appropriation of the copyrighted pop art was improper. Pop objects are utilitarian in nature, while the original pop work is intended to be pure art. Yet the courts have found that art may be infringed by a purely utilitarian object.[96] It should also be irrelevant that it may be Campbell or Brillo, the producer of the original labels, who is infringing the pop art based upon its product, since they are actually copying someone else's protected illlustration of it.[97]

From this analysis, it appears that a manufacturer's production of pop objects previously developed and copyrighted as art is an improper appropriation, one that infringes the artist's copyright. This view does not mean that all pop objects will necessarily infringe. Many involve products never developed as pop art by any artist. These works employ only the pop idea of transforming the commonplace into art. For such works, there is use of an artist's idea only in its most basic form, and no appropriation of the concrete means used by an artist.[98] Thus, a copyrighted soup can painting will be infringed by a pop object of a soup can, but will not be infringed by a NoDoz Pillow based upon the latter product's design. With this distinction, copyright law can protect the actual embodiment of the artist's idea without expanding protection to the idea itself.

V. Conclusion

The peculiar nature of pop art challenges the application of many of the standards traditionally used in copyright determinations. It is produced as an allowable infringement, a fair use, and then may itself be eligible for protection against copying by the very people who created the source for the art. This result arises from pop's own ability to be copyrighted. While the copyright element of creativity has been reduced to the requirement of status as a work of art, pop has developed art to the stage where intent is sufficient to make anything art.[99] The logical conclusion from this art-law conflict of terminology would be that anything could be copyrighted as art by the simple act of definition. Such a conclusion may be necessary if the law is to keep pace with developments in the arts; it is untenable as a legal standard, however, as it completely vitiates creativity as a requirement.

Similar difficulties arise with the copyright originality requirement. While

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[95] See Note, supra note 90, at 718, 721. Under the proposed Copyright Law Revision, copyright protection subsists in works "fixed in any tangible medium of expression," and this protection includes the exclusive right to prepare derivative works based on the copyrighted work. H.R. 2512, 90th Cong., 1st Sess. §§ 102, 106(2) (1967).

[96] Home Art, Inc. v. Glensder Textile Corp., 81 F. Supp. 551 (S.D.N.Y. 1948). Under the proposed Copyright Law Revision, the exclusive right to reproduce a copyrighted work of art "includes the right to reproduce the work in or on any kind of article, whether useful or otherwise." H.R. 2512, 90th Cong., 1st Sess. § 113(a) (1967).

[97] Blumcraft v. Newman Bros., Inc., 373 F.2d 905, 909 (6th Cir. 1967).

[98] See Dymow v. Bolton, 11 F.2d 690, 691 (2d Cir. 1926); Gaye v. Gillis, 167 F. Supp. 416, 418 (D. Mass. 1958).

[99] See Hess, supra note 35.

the law requires that the work "owe its origin to the artist,"[100] the major artistic aspect of pop art is its unoriginality. The pop artist is attempting to create art indistinguishable from the original subject matter, and thereby evoke an emotional as well as a visual response.[101] Thus the originality requirement is another instance where the law has failed to stay apace with new developments in the arts.

Finally, the commercial production of pop objects represents an obvious appropriation of the artist's work. Yet this appropriation may occur without infringement if the copying is done from the model used by the artist, the original product, instead of from the art itself. To avoid this result, it may be necessary to redefine copying under the copyright law to include such indirect borrowing as has occurred in the creation of pop objects. Unless the law is liberalized in this area, the ability to copyright such works of art will provide no protection at all.

Many apparent inconsistencies have arisen between the copyright law as it has evolved and the protection which the law was intended to provide. While copyright was designed to promote the arts through the granting of exclusive rights,[102] new art forms may lack this protection because the developed rules have failed to consider the possible ramifications of future artistic developments. Pop art presents perhaps the most blatant example of this problem. Since a basic reexamination of our copyright system is now under way, it is suggested that any intended revision of the copyright law take into account not only the doctrinal problems which have developed under the copyright law, but also the basic changes which have taken place in the fields to be protected.

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100 Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951); Alva Studios, Inc. v. Winninger, 117 F. Supp. 265, 267 (S.D.N.Y. 1959).

101 J. Rublowsky, Pop Art 110, 116 (1965). This effect is intended to be similar to Brecht's alienation effect in the theater. See Hess, note 35.

102 U.S. Const. art. I, § 8.

THE POP OBJECT