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**UNRAVELLING THE CREATIVE PATH- A CRITICAL EXAMINATION  
OF THE RELATIONSHIP BETWEEN CONTEMPORARY ART AND  
INTELLECTUAL PROPERTY**- Vanshika Bhatia<sup>1</sup>**ABSTRACT**

The Law of Copyright is capable of facilitating creativity as well as hindering it. Art has progressed over the years and the past few decades witnessed the expression of art in several forms. The market for contemporary art is thriving and this raises a very important question: Should the ambit of copyright law be extended or modified to protect newer forms of art work? As the art movement across the world is undergoing some dynamic changes, it becomes necessary to study the art protection laws across jurisdictions to hatch a regulatory framework, especially for contemporary artworks like appropriation art which are two fields of expression that are trickier than others. This article aims to provide a comprehensive deep-dive into the sufficiency of law and the changes that need to be made to both secure economic and moral rights of the creator and incentivize new art, but also to not thwart away the existing regime to accommodate trivial ideas, drifted from expression

**INTRODUCTION**

It is a tradition that art practitioners challenge and explore the community's moral, intellectual and social boundaries. It might also be said that some of the most conclusive definitions of those boundaries are provided by the judiciary. Those limits are formulated from the bundle of rights and their co-relative duties. However, when the rights exercised by one individual conflicts with the rights exercised by another individual, it paves way for problems. The law of copyright strives to protect the artistic creations by

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offering economic incentives to the creator of the artistic work. Affording Copyright protection encourages a diverse array of artistic and creative work from various genres by providing the artists the property rights in their works<sup>2</sup>. Ironically, the Copyright law sometimes hinders creativity too. The past few decades have seen some dynamic advancements in mediums of expression that have drastically changed the creative outputs that require protection. This raises a very important question: should the ambit of law be willing to completely modify to accommodate newer forms of expression that require protection? Scholars are truly divided on this point. While some believe that any progressive law would be expected to metamorphose according to the needs of the time and not restrict artistic expression to traditional norms, the other half believe that the characteristics of copyright protection cannot be altered because doing so, increases the challenges two-fold. Contemporary art is constantly evolving at a faster pace when compared to the related legislations. There are no qualitative tests to determine whether an art can be copyrighted or not. In most jurisdictions, a mere requirement of originality and the need for the work to be an expression rather than an idea is the only qualification mandated by the copyright Act.<sup>3</sup> Unfortunately, the Copyright Act of India, USA and UK do not do justice in providing protection for many post-modern art movements in spite of this comprehensive framework and flexible approach.

#### With Post-Modern Art

In simple terms, we can state that the post-modern art is a movement and cannot be restricted to fit into the conventional definition of art. The Post-modernism movement essentially revolts against the customary norms of ownership, originality and expression that are integral to the copyright protection. The post-modern artists lift images from already existing works and present newer ideas and perspectives on politics, consumerism, society and other thought-processes of that era. The post-modern artists create art works that rebels against the high-powered lot in the society which may monopolize dominion over the way in which the very imaged that create our

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<sup>2</sup>Ames E K, Note, Beyond Rogers v Koons: A fair use standard for appropriation, Columbia Law Review, 93 (1993) 1473, 1477.

<sup>3</sup>Cohen A B, Copyright Law and the myth of objectivity: The idea-expression dichotomy and the inevitability of artistic value judgments, Indiana Law Journal, 66 1 (1990)175

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popular culture is communicated to the society at large. In real world, the copyrighted works of other artists are appropriated by the post-modern artists to critique and comment on the society and this makes majority of the post-modern art non-copyrightable. The 'Blued Trees Symphony' is an excellent example of how Contemporary art was used as an instrument to challenge capitalism. This was an initiative to challenge the limits of the Visual Artists Rights Act (VARA) that protects only the rights of permanent art of recognized art historical statute but not movable, transient or activist art. This movement sought protection for eco-art as a new genre. The language defining legal theories of copyright ignores the power of the phrase *droit moral*. Resultantly, this continental-scale work of interdisciplinary art was copyrighted in the year 2015, requiring the courts to recognize an emergent overlap between eminent domain law, copyright ownership and new forms of art.<sup>4</sup>

Post-modern art has risen to the occasion, replacing the modern art of the early twentieth century. The concept of post-modernism traces its origin from the use of "found objects". These found objects could either be natural or human-made and they were minimally modified or in some cases, they were left entirely untouched by the artist. These works were finally offered as artworks. In the paintings of artists like Andy Warhol and Jasper Johns, we can observe the use of institutional symbols and commercial items. Minimalist sculptors deployed construction materials, like stone, mud, wood, wire, or metal, and exhibited the works with minimal or zero modifications. Appropriation art is one such art form in the post-modern movement, which lifts the images of other artists and incorporates them into already existing artworks to criticize on the society. Similar to the appropriation artists, conceptual artists also challenge the same high-powered lot by redefining the conventional notions of what is art and what are socially valuable ideas. The conceptual artists implement this by creating artworks that carry originality in idea, but not in expression. "Earthworks" artists install a sculptural matter in an outdoor environment or relocate the already existing materials that appear in a natural landscape to create artworks in nature. The performance artists try to blend different elements of theatre with traditional forms of visual art to create a fusion of choreography, sculpture and theatre.

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<sup>4</sup>Rahmani A, The blued trees symphony as transdisciplinary mediation for environmental policy, *Mediating Art and Science*, 3 (1) (2021)

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Mark Kostabi and Jeff Koons are New York based artists who believe that the financial value of an artwork is determined by the number of aesthetic elements present on it. Ever since Duchamp's time, the post-modern artists, rather than advocating for the artwork itself, have insisted that the primary stimulus for the creation is the idea behind the artwork

## **BACKGROUND**

The invention of the printing press by Johannes Gutenberg around 1450 marked the genesis of the first copyright system. In 1474, the Venetian Law made initial efforts to protect inventions through patents. By the late 19th century, industrialization spurred by innovative manufacturing techniques prompted the formation of the international IP system. Recognizing and rewarding IP ownership stimulates innovation, fostering economic advancement.

All forms of intellectual property are aimed at receiving enhanced protection under the TRIPS Agreement. This agreement delineates provisions regarding international IP agreements and the application of general GATT principles. It also establishes guidelines for the utilization, enforcement, adherence, acquisition, and maintenance of IPRs.

## **Research Questions**

This research paper addresses the following inquiries:

1. Are contemporary arts safeguarded under The Copyright Act of 1957?
2. Do contemporary arts pose challenges to existing Intellectual Property Laws?
3. How can the originality of artistic works be determined?

## **Research Hypothesis**

Contemporary art presents challenges to intellectual property laws, particularly those concerning copyright.

## **Research Methodology**

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The paper employs doctrinal research, characterized by a theoretical analysis of legal principles alongside an examination of legal theory formulation and application. Emphasis is placed on interpreting case law, legislation, and other legal documents.

These encompass any original creations of the human intellect, spanning arts, sciences, literature, technology, and other domains. IPRs confer legal privileges upon inventors or creators to safeguard their work for a designated period, granting exclusive rights for exploitation. Acknowledged as crucial to the modern economy, IP underscores the significance of recognizing the intellectual labor associated with innovation.

### Contemporary Art

Characterized by continual redefinition and reinvention, contemporary art often draws inspiration from diverse sources, including preceding artworks, reflecting a fusion of imagination and creativity.

### The Test of Originality and Contemporary Art

The work created by the post-modern artist must always fulfill the originality requirement even if it is borrowed from the public domain and transformed by the artist. Originality in a derivative work mandate that the author must contribute "something more than a 'merely trivial' variation, something recognizably 'his own. No matter how poor artistically the author's addition is, all that is required is that the work of the artist must be his own. In simple terms, the derivative work must pass the distinguishable variation test. Originality, as a requisite for copyright protection, has been interpreted by the courts in two ways. In *Bleistein v Donalds on Lithographing Co.* The Supreme Court presented the concept of originality as a creative impulse that "always consists of something unique. It expresses its uniqueness even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. Thus, under the *Bleistein* standard, originality subsists in the unique, personal contribution of the author. However, the standard enumerated in *Feist* requires de minimis proof that the "work was independently created by the author and that the "requisite level of creativity is extremely low". The *Feist* standard emphasizes creativity, however slight, over the unique.

### Legal Protection of Artistic Works

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### History of Art Copyrights

The Engraving Act of 1734 marked the initial recognition of the economic value of artworks. Subsequently, moral rights, such as attribution rights, were acknowledged in the Berne Convention of 1886. However, defining artistic works has become increasingly challenging as the artistic landscape evolves.

### Protection under The Copyright Act 1957

The Copyright Act of 1957 grants a spectrum of exclusive rights to copyright owners under Section 14. It safeguards original literary, artistic, musical, dramatic, cinematographic, and sound recording works. Originality denotes the absence of duplication from any other source. In India, copyright protection is governed by this Act, encompassing both economic and moral rights.

#### Economic Rights:

Copyright holders are bestowed with economic rights under Section 14 for original literary, dramatic, musical, and artistic works, as well as cinematographic and sound recording works.

#### Moral Rights:

Section 57 of the Act delineates two fundamental moral rights: the right to attribution (paternity) and the right to integrity.

### **CHALLENGES FACED BY IP LAWS DUE TO CONTEMPORARY ARTS**

Numerous challenges arise when contemporary arts fall under the purview of IP regulations, yet only a select few are addressed below:

1. **Lack of Awareness:** These ventures often commence with limited exposure and expertise amid the burgeoning number of individuals honing their skills and launching small enterprises. Consequently, they inadvertently infringe upon IP rights, leading to protracted and costly legal disputes with established corporate entities.
2. **Conflict Between the Objectives of Contemporary Art and IP Law:** While the primary aim of IP law is to prevent further appropriation and recreation of protected works, contemporary art often thrives on reimagining existing pieces, challenging traditional notions of creativity.

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This dichotomy underscores the inherent tension between the principles of contemporary art and the tenets of IP law.

3. Advancements in Technology: With the increasing digitization of the world, instances of IP infringement have surged. In such scenarios, the imperative for stringent IP regulations becomes paramount. Contemporary artists engaging in reinterpretations of artistic works must acknowledge and respect the rights of original creators.

### **POINT OF CONFLICT BETWEEN CONTEMPORARY ART AND COPYRIGHT**

Copyright, recognized as a valuable asset for artists, plays a pivotal role in safeguarding creative works. India, with its laws protecting intellectual property, including copyright, encompasses artistic creations within its ambit. Section 2(c) of the Copyright Act delineates artistic works.

Contemporary art, being classified as artistic production, falls under the purview of the Copyright Act of 1957 and is thus subject to the same regulations as other creative endeavors. However, the unique attributes of contemporary art pose challenges to copyright laws. Given that many contemporary art forms build upon earlier works, the delineation of an artist's rights vis-à-vis the original work remains a central issue. The resolution to this quandary lies in recognizing that all artistic endeavors draw inspiration from pre-existing knowledge, concepts, or artworks. Hence, restricting the rights of contemporary artists or undermining the rights of original creators would contravene the fundamental purpose of IP laws.

### **PROPOSED SOLUTION TO THE ISSUE**

While Section 13 of the Copyright Act of 1957 asserts copyright protection for original literary, dramatic, musical, and artistic works, it does not explicitly define originality. Judicial interpretations play a crucial role in elucidating the requisite level of originality for copyright protection, which may vary across courts.

The "sweat of the brow" doctrine, a cornerstone of copyright law, asserts that copyright protection extends to verbatim reproductions. In India, this principle was affirmed in cases such as *Macmillan and Co. vs. K & J Cooper* and *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber & Anr.*

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The concept of "modicum of creativity" was endorsed by the Hon'ble Supreme Court of India in *Eastern Book Co. vs. D.B. Modak* (2008), emphasizing the requirement for a minimal level of creativity for copyright protection.

### **CONFLICT WITH RESPECT TO CONCEPTUAL ART**

The existing copyright law in India distinguishes and protects works where ideas and expressions are separable, omitting consideration for works combining both elements. Conceptual art, including contemporary art, poses a challenge as it blurs this distinction. The idea-expression doctrine further complicates matters by restricting copyright protection to expressions rather than ideas.

The doctrine of merger applies in such cases, stipulating that if an idea and its expression are inseparable, copyright protection is not extended to the expression. This principle was upheld in cases like *RG Anand v. Deluxe Films* (1978), where the court ruled that despite similarities in ideas, distinct expressions precluded copyright infringement.

In essence, navigating the intersection of contemporary art and copyright law necessitates nuanced interpretations and considerations to uphold the rights of both creators and innovators within the evolving artistic landscape.

### **THE FIXATION REQUIREMENT-DOES CONTEMPORARY ART SATISFY THIS TEST?**

It is a well-settled principle of copyright law that protection can be granted to works only when they are expressed in some tangible form. This is referred to as the fixation requirement in copyright law. Simply put, the fixation requirement mandates that the work must be exhibited in a copy which makes it possible for others to copy and perceive it. One of the primary reasons for fixation to be a requirement in copyright law is to facilitate a distinction between the mere idea and the entitled expression of a work. This requirement appears to be incompatible with contemporary works that are either composed of impermanent materials or are heavily improvised.<sup>57</sup> Common law countries mandate the fixation requirement whereas the civil law countries do not. The TRIPS Agreement does not specify anything about

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the fixation requirement. Instead, the fixation requirement is incorporated in the Berne Convention which grants discretionary power to its signatories to decide whether the work must be fixated "in some material form". A work is considered to be fixed if and only if the work has been reproduced, perceived or otherwise communicated for a period exceeding that transitory duration. However, this rigid fixation requirement does not hold good for contemporary art creations that are created with transient materials or that which are highly improvisatory.

### **ANALYSIS**

Contemporary art stands out for its propensity to constantly redefine and reimagine itself.

Inevitably, to offer a fresh interpretation of existing works, this often involves drawing inspiration from earlier creations. Herein lies the crux of the issue. Where does the line blur between one artist's entitlements and another's? Virtually all artistic endeavors draw upon existing knowledge to some extent. Yet, dismissing the rights of the original artist whose work is being referenced is not a viable solution. Such a scenario would undermine the very essence of IP law.

The degree of borrowing would have to be looked at in order to determine sustainability. When an author who has taken inspiration from another artist creates a piece that is remarkably similar to the work that came before it, his rights should be curtailed. The issue with this solution is that it will necessitate significant borrowing, which is contrary to contemporary art's enthusiasm for the idea of offering fresh interpretations of preexisting works.

Given the issues raised above, several gaps must be filled in order to introduce the IP culture to modern artists and encourage the use of the many forms of protection that IP rights offer. To include contemporary art in the definition of the art forms under IP rules, there must be a proper distribution of rights and a passage of the same artwork being copied from a different angle. A crucial component is educating people about the advantages of IP and cultivating a sense of respect for the IP-related materials.

We are aware that because IP is transnational in nature, thefts of it can also occur abroad, which frequently creates difficulties due to language, geography, and other factors when trying to resolve the problem. Therefore, policies and strategies that take a more holistic

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approach need to be implemented in order to address a variety of issues and obstacles while also providing contemporary artists with the assurance that IP laws are crucial for the preservation of their works.

### Research Hypothesis Tested

The hypothesis contemporary art poses difficulties for intellectual property laws, particularly copyright laws is tested Positive through this research as it deals with originality of the work and it is difficult to determine the originality so it creates difficulty for copyright laws.

### CONCLUSION

The lack of inclusion of contemporary art in IP laws causes problems for artists, which is a problem that must be solved with a thorough understanding of the various art forms and a decision-making process that prioritizes the interests of the parties involved rather than following strict rules or formulas. To accomplish all of these things, which are not simple, policies and frameworks must be developed and made available to contemporary artists so that their works of art, their use of imagination, and the degree of recognition that their work deserves are all protected by the IP laws that are in place.

### **References:**

#### Webiography

Chandrath Saha, Intellectual property rights: An overview and implications in pharmaceutical industry NATIONAL LIBRARY OF MEDICINE (6th December 2022; 6:58PM) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/>

Bhargav Chetankumar Thakkar, All you need to know about the IPR Laws in India, IPLEADERS (6th December 2022; 9:45PM) <https://blog.ipleaders.in/need-know-ipr-laws-india/>

Giriraj kiradoo, Analysis of the Challenges Between IPRs and The Contemporary Art Business, 10 IJCET, 287, 287 (2019)

Priyasha Sen Gupta, The Challenging Relationship Between Contemporary Art And Intellectual Property Rights, LAWFIRM (6th December 2022; 11:05 PM)

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<https://www.ijalr.in/>

<https://lawfarm.in/the-challenging-relationship-between-contemporary-art-and-intellectual-property-rights/>

DAWN ELLMORE, <https://dawn-ellmore.medium.com/dawn-ellmore-on-intellectual-property-and-contemporary-art-91c2a9d9c46a> Last Visited on 7th December 2022

Sanjana, Analysing the relationship between contemporary art and IPR, IPLF (7th December 2022; 6:30PM) <https://www.ipandlegalfilings.com/analysing-the-relationship-between-contemporary-art-and-ipr/>

Shubhangi Agrawal, Highlighting the relationship between contemporary art and intellectual property, IPLEADERS (7th December 2022; 9:58PM) [https://blog.ipleaders.in/highlighting-relationship-contemporary-art-intellectual-property/#Does\\_contemporary\\_art\\_point\\_out\\_the\\_need\\_for\\_reform\\_in\\_the\\_IP\\_regime](https://blog.ipleaders.in/highlighting-relationship-contemporary-art-intellectual-property/#Does_contemporary_art_point_out_the_need_for_reform_in_the_IP_regime)

Tianchu Gao, Why do artists infringe copyright the tension between artistic creativity and copyright law, IPILOUGE (8th December 2022; 7:45PM) <https://www.iposgoode.ca/2022/07/why-do-artists-infringe-copyright-the-tension-between-artistic-creativity-and-copyright-law/>

Preeti, An Overview of Protection of Contemporary Art under The Copyright Laws, MYLAWMAN (8th December 2022; 9:12PM) <https://www.mylawman.co.in/2022/06/legal-article-overview-of-protection-of.html>

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