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INNOVATION AND CREATIVITY IN THE FINE ARTS: THE RELEVANCE AND IRRELEVANCE OF COPYRIGHT

Daniel J. Gifford*

I. INTRODUCTION

How have social institutions, customs, and intellectual property laws affected creative activity in the fine arts? This article examines the many relationships between the fine arts and their social and legal environment. For the purposes of this paper, the fine arts embrace painting, sculpture, and (classical) musical composition. As will be shown below, in the arena of the fine arts, the respective roles of subjective factors—factors internal to the artists themselves—and external influences upon them from the larger society have changed dramatically over the last one hundred years. These changes have expanded the role of the subjective. Consequently, significant gaps in understanding have arisen between artists and the educated (but unprofessional) public. One result has been the evolution of institutional mechanisms to surmount these barriers.

The exploration of the relationships between the fine arts and the larger society undertaken in the following pages identifies important external influences, which have helped connect artistic production to their audiences in the past. Intellectual property laws are premised largely on an assumption that a major external influence on the creation of intellectual property is an incentive generated by an anticipated market demand. This is not so for the fine arts. Although external factors have exerted a significant impact upon artistic creation, economic incentives have not been among them. Thus arises the anomaly that the economic-incentive model, which the courts have repeatedly asserted underlies the intellectual property laws, appears largely irrelevant to creative work.

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1 See, e.g., Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-51 (1988) ("The federal patent system thus embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years."); Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.") (quot-
in the arts. Rather, the critical external factors operative upon artists have been noneconomic or, if economic, then not of the type for which the protections of the intellectual property laws are needed. Historically, the external influences operative in the fine arts have been cultural, displaying the dominant artistic conventions and styles. These conventions and styles have both constrained artistic production and stimulated artistic efforts to overcome their limitations.

The economic-incentive model, however, does aid our understanding of the markets for fine art and of the commercial distribution of a variety of cultural products, including works of fine art. The economic-incentive model, for example, helps to shape the winnowing process performed by galleries and other “gatekeeping” institutions that identify superior works to their special audiences. By comparison, at the level of works of mass culture, that model is operative at both the creative and distributional stages.

Because the intellectual property laws are part of the social environment in which artistic creativity occurs, an examination of the interrelationships between the fine arts and their social environment is a way of approaching the particular impact of those laws upon the fine arts. Part II of this article sets the background for this examination with a brief review of the economic-incentive model that ostensibly underlies the intellectual property laws. Part III reviews the application of this model in its core setting, the world of commerce and industry. In that examination, differences between pure and applied research are noted, especially as they affect the freedom of researchers to follow self-directed paths, free from external constraints. This examination lays the groundwork for comparisons, which are made throughout the article, between research activities and artistic endeavors—first, on a scale of subjective motivation and external influences, and second, on other scales representing degrees of economic motivation and the relevance of intellectual property protections. Part IV examines artistic

innovation and the degrees to which artists have been subjected to external constraints or standards at various historical periods. It finds that artists have moved from being subjected to an array of external influences and constraints to a situation in which most constraints have disappeared. On the subjectivity/external influence scale, the situation of contemporary fine artists resembles that of the pure researcher. Contemporary artists may possess more freedom and may respond to subjective motivations to a greater degree than pure researchers. While fine art at the creation stage is exceedingly free, the influences of the marketplace exert significant constraints at the stages where artistic reproductions and musical recordings are produced and distributed. It is at these latter stages where intellectual property laws become increasingly important.

As we move towards more popular forms of art, the commercial element grows in importance. Products such as books, musical recordings, and motion pictures are impacted at the publishing and distribution stages by market factors. Part V takes up a so-called "gatekeeper" theory propounded by art sociologist Diana Crane. Crane has suggested that innovation has been curtailed or retarded in various cultural areas by institutions that control or influence access to innovative cultural works. Part V concludes that the so-called gatekeeping institutions perform socially valuable functions of collecting and synthesizing information, and thus facilitate the distribution of artistic works, both at the level of fine art and at the level of mass culture. Part VI develops the case that it is primarily the replicability of a work (including a cultural work) that underlies the economic-incentive model of intellectual property. It concludes that the economic-incentive model does not provide a satisfying explanation for the application of intellectual property law to serious painting, sculpture, or composing. Finally, in light of the prior discussion, Part VII examines the correspondence between the intellectual property laws and their tasks in fields of artistic creativity. After examining the copyright, trade dress, and design patent laws, it concludes that the primary role for these laws lies in fields where works are mass-produced and distributed in volume. In contrast, these laws perform only a limited service in the fine arts, where their primary application is in the protection of the rights of publishers. Finally, current developments have revealed that intellectual property laws possess some potential for interfering with, rather than encouraging, artistic creativity.

The article concludes, first, that the in the case of the fine arts,
the intellectual property laws do not perform the stimulative purpose that is commonly ascribed to them. Second, the article concludes that the intellectual property laws are largely irrelevant to the production of unique works, even when their production is economically motivated. The copyright and other intellectual property laws, therefore, are of limited importance in fine arts such as painting, sculpture, and musical composition at the creative level where economic motivation is least likely to be a significant motivating factor. As artistic production descends from the fine arts to works of popular culture, the copyright and other intellectual property laws rise in importance.

II. INTELLECTUAL PROPERTY LAW AND THE ECONOMIC-INCENTIVE MODEL

The United States Constitution confers upon Congress the power "[t]o promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\(^2\) Cases have repeatedly described this power as embodying an economic-incentive model: by conferring upon authors and inventors the exclusive right to their writings and discoveries, the patent and copyright laws provide the incentive for authorship and invention, thereby benefiting society.\(^3\) According to these cases, this economic-incentive model not only underlies the patent and copyright laws, but it also underlies other forms of intellectual property law, such as the laws protecting trade secrets\(^4\) and conferring so-called rights of "publicity."\(^5\)

Law journal articles have discussed extensively this economic-incentive model. Under the prevailing analysis, intellectual property laws fill a gap in the property rights regime. This regime of property rights enables those who produce value to capture a part of that value and thus provides incentives for productive actions. But traditional property rights do not include rights over commercial and industrial innovation, nor do they include rights over creative activities in the arts. Moreover, most new inventions and

\(^2\) U.S. Const. art. I, § 8, cl. 8.

\(^3\) See supra note 1.

\(^4\) See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 485, 493 (1974) (stating that "[t]rade secret law will encourage invention in areas where patent law does not reach . . . [and] promotes the sharing of knowledge").

\(^5\) See Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576-77 (1977) (noting that Ohio's protection of a "human cannonball"'s right of publicity provided "an economic incentive for him to make the investment required to produce a performance of interest to the public").
artistic creations possess "public goods" characteristics, in that they are easily replicable by others. Thus, in the absence of intellectual property laws, free riders would appropriate the value of innovation and artistic creativity. Innovation and artistic development would be retarded for lack of incentive. This would be a "market failure": the market would fail to generate the incentives necessary to increase aggregate welfare. Intellectual property laws, therefore, are a response to this market failure. By creating intangible property rights in innovative and creative works, intellectual property laws remedy the market failure by enabling inventors and artists to capture some of the value that they create, thus restoring their incentives to undertake these creative activities.

The Patents and Copyright Clause of the Constitution, which is cast in instrumental terms, incorporates the economic-incentive model. The premise is that the recognition of exclusive rights will promote progress. The incentive rationale also finds expression throughout intellectual property law, particularly in the fourth statutory fair use factor of copyright law, and in the prominent role that market demand plays in copyright infringement analysis.

The economic-incentive model, which the courts and commentators identify as underlying the intellectual property laws, is a limited version of a more simple and broadly applicable model of economic incentives. This simpler model assumes economic rationality and profit-maximization, upon which most economic anal-

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6 See Stephen L. Carter, Owning What Doesn't Exist, 13 HARV. J. L. & PUB. POL'Y 99, 102 (1990); Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors, 82 COLUM. L. REV. 1600, 1610-11 (1982); William M. Landis & Richard A. Posner, An Economic Analysis of Copyright Law, 18 J. LEGAL STUD. 325, 326 (1989). Generally the regime of property rights ensures that people who, through their activities, generate economic value capture some of that value, thereby providing the incentive for socially beneficial activities. This property-rights regime fails in the case of inventions and most artistic creations, however, because their value lies in their conceptions, which are freely appropriable and easily replicable. By expanding property rights to reach inventions and artistic creations, intellectual property laws remedy this defect in the traditional property-rights regime.

7 U.S. CONST. art. I, § 8, cl. 8.

8 See supra note 1 (citing cases referring to the economic-incentive model as underlying copyright law).


ysis is based. This latter model helps us understand the relationships between a wide range of productive activities (not just the creative and innovative ones that are the special subjects of the intellectual property laws) and the society these activities serve. Market incentives guide routine productive activities towards satisfying the needs and wants of consumers. Innovative and creative activities are guided by anticipations and predictions of what kinds of goods consumers will want and desire. Intellectual property laws, as observed above, are widely believed to be a necessary condition for market incentives to foster these innovative and creative activities. These laws create the property rights that enable innovators to capture some of the economic value that they create. Thus, the economic-incentive model is not only an explanatory model of how productive activities relate to the needs of society, but is also an instrumental model: one which guides the structure of intellectual property laws towards their ostensible goal—the fostering of innovative activity.

III. COMMERCIAL INNOVATION: A POINT OF COMPARISON

A. The Research Spectrum

When we think of creativity in the world of business, we generally focus upon the development of new products and new processes. These developments are the end result of extensive research and development. We begin with distinguishing “pure” research from applied research and development.

The market provides signals about the types of products and services for which there is a demand and, hence, which might generate revenue. This is illustrated in Figure 1 below:

![Figure 1](image)

Pure research falls on the left of the spectrum, where the market provides no indicators directing the course of or goals for research. Pure research reflects the subjective interests of the investigator, and the views of funding agencies and their peer-review commit-
tees about the importance of research for reasons other than commercial exploitation. In this area there are no research goals that promise a commercially profitable return. Moving away from the left, which is the domain of pure research, toward the center of the spectrum, market clues begin to appear. At first these clues are weak and diffuse, because the market has little to say about the direction of research. Moving towards the right, market clues become strong enough to provide information useful to applied research. Moving further to the right, those clues become even stronger. Finally, at the right end of the spectrum, the market provides information indicating products that economically significant sectors of the buying public would welcome and which would produce significant revenues for their producers. For example, during the 1980s, it became apparent that users of personal computers would welcome a graphical (or other) user interface. Although Xerox performed the basic work in its Palo Alto laboratory, Apple first brought graphical user interfaces to the market—initially, in its ill-fated Lisa computer and then later, successfully, in its Macintosh computer. Several companies attempted to develop a user interface for the Intel-powered personal computers. IBM raced with Microsoft to bring such an interface to the market, but Microsoft ultimately prevailed with its Windows system.

Business firms respond to demand when they can produce what is demanded at a profit. Businesses, therefore, are moved to undertake research and development when they believe that their expected profits from product development will exceed the costs


Thus, the existing state of technology is a major determinant of applied research: as technology develops, the cost of moving to a new product frontier diminishes. Moreover, the ability to assess demand, especially demand for a new product or its improvement, is itself a process which has improved over time as a result of the emergence of improved survey techniques, focus groups, and new techniques for interaction between marketing personnel and customers. Thus, demand (including the techniques for assessing it) and the existence of enabling technology are the primary determinants of research-and-development expenditures.

B. Research at the Right End of the Spectrum

At the right end of the spectrum, market indicators become strong and unambiguous. This is the area where widely perceived needs are located and, consequently, where business firms are most aware of the demand for new products. Thus, in the 1980s, it was widely understood that the public would welcome a graphical user interface on Intel-powered personal computers. Let us consider the economics of competitive research and development in a situation like the development of a graphical user interface.

The market indicates most clearly the need for a new product when product development has proceeded to the point where its next stage is obvious. For example, there was no widely perceived need for a graphical user interface before personal computers were widely used. Thus, the spectrum of market indicators is based, first, upon the state of existing product development and distribution (which influences demand for a new product). Second, the spectrum is based upon the state of technology (which ultimately defines the limits of the commercially practicable). From the perspective of business firms, the market provides indicators towards particular research and development only when the existing state of technology makes those moves feasible. Thus, business firms must compare the new product’s potential profit with the research and development investment necessary to create the product. After all, research and development involve bridging the gap between existing technology and the technology necessary to produce the new product. Unless the existing state of technology is sufficiently developed, the cost of bridging that gap will exceed

15 See supra text accompanying note 12.
the expected profit. Market indicators and the existing state of technology, therefore, govern the development of new commercial products.

The business firms that respond to the technological and market indicators of new products are most likely already in the industry in which those products will be sold. These firms are most familiar with that market, and they are most sensitive to the market signals indicating the need and demand for the new products. Alternatively, the responding business firms may be close technologically to the kind of research required for the development of the new products. In either case, it is likely that firms close to new products or product groups, from either a market or technological standpoint, will be the principal rivals in the race to develop the new product or product group.

In summary, market indicators combined with technological potential will govern the direction of research on new product development. Firms will undertake research based upon the expected profitability of the new product, two elements of which are the demand for the product and the cost of developing it. Research competition will tend to break down into clusters of competing firms. The principal factors distinguishing the clusters will be the proximity of the current product sold by each firm to the target of the research, and the proximity of each firm's existing technology to the research needed to develop the target product. Market and technology indicators guide the decisions of each firm to undertake research and on the kind of product development to pursue. These indicators provide the basis for estimating the profit potential from the research project.

IV. ARTISTIC DEVELOPMENT

A. Artistic Development in Context

Although commercial development proceeds according to market indicators and the existing state of technology, the development of fine art proceeds quite differently. Commercial development is self-supporting. The need for expected profit to exceed research-and-development costs imposes a discipline upon development, and requires that development be guided by the standards just described. This analysis of commercial development provides a useful comparison with artistic development.

Commercial development is undertaken for profit; therefore, commercial development follows indicators of potential profitability provided by the market. Indeed, because potential profitability
drives commercial product development, development frequently involves a series of progressive improvements in which each improvement builds on previous work. Thus, the development of graphic user interfaces improved personal computer operating systems. The integration of the graphic user interface and the addition of new capabilities further improved these operating systems.  

Contrary to the way commercial development proceeds, work in the fine arts is not generally undertaken for profit. At the level of production, it is difficult to tie the supply of painting, sculpture, or composition of classical music directly to a system of economic rewards. When Congress devised the copyright renewal mechanism under the pre-1976 law and the right of termination under the 1976 law, it recognized that artists and writers often work in contexts where short-term economic rewards are not generated. Artists, like everyone else, face the challenge of supporting themselves economically. At the top ranks, only a few artists earn substantial sums for their work. Others are able to support themselves through their work. Most artists, however, cannot support themselves through their work. Many of the less commercially successful artists have found alternative means of support, even as their purely artistic productions fail to generate financial returns. Some artists spend part of their time producing goods, such as jewelry or other art objects, for which there is a strong demand, thus generating significant income. Some artists, ignoring issues of aesthetics, paint pictures designed to appeal to wider audiences than those concerned with pure or "fine" art, thereby generating significant income. Some are employed, especially in academia, thus supporting themselves with a teaching salary while they produce paintings and other works of art that do not generate significant income. Because the profit motive does not guide the production of pure art, artistic works tend to be oversupplied. However,

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16 See supra text accompanying note 12; see also MANES & ANDREWS, supra note 12, at 6-8 (discussing the evolution of the graphical user interface); MARK MINASI, THE EXPERT GUIDE TO WINDOWS 95, at 2-7 (1996) (pointing out improvements in the Windows 95 interface as compared to earlier Windows interfaces).


19 See Linda J. Lacey, Of Bread and Roses and Copyrights, 1989 DUKE L.J. 1532, 1573. Lacey reported data showing that most artists would be unable to survive from revenues generated by their work. See id. Indeed, Lacey reported that the median income of artists from all sources in 1980 was $9,800. She concluded that monetary gain was not the motivating force in the production of art. See id.


21 See id. at 10.
as discussed below, the market nonetheless contributes to the identification of works of superior quality, and thus generates symbolic and economic rewards to a few of the most successful artists. The market does this through the operation of the "gatekeeping" institutions discussed in Part V.

This article argues that artistic production is most analogous to basic research because its guidance is left to the idiosyncrasies of the individual artist. By contrast, a complex system of museums, galleries, and critics guide its distribution. That system once shared a common view on artistic standards, which influenced both distribution and production accordingly. Largely as a result of the breakdown of the governing artistic paradigm, that system is in the process of becoming increasingly responsive to a broad array of tastes. The museum/gallery/critic distribution system nonetheless still exercises a governing influence over the kinds of art that are purchased.

B. Artistic Standards: Stability, Change, and Erosion

1. Standards Prior to the Mid-Nineteenth Century

Artistic production was historically commissioned by patrons, and the resulting works conformed to broad standards accepted by those patrons, the artists, and the educated public. The standards were those of the prevailing style. Although styles changed over time, a single style generally was dominant during any one period. The progression from one dominant style to another was understood by artists and the educated public as a development under which the new style better carried out a widely shared aesthetic imperative, such as an improved visual representation in the traditional approach, or an improved way of revealing the essential characteristics of the art form in a "modernist" approach.22

This widespread allegiance to a single aesthetic ethos, which underlies the dominant styles that constantly change, prevailed among artists, critics, patrons, and collectors from the early Renaissance23 until the mid-twentieth century. Recognizing that a dominant style prevailed in each period, and that a single aesthetic ethos generally underlay all of the dominant styles, supports the analogy between artistic development and commercial product development. At the time of the Renaissance, patrons supported art-

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22 See infra text accompanying notes 24, 27-28, 32-34.
23 Some scholars take the view that western "art" began with the Renaissance. See, e.g., ARTHUR C. DANTO, AFTER THE END OF ART 3 (1997). Although artistic images were created throughout the middle ages, they were created for devotional purposes. The concept of art—works produced self-consciously by artists—began during the Renaissance. See id.
ists by commissioning works for palaces, churches, and public buildings. These patrons generally shared an admiration with the artists for the works of classical antiquity. These patrons also shared a desire with the artists to recover the ability to render both perspective and a finer representation of the human form. It became widely accepted that art—especially painting—should strive progressively to improve its depiction of visual appearances. This goal was consistent with the rendition of such otherworldly scenes as the last judgment, the crowning of the virgin, or the escapades of the mythological figures in the Greco-Roman tradition. Indeed, this goal guided artists in their rendition of light and shadow, anatomy, perspective, texture, and the like, regardless of the painting’s subject. Patrons, artists, and the entire educated public shared the same set of standards, thereby making art production consistent and stable during this period. The patrons financially supported the artists, and they probably also influenced the choice of subjects. However, the patrons did not influence the major trends of development, because these trends proceeded along lines widely held and internalized by all three groups: the patrons, the artists, and the public.

During this period, new developments in art frequently consisted of improvements or further developments of what had gone before, usually in the direction of a more accurate rendition of reality. The refinement of perspective, for example, took place incrementally. Giotto, an early fourteenth-century painter, produced works that lacked perspective, while Masaccio, an early fifteenth-century painter, began introducing perspective into painting. For approximately one hundred years, artists struggled with perspective, each drawing upon the contribution of his predecessors and adding his own contribution. As a result, painters became progressively more adept at rendering perspective during this period. The great art historian, Giorgio Vasari, credited Uccello and Brunelleschi with major advances in this technique. By the end of the fifteenth century, complete success had been attained.

Western art history began with the publication, in 1550, of Vasari’s *Lives of the Most Eminent Painters, Sculptors, and Architects*. Not only did Vasari provide biographies of a vast number of artists,

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24 See id. at 48.
25 See *Giorgio Vasari, 1 Lives of Seventy of the Most Eminent Painters, Sculptors and Architects* 178-79, 249 (E.H. Blashfield et al. eds., 1896). This cited work is a widely available abridgement of Vasari’s 1550 work, *Lives of the Most Eminent Painters, Sculptors and Architects*. All future references to Vasari’s work are from the Blashfield edition.
26 See generally id.
but he also provided a critical approach towards art that lasted for centuries. Thomas Boase, in his Mellon lectures, attributed to Vasari a developmental theory of art under which its growth is "governed by increasing accuracy by means of perspective, anatomy, and shading of color, in the rendering of the thing seen."27 Arthur Danto describes Vasari as taking the view that art was "an unfolding progressive narrative,"28 a narrative of continuing improvement in representation. Under that view, art develops over time, each new "movement" drawing upon and reacting to the artistic movements that have preceded it.

Throughout modern history, numerous "movements" have emerged in art. The Renaissance was followed by the mannerist, baroque, and rococo movements.29 In the eighteenth century, a "neoclassical" movement emerged, led by the French painter, Jacques-Louis David.30 This movement was a rebellion against the highly ornate rococo style that had become prevalent in the early eighteenth century. The paintings of David and his followers were sparse and formal. Later, in reaction against the neoclassical style, the romantic movement in painting—led by Eugene Delacroix and others—abandoned formality and sparseness in favor of emphasizing heroism and powerful irrational forces, such as those of nature, with which humans must contend. Many painters participated in each of these movements. The artists and their publics understood the directions in which these movements were headed. Neoclassicalism, for example, was a significant change from the styles preceding it. Yet, ultimately, it was accepted as the prevailing style, a situation reflecting the acceptance of similar standards by artists and the educated public.

Within each of these movements, artists drew from the work of others. Using the contributions of earlier artists to inform their own work, they sought to improve upon those earlier contributions. Within each of these movements, therefore, there existed a consistency of approach, combined with development over time.

Over time the subject matter of painting changed significantly. The Reformation drastically narrowed the subject matter of painting in most of northern Europe, forcing painters in many of those countries to confine themselves to portrait work.31 Conversely,
events (including the French Revolution) towards the close of the eighteenth century and continuing into the nineteenth century fostered an immense broadening of the subject matter of painting.\textsuperscript{32} Painters began to paint both historical and contemporary events. More painters began to paint landscapes, making landscape painting a major sector of work.\textsuperscript{33}

Despite the evolution of artistic subject matter, the broad-based movements themselves are best understood as a continuous progression of developmental stages reflecting back on earlier periods. To the extent that this progression involved a steady improvement of the way artists represent visual reality, it conforms to the Vasarian model. The expansion of subject matter is also fully consistent with this view. The artists who pioneered subject matter expansions saw themselves as participating in this development. Indeed, this underlying artistic ethos at least partly explains why the public ultimately understood and accepted artistic movements that had initially appeared novel and unfamiliar. Because the new movements were developmentally related to their predecessor movements, the tools for understanding and appreciating the new movements were close at hand. Subsequent movements, such as the impressionist movement of the late nineteenth century, also conform to this model. The impressionist movement, however, proved to be the last movement that could be understood under this Vasarian model. Thereafter, artistic developments underwent substantial changes.

2. The Development of Twentieth-Century Art

Beginning in the late nineteenth and early twentieth centuries, the model of artistic development underwent a profound change. The impressionist movement largely followed the course of other movements described above. The impressionists shared the idea of producing art in the way the conscious eye sees the world. The eye normally does not see all objects in its perimeter in precise detail and focus in the manner of a camera. Rather, the eye focuses upon a subject, while the periphery remains blurry and out-of-focus. It is affected by sunlight, shadows, and glare. The eye creates an impression that is strikingly different from photographic reproduction. The impressionists sought to produce similar images on canvas. While this objective united the impressionists, it

\textsuperscript{32} See id. at 481-85.
\textsuperscript{33} See id. at 490-92.
contained the germ of an idea that would revolutionize painting—and, indeed, all art.

The expressionists started with the impressionistic idea that the world is not seen photographically, and then they shifted the focus away from representation as an internal apprehension of the world, focusing instead upon expression. The early expressionists used objects of the world as a basis for expression, rather than for literal representation, altering various familiar objects in color or shape. Later, abstract expressionists (such as Jackson Pollock) would express themselves without using objects. Common themes or goals guided the prior artistic movements. The artists of the neoclassical movement shared an appreciation of formality and decorative sparseness. The artists of the romantic movement shared an appreciation of larger-than-life scenes and of human heroes confronting overarching challenges. The artists of the impressionist movement shared a concern with depicting the world as actually seen by the eye, with all of the imperfections of the actual eye. With the advent of the expressionist movement, painting embarked on a new and uncharted route in which the previous standards, which had guided its development, were no longer relevant.

The goal of depicting reality with ever-improved techniques was abandoned. From the early twentieth century onward, art no longer sought to represent reality. Perhaps the invention and perfection of photography (including motion picture photography) rendered the earlier goal obsolete. Artists now, in a host of different ways, produced works that explicitly changed or altered reality, where the visual appearances were suggested, exaggerated, completely restated, or entirely lost. Van Gogh's *Starry Night* does not purport to be a literal depiction of night sky; its beauty lies in its suggestiveness combined with its heavy brush strokes. Picasso's *Les Demoiselles d'Avignon* is thought to have commenced the cubist movement. Mimesis was clearly over as the dominant art form. What standards would then guide artistic development henceforth? The early twentieth century was a period of upheaval in the art world, in which various groups of artists periodically sought to organize new artistic movements, often issuing manifestos justifying their position.

Eventually, and with some of the wisdom of hindsight, a new way of looking at art emerged. By mid-century, Clement Greenberg had devised a new narrative of artistic development: art is the

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35 See *Danto*, supra note 23, at 28, 30.
progressive finding of its own essence, eliminating all elements that
do not belong to its particular form. Painting, in this view, strives
to eliminate everything that is inconsistent with the flatness and
squareness of the easel, and, thereby, to reveal its own essential
qualities. Mimesis is inconsistent with painting because it seeks to
incorporate elements from sculpture. Indeed, the Renaissance
project of recapturing perspective becomes, under this new guid-
ing principle, inconsistent with the primary aim of painting.
Greenberg's new theory helped to explain artistic developments
that were inexplicable under the old Vasarian theory. Both
Vasari and Greenberg could explain the impressionists, who, from
a Vasarian perspective, were attempting better to replicate the way
in which the eye sees reality and, from a Greenbergian perspective,
were revealing essential features of painting with their prominent
and unfinished brush strokes. But only Greenberg could explain
artists like Cezanne, whose angular representations reflected the
squareness of the canvass.

Yet, pop art emerged in the 1960s and undermined the Green-
berg developmental thesis. Pop rejected the progressive revelation
of the materials of painting. With that rejection, as Arthur Danto
has argued, the Greenberg narrative (which had itself replaced the
Vasari narrative) was over. There was now no narrative guiding
the development of painting. Artists were freed from the con-
straints of the artistic establishment to do the kinds of art they
wished. Artistic development has evolved from a situation that was

36 See CRANE, TRANSFORMATION, supra note 20, at 55; see also Clement Greenberg, To-
rwards a Newer Laocoon, in THE COLLECTED ESSAYS AND CRITICISMS 23, 34-35 (John O'Brian
ed., 1986). "The history of avant-garde painting is that of a progressive surrender to the
resistance of its medium; which resistance consists chiefly in the flat picture plane's denial
of efforts to 'hole through' it for realistic perspectival space." Id.
37 The Greenberg thesis could explain twentieth-century developments through the ab-
stract expressionists at mid-century. Greenberg himself identified Jackson Pollock as one
of the standard-bearers of artistic development before Pollock became widely known. See
DANTO, supra note 23, at 70-71, 88. With Pollock and his contemporaries, painting had
fully cast off representation and revealed itself as color on canvas. Even so, Pollock could
be accused of neglecting the natural flatness of the canvas, as his drippings produced an
almost sculpture-like surface.
38 Pure modernist art forms were thus incapable of commenting on contemporary so-
cial issues. See Peter Margulies, DOUBTING DOUBLENESS, and ALL THAT JAZZ: EMBASSY CRITICISMS
OF OUTSIDER INNOVATIONS IN MUSIC AND LEGAL THOUGHT, 51 U. MIAMI L. REV. 1155, 1159-65, 1169-
77 (1997).
39 See DANTO, supra note 23, at 125 (noting that Greenberg wrote disparagingly about
pop art, which, according to Danto, "recognized that there was no special way a work of art
had to be"); see also CRANE, TRANSFORMATION, supra note 20, at 36 (citing Greenberg's be-
ief that "art criticism should, like science, exhibit logic and precision and be based on
general concepts rather than on intuitive reactions to the stimulus of a particular
painting").
governed by a shared set of relatively strict standards to one that is essentially standardless.

C. Artistic Freedom, Heterogeneity, and the Culture of Novelty

1. The Culture of Novelty and Its Origins

With the arrival of pop art and the breakdown of the Greenberg narrative, art was free to take any form at all. Numerous styles have emerged since the early 1960s, such as minimalism, photorealism, pattern painting, neoexpressionism, and others. Moreover, artists have produced their own art works in unique styles, sometimes employing several styles over time. The resulting heterogeneity of contemporary art has impelled Stephen Jay Gould to identify a new problem relating to artistic development. This problem arises from the combination of an artistic “ethic of innovation” that “awards greatness only to those who devise a novel style” and the limits of what a highly sophisticated, sympathetic, intelligent, but nonprofessional audience can “grasp with understanding and compassion.” Thus, Gould sees an array of possible forms for musical and artistic composition that is limited. True, there is no end to the potential for variation in style in art and music, but there is a limit to that which humans find pleasing. Gould further argues that society follows a cult of novelty in music and the arts. Society accepts a new style from its creator, but it does not expect others to follow this form. It expects others to develop their own styles. This cult of novelty thus generates artistic productions in styles to which the public does not easily relate.

The problem that Gould has identified—the impact of a cult of novelty upon aesthetics—is both a partial cause of the breakdown of common standards in artistic creation and its result. When the public shared standards with the artists, it accepted the work of many artists who were all working in the same overall genre. During the impressionist period, for example, the public accepted the work of Bazille, Cassat, Degas, Guillaumin, Monet, Morisot, Pissaro, Renoir, Seurat, Sisley, and others who, while differing among themselves, all worked in the impressionist style. When the public fails to understand an artist, it is unable to grasp the connection between that artist’s work and the work of another.

41 Id. at 228 (discussing the limitations of a nonprofessional audience in its understanding the art of the mid-twentieth century); see also Daniel Bell, The Cultural Contradictions of Capitalism 38-41 (1976).
42 Bell sees the cult of novelty as underlying prevailing culture. See Bell, supra note 41, at 34, 37.
There are no shared standards uniting the artist and the public; hence, the public looks not for other work in the same unintelligible genre, but for an entirely different style from later artists. Or, in other words, since the standards uniting the artist and the public have all but disappeared, the public—finding it difficult to grasp subtle connections and relationships among contemporary artists (analogous to the relationships among the Impressionists)—sees each artist as working in a style unique to that artist. The public demands major differences in style because it is unable to appreciate subtle differences.

The absence of in-depth knowledge among the educated public about contemporary artistic creation has given rise to a major gulf between an elite class of collectors and scholars, and the mass of the public, including the educated public. While such a gap has always existed, it widened substantially when the modernist movement rejected the Vasari narrative at the beginning of the twentieth century and embraced non-representational painting. It may have widened further when the Greenberg narrative was rejected in the 1960s. Thus, the conditions creating Gould's cult of novelty arose, further contributing to that gulf in understanding. These conditions, in turn, appear to increase the need for institutional mechanisms to identify superior works. Part V of this article examines art sociologist Diana Crane's account of such an institutional structure: the interrelated roles of art critics, elite galleries, and museums appear to respond to this informational problem.

2. The Role of the Patron

Because both patrons and artists shared the same sets of aesthetic standards during the Renaissance and post-Renaissance periods, there was little likelihood of patrons directing or controlling the course of artistic development. Yet, the economic fact that patrons supported art ensured that the development proceeded in accordance with the expectations of those patrons, even if those expectations were rarely, if ever, challenged. It is probably no coincidence that the subjects for much Renaissance and post-Renaissance art are scenes of religious significance, mythological scenes, or portraits of nobles, ecclesiastics, and merchants. The patrons would likely favor these subjects. Although patronage remained the principal economic base for the arts from the Renaissance

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43 See DANTO, supra note 23, at 54-57 (describing widespread bafflement among educated classes, including critics, generated by the emergence of nonrepresentational art).

44 See infra Part V.
through the nineteenth century, the period was marked by several major disruptions. The Reformation, as noted above, destroyed the market in northern Europe for altarpieces and for much church decoration.\textsuperscript{45} This relegated painters to portrait work in England and created an upheaval in the Netherlands art market.\textsuperscript{46} This upheaval eroded the tie between artists and patrons, causing Dutch artists to produce uncommissioned paintings of nonreligious subject matter and to rely upon dealers or themselves to find buyers.\textsuperscript{47}

In pre-Revolutionary France, the monarchy and its political allies subsidized a wide range of arts and artistic activities, in part, because the arts could provide support for the crown.\textsuperscript{48} Subsequently, the emergence of the neoclassical style with David’s work coincided with the advent of the French Republic, which furnished support for that new style.\textsuperscript{49} The aftermath of the Revolution engendered a dispersion of tastes, both among artists and their public, causing artists to paint in a wide variety of subject matters.\textsuperscript{50} This state of affairs both produced and reflected a growing distance between patrons and artists, raising the prospect of substantial losses in artistic commissions. In response, the so-called academies in both France and England began to arrange annual exhibitions designed to acquaint potential buyers with representative work of their members.\textsuperscript{51}

The advent of the romantic movement largely coincided with the post-Napoleonic restoration of the ancient monarchies, when governments, nobles, and other conservative patrons were probably especially happy to contribute to the rise of a rival to the republican artistic movement.\textsuperscript{52} Indeed, the growing variety of artistic subject matters, replacing the earlier focus on republican and classical themes, probably also pleased these conservative patrons. Throughout the turmoil of these times, governments supplemented the roles of private patrons. Indeed, European govern-

\textsuperscript{45} See supra text accompanying notes 29-31.
\textsuperscript{46} See GOMBRICH, supra note 30, at 379.
\textsuperscript{47} See id. at 418.
\textsuperscript{49} See Christopher M.S. Johns, Antonio Canova and the Politics of Patronage in Revolutionary and Napoleonic Europe 109-10 (1998) (discussing the patronage of the arts during the Napoleonic era); see also Jonathan P. Ribner, Broken Tablets: The Cult of the Law in French Art from David to Delacroix 30-35 (1993).
\textsuperscript{50} See supra text accompanying notes 32-33.
\textsuperscript{51} See GOMBRICH, supra note 30, at 481.
\textsuperscript{52} See Ribner, supra note 49, at 54-65 (discussing government patronage during the Bourbon restoration).
ments continued to support artists and their work throughout the nineteenth and twentieth centuries, gradually replacing the nobility and the church as artistic patrons, as the latter were eclipsed by the spread of the Enlightenment and parliamentary democracy.\textsuperscript{53}

Yet, as governments gradually assumed financial support for the arts, artistic standards crumbled. Through the end of the nineteenth century, it was unimportant whether the governments or private largess supported the arts, since at any given time the artists, the educated public, government officials, and private patrons shared the same standards. But just as parliamentary institutions were becoming widely accepted throughout most of western Europe in the first quarter of the twentieth century, the disintegration of artistic standards, which had begun with the advent of Expressionism, gained momentum.

When democratic institutions support art—institions that are responsible to an electorate—at a time when artistic standards uniting artists and their publics have all but disappeared, the funding institutions cannot exercise direction over the course of artistic development at all.\textsuperscript{54} The funding institutions assist the development of standardless art because they support artistic production that tends to be idiosyncratic to the artists. In the United States, the National Endowment for the Arts ("NEA")\textsuperscript{55} provides funds under a largely standardless mandate. This is no criticism of the NEA. The institutions of a democracy cannot legitimately impose artistic standards that the public does not accept. Most private foundations lack the confidence to guide standards of artistic development.\textsuperscript{56} They, like the NEA, have abdicated the role of patron. They also fund standardless art, believing perhaps, that any other role would be inappropriate in a democracy. The democratization of funding institutions completes the process of transform-

\textsuperscript{53} See, e.g., John Russell Taylor, Impressionist Dreams: The Artists and the World They Painted 20 (1990) (discussing the enormous number of publicly-commissioned murals required for new public buildings during the last half of the nineteenth century). Taylor reports that subject matters for these public commissions continued to be historical, allegorical, and religious through the century's end. See id.

\textsuperscript{54} See National Endowment for the Arts v. Finley, 524 U.S. 569, 573 (finding that a statute requiring the NEA to consider "general standards of decency and respect" in its grant-making decisions was neither void for vagueness nor a First Amendment violation).

\textsuperscript{55} See id. at 580-84 (discussing the NEA's practice of using "diverse advisory panels" to make grants within the parameters of the statute under which the institution was created); 20 U.S.C. § 954 (1999) (establishing the NEA and listing certain guidelines for its operation); Symposium: Art, Distribution & the State: Perspectives on the National Endowment for the Arts, 17 Cardozo Arts & Ent. L.J. 705 (1999).

ing art from the era prior to the twentieth century, in which it was governed by standards, to the contemporary period where it is not. In that earlier era, both patrons and artists internalized the same standards, as did the educated public. In the twentieth and twenty-first centuries, artists have ceased to share standards with the public; and the funding agencies not only lack standards, but also are institutionally incapable of adopting them.

3. The Similarity between Art and Pure Research

Pure research is undertaken without regard to commercial applications. Pure research is often contrasted with applied research, which is research directed at applying knowledge to a useful end. Much applied research is undertaken for commercial ends, i.e., for the development of commercial products. Indicators from the market guide the research and development of such products. Indeed, since commercial research and development are self-supporting, the market and its profit opportunities must guide them. Since pure research has no commercial applications, unlike applied research, it is not market-driven.

Pure research is costly; therefore, it must be supported or subsidized. Much pure research is supported by the government, foundations, and universities. Some research is carried out in private laboratories, where its support comes from business. Even here, however, that support is necessarily divorced from market indicators, because pure research generally does not have direct commercial applications.

Thus, pure research is funded, but the funding decisions are not made on the basis of direct commercial links or current market indicators, as are the decisions to support applied research. The researcher and the funding agency make decisions about pure research, largely on the basis of what interests the researcher, and the extent the researcher can convince the funding agency of the importance of the projected research. In short, each research project is likely to be idiosyncratic and not subject to meaningful standards applicable to other research projects.

Art, which once was produced pursuant to standards widely shared by artists, patrons, and the educated public, is now not subject to such standards. Each artist now produces idiosyncratic art. The artist may explain to the funding authorities why he or she

57 Agencies funding basic research may have broad nonmarket goals or objectives, even though the agencies are not able to articulate detailed standards governing their grant decisions. See Goldberg, supra note 11, at 1354. The composition of the peer-review panels also exerts an impact on funding decisions. See id. at 1361.
should be supported. However, grants to individual artists are not subject to meaningful standards that will also govern grants to other artists. Thus, today, artistic development resembles pure research in that both are largely free from governing standards.

V. Retarding Innovation in Art: The Theory of the Gatekeepers

A. Painting and a Theory of Gatekeepers

In a study of avant-garde art, sociologist Diana Crane developed a "gatekeeper" theory under which certain dominant galleries retard the acceptance of new artistic developments.58 Her model involves, inter alia, (1) the difficulties of evaluating new works of art; (2) a class of galleries that skew their showings in favor of particular styles; and (3) an overlapping class of galleries that exercise an extraordinary influence upon the ultimate acceptance of an art style. Crane concludes that the dominant galleries have retarded the acceptance of new works by limiting their commitments to established styles.

The market for art is divided into a primary sector, where new works are sold, and a secondary sector, where older works are sold.59 A lack of information about new artists, their work, and their styles is a common characteristic of the primary market. High risk and steep transactions costs affect the market. The secondary market is affected less by these informational defects, as works traded in the secondary market have had a chance to acquire a reputation and a track record. News about established artists and evaluations of their works is readily available from a variety of sources, including art magazines.60

Crane has described the difficulties of evaluating new works of art in the primary market. Because the evaluation of art requires a high degree of experience and skill, even the educated public relies upon others to identify high-quality works.61 This process of identification takes place through showings in the galleries, reviews by art critics, exhibitions in the museums, and, to some extent, purchases by eminent collectors.62 The galleries identify new ar-

58 See Crane, Transformation, supra note 20, at 113-18; see also Diana Crane, The Production of Culture: Media and the Urban Arts 70 (1992) [hereinafter Crane, Production].
60 See id. at 154.
61 See Crane, Transformation, supra note 20, at 112.
62 See id.
ists by showing their works, thereby bringing them to the attention of the critics.\textsuperscript{53} James Heilbrun and Charles Gray suggest that a new artist is likely to establish an exclusive relationship with a dealer who arranges an exhibition of that artist's work.\textsuperscript{64} A dealer who expands the resources to identify emerging talent is thus able to capture some of the value of its discovery. The works of artists who pass these tests (i.e., identification by the gallery, favorable reviews by the critics) have a chance of being exhibited in the important museums—the ultimate certification of outstanding artistic work. Thus, while artistic works are produced in great numbers, the distribution process severely narrows the number of works that are identified as having superior artistic quality. These works carry the symbolic and economic rewards of such identification. They reflect high artistic quality and command high prices in the auction and other markets.

Crane has argued that a small number of New York galleries have performed the role of "gatekeepers," a role that she equates with fostering the acceptance of new styles by the art establishment (i.e., recognition by critics, exhibition in museums and sales on the auction market). In her view, a gallery becomes a gatekeeper when it evidences a commitment to advancing a particular style. She interprets the representation of multiple artists in a particular style as such a commitment.\textsuperscript{65} Crane believes that a small number of galleries performed the gatekeeping function at least as early as the 1940s and 1950s.\textsuperscript{66}

Since mid-century, the market for art has increased enormously. This increased demand has generated an expansion in the organizational infrastructure supporting its production and distribution: the numbers of museums, corporate collectors, art school graduates, galleries exhibiting new work, and other art-related institutions have grown substantially.\textsuperscript{67} Crane identifies a threefold-plus increase in the number of New York galleries devoted to the showing of avant-garde work from 1949 to 1980.\textsuperscript{68} She does not believe that the gatekeeper galleries expanded in proportion to the

\textsuperscript{53} See id. at 113-14.
\textsuperscript{54} See HEILBRUN & GRAY, supra note 59, at 153.
\textsuperscript{55} See CRANE, TRANSFORMATION, supra note 20, at 113-14.
\textsuperscript{56} See id. at 110.
\textsuperscript{57} See id. at 137. According to Crane, the number of new galleries in New York devoted to avant-garde work increased from 90 in 1949 to 290 in 1980. See id. at 3 (table 1.1). The expansion in galleries showing all kinds of work was in process during World War II. From 1940 to 1946, the total number of galleries increased from 40 to 150. See Ann Douglas, Pollock's Volcanic New York Circle, N.Y. TIMES, Nov. 27, 1998, at B37, B39.
\textsuperscript{58} See CRANE, TRANSFORMATION, supra note 20, at 137.
general expansion in galleries.\textsuperscript{69} She further believes that as the market for art expanded during the 1950s and 1960s, the gatekeeper galleries exercised a restraining influence upon the proliferation of styles. This restraining influence, she believes, conforms to the basic model that she has in mind: "As markets increase in size, a few organizations establish positions of leadership, thereby limiting the level of competition and the incentive to innovate. In such a situation, certain galleries would be expected to behave like an oligopoly, selecting styles that would appeal to the largest number of buyers."\textsuperscript{70}

Crane thus interjects a structural focus into the identification and acceptance of innovation in the world of art. Her suggestion recalls analytical approaches to industrial innovation where, under a model developed by Kenneth Arrow in the 1960s, incentives to innovate are reduced as the market becomes more concentrated.\textsuperscript{71} Arrow pointed out that a monopolist limits its output to an amount indicated by the intersection of its marginal revenue and marginal cost curves.\textsuperscript{72} Thus, its potential benefit from a cost-saving invention would be measured by a smaller volume than would a similar cost-saving invention licensed to all firms operating in an (unrestricted) competitive market. However, a number of questions about Crane's theory arise. Crane herself states that the number of galleries showing new work increased during the 1950s and 1960s. Moreover, she defines gatekeeper galleries as galleries showing multiple artists of the same style. But galleries that do not show multiple artists of the same style are likely to be showing a variety of styles. Why is not the showing of a variety of styles by many galleries bringing new work to the attention of critics?

A possible answer may lie in the informational problems affecting new works previously described. It is exceedingly difficult and time consuming to identify works of superior quality; therefore, critics and others may rely upon particular galleries to identify promising artists and their works in the first instance. Here the reliance is upon the judgment of the owners of these particular galleries. These galleries then become "gatekeepers" in a sense slightly different from the sense used by Crane (i.e., commitment to a style evidenced by showing multiple artists in the same style).

\textsuperscript{69} Crane wrote in the mid-1980s that the so-called gatekeeper galleries had all been established prior to 1970. See id. at 3.

\textsuperscript{70} Id. at 110.

\textsuperscript{71} See Kenneth Arrow, \textit{Economic Welfare and the Allocation of Resources for Invention}, in \textit{The Rate and Direction of Inventive Activity} 609, 619-22 (1962).

\textsuperscript{72} See id. at 620.
Rather, they are gatekeepers because they have earned the special trust of critics, who are more likely to review works shown in those galleries. Galleries that are particularly influential in this way would have attained that influence as a direct result of a network of relationships developed among the galleries, artists, critics, and collectors. Over time, critics learned to trust the judgment of those galleries, which developed the contacts and skills requisite to identifying promising artists. The development of the necessary network of contacts entails substantial costs and these costs constrain the number of galleries that exercise extraordinary influence at any one time.

Crane’s identification of the gatekeeper galleries with those committed to a single style may thus reflect the full exploitation by the galleries of the information that their networking has uncovered. The discovery of one new artist working in a particular new style may lead directly to the discovery of other artists working in that style. The marginal costs of discovering artists of quality may at first be substantial and then drop steeply within a particular style cluster.

As demand for artistic production has increased over the second half of the twentieth century, the network has likely expanded. As demand has increased, it has become more feasible for new galleries to incur the costs of entering the gatekeeping network. By this analysis, the number of galleries that have earned the special trust of critics should have increased over the period of increasing demand. Those galleries, however, would not necessarily be identified by the criterion of showing multiple artists in the same style.

In drawing from industrial innovation models, Crane appears to reflect the Arrow insight that a monopolist or an oligopolist has less incentive to innovate than a competitor because the rewards are lower. Crane applies that model to the art galleries, implying that the influentially dominant galleries retard innovation. However, there are several problems with that hypothesis. First, it suggests that the small, nondominant galleries will do the innovating. Let us grant that economically successful galleries may be unlikely to deviate from a demonstrably successful course by introducing numerous new styles. Thus, new styles are likely to come from the less successful galleries who have the most to gain. However, this is

73 See id. The monopolist or oligopolist captures the benefits of a cost-reducing innovation on a smaller (monopolistic or oligopolistic) production base than a competitor who captures (through patent licensing) the cost reduction on the entire pre-innovation output of a competitive industry. See id. at 620-21.
not an absence of innovation. It is, rather, an hypothesis of where innovation originates.

Crane shows how the introduction of a new style may be a way for a nondominant gallery to advance its welfare. In a market context where demand is increasing but product value is subject to control and evaluation of a tightly knit institutional network, one rational strategy for nondominant galleries is to attempt to differentiate their product.74 One means for differentiation lies in introducing a new style. This is what occurred after 1962 with the breakdown of the Greenberg paradigm.75 Pop emerged as the successor to abstract expressionism, and with its arrival, that paradigm dissolved.76 The extent to which the economics of the distribution system assisted the emergence of pop art and the styles that followed it (photorealism, pattern painting, and neoexpressionism) is unclear. Crane provides reasons why the two may have been related.

The second problem with Crane’s hypothesis is that the less successful galleries are required to incur substantial networking costs to discover and assess new styles, and to gain the trust of the critics. Their chance of greater gain must be offset by the incurrence of these costs. There is an analogy here with innovation in the commercial and industrial contexts. The Arrow analysis identifies the greater rewards potentially available to a competitor-innovator.77 However, in the industrial context, there are other factors at work besides the size of the potential reward. Each competitor-innovator, besides focusing on the potential reward, must also assess the risks of absolute failure or of losing the innovation race to a rival. As the number of potential innovators increases, the likelihood that any one of them will profit from innovation decreases. In the case of innovation by art galleries consisting in the promotion of a new style, a similar cost/benefit relationship is present. A gallery that seeks success through the promotion of a new style must assess, not only the networking and other costs involved in laying the ground work, but also the prospect that it may have to share that success with other galleries that promote the same new style, either through their own concurrent efforts or by free-riding on the innovating gallery’s earlier networking efforts. The question here thus becomes whether the likely gains in fostering inno-

74 See Crane, Transformation, supra note 20, at 113.
75 See supra note 39 and accompanying text.
76 See discussion supra notes 35-40 and accompanying text. See also Danto, supra note 23, at 125.
77 See Arrow, supra note 71, at 620-21.
vation exceed the related costs. In the case of fostering new art styles, it may be that the costs of identifying superior works in a new style are sufficiently low as to fall below the probability-discounted rewards. To that extent, we could expect innovation from the smaller galleries.

To the extent that Crane correctly suggests that innovation was retarded as a result of the behavior of the gatekeeper galleries, the transformation of art distribution, from a model governed by widely accepted standards to one that is becoming increasingly standardless, was slowed but not halted. The Vasarian\textsuperscript{78} and Greenbergian\textsuperscript{79} principles no longer constrain art. Contemporary artists are using their new freedom. Arthur Danto identifies Sigmar Polke, Gerhard Richter, Rosemarie Trockel, Bruce Nauman, Sherrie Levine, Vitaly Komar, and Alexander Melamid as exemplifying those who refuse to be limited by a genre.\textsuperscript{80} These artists innovate, copy, reinterpret, perform, combine, satirize, and politicize through their work, to a degree unknown prior to the 1960s. Although innovation appears to continue apace, Crane's broader point remains true: the identification of superior works is a task beset with informational problems and high transactions costs. Indeed, it may be that the proliferation of styles since the 1960s has increased these costs.

B. Other Fine Arts and Works of Popular Culture

The gatekeeping function, which Diana Crane described in the avant-garde art world, has analogues in other areas of fine arts and popular culture. As she explained, because of the large volume of work created and the substantial informational problems involved in evaluating it, the market for avant-garde painting required a mechanism that would identify quality work. What Crane refers to as the gatekeeping function thus is a winnowing process in which certain works are selected from an abundance of created works for the benefit of target audiences. In the world of avant-garde painting, the specialist galleries applied their expertise and background research to assure their clients that the works exhibited met a threshold level of quality, as understood by the gallery proprietors. Since elite buyers and collectors trusted those particular galleries, their approval carried weight with that same audience. However, a similar winnowing process takes place in scholarly writ-

\textsuperscript{78} See \textit{supra} notes 27-28 and accompanying text.

\textsuperscript{79} See \textit{supra} notes 36-38 and accompanying text.

\textsuperscript{80} See \textit{DANTO, supra} note 23, at 45.
ing, in writing generally, and in many areas of popular culture where uncommissioned works are produced.

In the field of scholarly writing, the winnowing process takes the form of peer review. An abundance of manuscripts confront academic journals. Therefore, they must select a smaller number for publication. That process takes the form of review and evaluation by other scholars who apply their own expertise to that task. This "gatekeeping" function assures the journal’s readers that its articles have met a threshold level of quality, while at the same time identifying for the journal a smaller number of manuscripts that the peer reviewers have identified as the most meritorious. Since each journal has a limited number of pages which it can publish each year, peer review thus assists the journal to allocate that resource to the most deserving articles. A similar winnowing task is present in book publishing. Every year such publishers receive thousands of manuscripts from writers. Once again, a selection is required.

C. Gatekeepers: The Role of Economics

The reason that galleries and publishers must engage in a winnowing process is related to the fact that, in the case of painting and the writing of manuscripts, market constraints do not perform their usual role of limiting production to demand. Generally, in commercial markets, goods and services are not produced beyond the point where the price that they command covers their marginal cost of production. To the extent that artists, composers, and manuscript writers are not responding to market signals but, instead, are creating works for their own subjective satisfaction, there is likely to be an oversupply of these works. The result is that galleries and publishers must engage in a selection or winnowing process. In performing that task, these enterprises narrow the informational barriers separating the works from their audiences.

For most cultural products, that winnowing is often closely connected to a publisher’s estimate of a product’s salability. Salability usually involves multiple replications. Except for painting and sculpture, whose market is for originals, most forms of artistic and cultural production are sold in substantial volume in a marketplace where there is no distinction between originals and copies, and every item sold is an identical copy. Books and musical recordings are sold in this way. Every copy of a book is identical to every other copy of that book. Each recording on a compact disc is identical to that recording on every other compact disc. Television pro-
grams are replicated in identical form on millions of television screens. Thousands of theaters replicate motion picture films shown on screens. This multiplication of cultural products underlies the economics of publishing and recording.

Publishing and recording enterprises incur substantial initial (fixed) costs in selecting and editing, and low marginal costs in the production of copies for sale. In such a marketplace, publishing or recording a work will earn a profit only after the work has attained that threshold sales level at which the excess of revenues over variable costs covers the initially incurred fixed costs. Additional sales produce profits. It is not surprising, therefore, that market factors are especially likely to influence the selection of the works for replication and distribution. Publishers and recording studios are not just profit-seeking enterprises; they must also cover their costs to survive. Thus their estimates of potential sales are likely to be the prime factors at work in the selection of works for replication. The market even constrains nonprofit publishers, such as university presses. Although these latter publishers do not seek to maximize profits, their selections of manuscripts for publication must take market factors into account, because they must operate within budgetary constraints.\(^81\) Similarly, a recording firm may decide to produce and distribute a recording of a new work of a prominent composer for prestige reasons, even though it does not expect to earn a profit on the work. Overall, it must earn a profit to survive; and that constraint is sufficient to guarantee that its selection of recordings will be influenced by market factors. Thus both for-profit and not-for-profit publishing houses perform their winnowing function in the light of market considerations. In works of popular culture—the production of television programs, motion pictures, romance novels, and popular music—the influence of market factors may extend beyond the stage at which works are selected for replication and distribution. Their influence often permeates the creation of the works themselves.\(^82\)

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\(^81\) Even the journals that publish scholarly articles must pay some attention to the kinds of articles that their target audiences desire; the more they cultivate their target audiences, the easier is their task of survival. Although many of these journals are subsidized, the more they minimize their losses, the less subsidy will they require.

\(^82\) See Crane, Production, supra note 58, at 67-69 (noting that the influence of market factors may sometimes extend even to the level at which a work of fine art is created); see also Heilbrun & Gray, supra note 59, at 158 (discussing market influences at the creative level).
D. Gatekeepers as Constraining Innovation

In her book, *Production of Culture*, sociologist Diana Crane expands her gatekeeping thesis from avant-garde painting to popular culture. She argues that the oligopolistic industry structures, which she finds in the television broadcasting, motion picture, and book publishing industries, constrain innovation and creativity:

Because each firm is trying to obtain the largest share of the mass market, there is a high level of competition among the members of an oligopoly but each member has little incentive to innovate. These companies prefer to avoid the risks associated with innovation and to produce relatively standardized and homogeneous products. Each oligopolist tries to sell a product that will please a large number of consumers without offending any major subgroup within the population.

Although Crane has reached the correct conclusion here, her exposition suggests that innovation in works of popular culture is negatively correlated with industry concentration. That implicit suggestion is at least questionable and too simple. Of course, Arrow, like Crane, has provided us with an analysis that associates a greater incentive to innovate with a competitive market structure, but Arrow’s analysis appears to be focused upon industrial contexts, not cultural ones. Moreover, Arrow’s model does not at all suggest that a competitive market structure will promote diversity. In Arrow’s model, the greater incentive to innovate in a competitive market arises from the prospect of a universal adoption of the innovation. Peter Steiner and Richard Posner, in examining the broadcast industry, have shown that a monopolist may have a greater incentive to innovate than an oligopolist. In the three commercial broadcasting networks, for example, each network seeks the mass audience. Consequently, as Crane, Steiner, and Posner agree, each network will produce programming that is similar to the programming produced by the others. A monopolist cable

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83 See Crane, Production, supra note 58, at 67-75.
84 Id. at 50.
85 Arrow is interested in the production of knowledge with technological ramifications. In particular, he directs his analysis upon inventions that reduce production cost. See Arrow, supra note 71, at 609, 619.
86 See id. at 620-21.
87 See Peter O. Steiner, Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting, 66 Q.J. Econ. 194 (1952).
89 My colleague, Jim Chen, has recently applied this analysis in his critique of FCC regulation. See Jim Chen, The Last Picture Show (On the Twilight of Federal Mass Communications Regulation), 80 Minn. L. Rev. 1415, 1491 (1996).
provider, however, gains nothing by replicating on a second channel the situation-comedy programming designed for the mass audience on its first channel. It already has the sitcom audience. Rather, it has an incentive to employ different programming on the other channels in order to capture different audiences; it is likely first to exhaust the opportunities for mass audiences by providing sports, drama, and adventure programming. Then it will target specialized audiences, such as those interested in history, science, classics, education, and other subjects appealing to limited market sectors.

Crane correctly intuits that a key to successful entry in a concentrated industry may lie in product differentiation. She recognizes that entry into the elite circle of gatekeeper galleries occurred when the entrants were able to introduce a differentiated product. Diversity in programming is facilitated when the number of available channels is increased. Such an increase in available channels virtually invites product differentiation. When Fox entered network broadcasting, its entry was accompanied by programming formats that differed significantly from the three entrenched commercial networks. The success of that entry, therefore, can be seen as facilitated in part by a strategy of product differentiation.

VI. PAINTING, MULTIPLE REPRODUCTION, AND INTELLECTUAL PROPERTY LAW

A. The Market for Painting as a Market for Unique Works

Although painting in the pre-1960 period resembles applied research in its subjection to standards, there are other ways in which painting, both before and after 1960, differs radically from applied research: applied research typically focuses upon the development of a new product which will be mass-produced, or upon the development of a technology which will be used in large-scale production. By contrast, painting usually involves the production of unique works. A painter does not design a prototype to be mass-produced. The painter may labor over design and composition, but the end product is a single work. Both painters whose work is widely recognized, and those whose work is not, generally produce a succession of unique works. Even Monet, who is known for repeatedly painting water lilies and the facade of the Rouen cathedra-

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90 See id. at 1492.
91 Fox, inter alia, employed programming targeting black audiences, a programming format that the three networks had avoided. See id. at 1493.
dral, did not produce copies, but each of his paintings is, and is recognized as, a unique work, despite the repetition of the underlying subject matter.

This supply of unique works mirrors the demand for painting, which is a demand for unique works. Contrary to the situation in most commercial markets, which deal in fungible products, a copy is not normally a substitute for the original in the market for paintings. This kind of market thus carries implications for the vulnerability of painters to copyists and imitators. To the extent that paintings are not reproduced in multiple copies, painters are not very vulnerable to a loss of their market to copyists. Since the market is for originals and each original is unique, there is little scope for copyists. Moreover, recognized painters sometimes are commissioned beforehand to produce works. This practice, which was especially common in nineteenth-century France (when the construction of many public and quasi public buildings raised the demand for painting and other works of fine art to decorate them), continues to this day. Portrait painters (such as John Singer Sargent and others of lesser stature) also paint on commission. In such cases, because compensation arrangements are made in advance, there is no opportunity for copyists or forgers to substitute their work for the legitimate work. Even so, there remain limited opportunities for forgers in the painting markets: A forger could copy an existing painting and attempt to sell it as the original. A forger could also attempt to paint in the style of a recognized painter, attempting to sell the forgery as a newly conceived work by that painter. However, in either case, the forgery cannot replace the original in the market: the value of the forgery depends upon deceit. Once the true authorship is revealed, the forgery loses its value.

B. Painting as Uniquely Ill-Suited to Intellectual Property Law

Because of the different vulnerabilities of commercial producers and fine art producers to copyists, intellectual property laws play different roles in the two settings. Intellectual property laws protecting industrial innovators from copyists are necessary to pro-

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92 See Taylor, supra note 53, at 20.

93 Arranging compensation in advance is a widely-known means for avoiding problems from copyists. In his study of copyright and the book publishing industry, Supreme Court Justice Stephen Breyer, while a professor at Harvard Law School, suggested that this technique could protect publishers, even in the absence of copyright. See Stephen Breyer, The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs, 84 Harv. L. Rev. 281, 302, 305 (1970).
tect the economic value created by the innovator in the typical industrial setting involving mass production or the use of a new technology in mass production. Intellectual property laws are necessary in such situations because the value created by the innovator lies in the aggregate of the units produced. A copyist could appropriate that value by producing identical units, substituting the copyist's output for the innovator's output. Painting presents a quite different situation. Since each painting is a unique work, there is no opportunity for that kind of substitution. There is thus no similar role for intellectual property laws in the protection of painters. The limited vulnerability of a painter to forgers can be dealt with by laws against fraud. Intellectual property laws are not needed to deal with the forgery of paintings.

A comparison of applied research and industrial innovation with painting suggests that it is in the area of multiple replications where intellectual property laws play their primary role. Industrial innovation creates value, which lies in the multiple replication (or use) of the innovation. Many of the arts also involve multiple replications. Books, the oldest subject of copyright protection, are produced in multiple copies.\footnote{Breyer questioned the need for copyright protection for books on the ground that its incentives are unneeded. \textit{See id.} at 321. Some contemporary observers have suggested that because of the low costs of publishing on the Internet and the ease of copying, copyright has lost its justification. \textit{See} John Perry Barlow, \textit{The Economy of Ideas}, \textit{WIRED}, Mar. 1994; Esther Dyson, \textit{Intellectual Value}, \textit{WIRED}, July 1995. Lawrence Lessig has argued that technological protection is about to replace copyright law as the means of protection for material published on the Internet. \textit{See} LAWRENCE LESSIG, \textit{CODE AND OTHER LAWS OF CYBERSPACE} 139-38 (1999). Lessig raises the question of whether, in that context, copyright law should limit the extent of technological protection to accord with the traditional limits of legal protection, thus permitting copying under fair use standards and after the expiration of an initial term. \textit{See id.}} Music involves multiple replications in a variety of ways: A composer writes the musical score. That score is reproduced and sold in multiple identical copies. Musical performances are recorded on compact discs, which are sold in multiple copies. Similarly, motion pictures are distributed in multiple identical copies. So is computer software. Since each copy of a book, compact disc, or motion picture film is a substitute for another copy, copyright law is needed to preserve the value of the created work for the copyright owner. Thus, for most of the arts, intellectual property laws play a needed role. In Figure 2, the market for painting falls on the left. The market for industrial products falls overwhelmingly on the right, as does the market for books, compact discs and motion picture film. As argued below, intellectual property laws have their primary application to matter falling to the right on Figure 2.
C. Painting and the Purposes of Intellectual Property Laws

The economic-incentive model, which the courts have identified as providing the rationale for the intellectual property laws, is not the only rationale for recognizing and protecting intellectual property. Intellectual property scholars have identified an alternative rationale that would see the creations of inventors or artists as extensions of their personalities, and therefore as deserving of protection. This extension-of-the-personality view underlies the moral rights doctrine, which originated in nineteenth-century France and found limited expression in the Visual Artists Rights Act ("VARA"). Consistent with an extension-of-the-personality approach to intellectual property, the moral rights incorporated in VARA are concerned with matters other than economic reward. Rather, they are designed to ensure proper attribution of authorship and to protect the integrity of artistic productions. The economic vulnerability of painters to copyists is limited, so the protections provided by most of the copyright law have exceedingly limited applicability to painters. The whole incentive scheme underlying the copyright law has limited application to painters, inasmuch as there are substantial grounds for believing that the production of painting, like the production (not the distribution) of fine art generally, is not primarily motivated by economic considerations. Rather, the legal protections likely to be most important to painters involve proper attribution and protection of works from mutilation. These are the protections provided by the moral rights doctrine.

95 See supra text accompanying notes 1-10.
96 See, e.g., Barbara Friedman, From Deontology to Dialogue: The Cultural Consequences of Copyright, 13 CARDOZO ARTS & ENT. L.J. 157, 167-71 (1994); Lacey, supra note 19, at 1541-42; Breyer, supra note 93, at 284-91 (discussing "moral" and other non-economic justifications for copyright protection).
98 "The phrase 'moral right' is a translation of the French term droit moral..."
VII. ARTISTIC DEVELOPMENT AND INTELLECTUAL PROPERTY LAW

A. ARTISTIC DEVELOPMENT AND THE LAW: COPYRIGHT

Although the U.S. Constitution extends copyright protection to the “writings” of “authors,” Congress gradually broadened the scope of copyright. In a series of legislative enactments, Congress progressively extended protection to maps and charts, etchings and engravings, musical compositions, photographs, paintings, statuary, and models or designs of fine art. The extension of explicit copyright coverage to musical compositions in 1831 probably ratified and reinforced an earlier understanding that such compositions were already protected, because the law’s coverage of books and writings would logically extend to musical compositions that were written in musical notation (and hence were “writings”), and were often compiled into pamphlet or book form.

The extension of copyright protection to paintings and sculpture appears different from the earlier expansions of coverage. Maps, charts, etchings, engravings, musical compositions, and photographs are subjects that are generally replicated. Paintings and statutes generally are not replicated. Until 1870, the focus of copyright law was upon protecting the market for the copyrighted work. The expansion of coverage to paintings and sculptures in 1870 appears to break with that tradition, especially since the legislation grouped painting and sculpture with “fine art,” thereby suggesting that Congress valued museum-quality work, rather than repetitious work designed for the commercial marketplace. The explicit protection that U.S. law accorded to paintings in the late nine-

moral does not refer exclusively to rights inherent in our morality, but also encompasses a right that exists in an entity’s ultimate being.” Roberta Rosenthal Kwall, Copyright and the Moral Right: Is An American Marriage Possible?, 38 Vand. L. Rev. 1, 3 n.6 (1985).

100 See Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124 (1790).
101 See Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171 (1802).
102 See Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (1831).
103 See Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540 (1865).
105 See Act of Feb. 3, 1831, ch. 16 § 1, 4 Stat. 436 (1831).
107 See Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (providing copyright protection to paintings, sculptures and other “fine arts”). See also Mazer v. Stein, 347 U.S. 201 (1954) (dealing with machine-made figurines used as lamp bases). That Justice Holmes three decades later refused to differentiate art into categories of “fine” and not-so-fine does not alter the significance of Congress’s equation of painting with fine art in 1870. See Bleistein v. Donaldson Lithographing, 188 U.S. 299, 249 (1903) ("[P]ainting and engraving ... are not among the useful arts, the progress of which Congress is empowered ... to promote."); cf. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (protecting engravings and paintings).
teenth century, mirrors the protection that French law simultaneously extended to artists through the moral rights doctrine. Neither the U.S. nor the French law carries much practical importance in protecting a market for painting, but both laws protect the integrity of an artistic work. The French law prohibits mutilation, while the U.S. law (prior to the enactment of VARA) protects against mutilation that substantially alters the work or rises to the level of a derivative work.

Considering that the core of copyright law developed in the nineteenth century, when its principal task was protecting books, writings and artistic works, traditional copyright law may reflect the assumptions, practices, and concerns of that period. One of the concerns of that period was how to protect the integrity of a work of art. That concern is reflected in the French moral rights doctrine and in the extension of copyright protection to painting in the United States. An assumption of that period, confirmed in its practices, was that at any time many artists would be working within the same style, adhering broadly to its standards. The extension of U.S. copyright protection to paintings respected their artistic freedom: nothing in the copyright law inhibited any artist from working in the same style as other artists. Since it protects “expression” and not “ideas,” copyright law provides ample room for followers to work in the same broad style as the originator of a genre. The impressionist idea, for example, of rendering on canvas a representation of the subjective impression of the viewer is unprotected, providing latitude for many to employ their own individual methods in working towards that end. Copyright law also contains a doctrine of “merger,” which does not protect expressions that cannot be practically separated from the ideas underlying them.

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108 See Act of July 8, 1870, ch. 230, § 86, 16 Stat. 212 (providing copyright protection to paintings).
110 See Swack, supra note 109, at 397 (citing a 1957 French law).
111 Under current U.S. law, the author possesses the exclusive right to prepare derivative works based upon the copyrighted work. See 17 U.S.C. § 106(2). A “derivative work” is defined as a work “based upon one or more preexisting works” and includes an “art reproduction” or “any other form in which a work may be recast, transformed, or adapted.” Id. § 101.
112 Thus, at various times during the nineteenth century, many painters were simultaneously working within the neoclassical, romantic, and impressionist styles.
113 See Kregos v. Associated Press, 937 F.2d 700, 705 (2d Cir. 1991) (holding that “expression is not protected in those instances where there is only one or so few ways of
Thus, for example, as the artists of the Renaissance developed the technical ability to render perspective, they would render it in the same way, making the images in the foreground larger than those in the background, and the foreground would connect with the background via the vanishing point. Whether they copied from each other in that use of perspective is irrelevant under copyright law, because what they copied was an idea. The merger doctrine allows the copying of any amount of expression that is necessary to copy the idea\textsuperscript{114} since when there are only a few ways in which the idea can be expressed, the expression "merges" with the idea and is thereby unprotectable.

Thus, copyright protection is consistent with an artistic world in which each artist develops an approach that relates to the work of others through sharing a broad similarity of style, but where each particular artist works within that style to express herself in her own unique way. In the nineteenth century, one artist related to other artists, not by copying and improving in the manner of much commercial product development, but rather in the manner of creating from scratch within a broad genre which was shared with those others. Through its use of the idea-expression dichotomy and the merger doctrine, copyright protection is ideally suited to the world of pre-twentieth-century artistic development.

In the late twentieth century, copyright law remains broadly compatible with artistic developments. It is, however, challenged by postmodern artistic developments. The breakdown of artistic standards, beginning with the expressionists, ultimately meant that artists no longer worked within the same genre, their differences reflecting subtle changes in style, color, tone, and composition from the older manner. The work of modern painters, sculptors, and composers is increasingly conducted in genres unique to a single or very few artists. For example, who works in the genre of Alexander Calder other than Calder?\textsuperscript{115} As a result, the ability of copyright law to provide a system of protection adapted to an artistic world, where subtle differences distinguish one artist from another, is increasingly out of touch with its subject matter. The

expressing an idea that protection of the expression would effectively accord protection to the idea itself\textsuperscript{114}).

\textsuperscript{114} "Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way." Baker v. Selden, 101 U.S. 99, 100 (1879). \textit{See also} Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971); Morrissey v. Proctor & Gamble Co., 379 F.2d 675 (1st Cir. 1967).

\textsuperscript{115} In his mobile sculptures, Calder has found a unique way to address the forces of motion and balance underlying the universe. \textit{See} GOMBRICH, \textit{supra} note 30, at 584.
“protections” traditionally provided by U.S. copyright law, while important for remedying the market failure problem in the multiple-replication commercial sectors, were never well adapted to the world of painting. Although VARA provided meaningful protections to painters, it is possible that other aspects of copyright law may actually impede artistic development.

In the postmodern world, artists appropriate works freely, not to adopt and improve in a conventional sense, like commercial product development, but to alter and ridicule instead. Marcel Duchamp presaged this aspect of post modernism in 1919, when he portrayed the Mona Lisa with a mustache and goatee. Jeffrey Koons followed this route by appropriating prior works for exhibition in his “banality” show. In the realm of popular music, the group Two Live Crew appropriated a musical composition written by another artist, changed its entire spirit and tone, and arguably held it up to ridicule.

Sherrie Levine bases much of her work on “reinterpreting” (by copying and transforming artistic works of her predecessors). Judicial decisions indicate that the lawfulness of such appropriation may depend on whether the appropriator can claim to have changed the original by “transforming” it.

The judicial emphasis upon the transformative aspect of the copied work makes sense in the overtly commercial sectors, where the law is concerned with preserving market incentives for mass-produced subject matter. In these areas, an arguably transformative work such as the Two Live Crew version of the popular song “Oh Pretty Woman” probably does not interfere with the market of the original. Since the Two Live Crew version was a parody, few people wanting to purchase a recording of the original would accept a parody as a substitute. However, this concern over preserving the market for the original is largely irrelevant to the fine arts.

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116 See Rogers v. Koons, 960 F.2d 301, 314 (2d Cir. 1992) (finding that Koons’ “String of Puppies” sculptural work infringed a photographer’s “Puppies” photo, on which the sculpture was obviously based).

117 See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). The Supreme Court noted that Two Live Crew’s version of “Pretty Woman” was meant to “derisively demonstrat[e] how bland and banal the Orbison song seems to them.” Id. at 582 (quoting Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991)).


119 “Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” Campbell, 510 U.S. at 579.

120 The district court found the chances of market harm “extremely unlikely.” Acuff-Rose, 754 F. Supp. at 1159.
When Sherrie Levine exhibits her versions of Marcel Duchamp works,\(^\text{121}\) she is probably not interfering with the market for Duchamp’s work. A focus upon market interference here would be misplaced. Jeffrey Koons also did not interfere with the markets for Art Rogers’ photograph, or the note cards on which his photograph had been reproduced, in any way properly cognizable by copyright law. The court’s decision in the _Koons_ case protects Rogers’ photography from derisive commentary.\(^\text{122}\) That decision is an effort by the court to protect the integrity of Rogers’ work and thus applies a version of moral rights doctrine to events that preceded the enactment of VARA, even though the decision was ostensibly based upon traditional copyright doctrine.\(^\text{123}\) Perhaps that was a proper approach under nineteenth-century assumptions. Yet the _Koons_ decision has been widely criticized as being inconsistent with the premises of postmodernism and even as inhibiting artistic development.\(^\text{124}\) All of these concerns raised in the aftermath of _Koons_ become relevant to the current efforts to incorporate moral rights into American law. VARA, which does incorporate moral rights into the federal copyright law, is carefully crafted to avoid the commercial problems which moral rights may generate.\(^\text{125}\) But it is less well-crafted to avoid potential conflict with the kinds of post-modern artistic activities exemplified in _Koons_.\(^\text{126}\) Indeed, one commentator has expressed the view that any reproduction (authorized or unauthorized) of a work of visual art that has been modified or altered by anyone other than the


\(^{122}\) The _Koons_ court noted that the fair use doctrine allows an extensive use of a pre-existing work if the second work is a parody of the first. The court then held that the sculpture was not a parody and that the use of Rogers’ photo did not fall within the fair use exception to copyright infringement. See Rogers v. Koons, 960 F.2d 301, 309-10 (2d Cir. 1992), cert. denied, Koons v. Rogers, 506 U.S. 934 (1992).

\(^{123}\) See id. at 306-12 (analyzing the infringement claim under traditional copyright doctrines).


\(^{125}\) VARA extends protection only to works of visual art, which are defined as paintings, drawings, prints, sculptures, or photographic images produced in no more than 200 copies. See 17 U.S.C. § 101. In addition, VARA provides an exception, _inter alia_, for reproductions of works of visual art used in or in connection with books, magazines and motion pictures. See _id._ § 106A(c)(3). Finally, VARA provides an elaborate set of exceptions for works of visual art that have been incorporated into a building. See _id._ § 114(d).

\(^{126}\) Exceptions to VARA’s protections contained in 17 U.S.C. § 106A(c) leave open the question of the extent to which a work of visual art can be distorted or mutilated in a “reproduction.” See 17 U.S.C. § 106A(c)(3).
Most state laws applying moral rights doctrines to prohibit distortions of works of art in reproductions limit the prohibition to cases in which the reproduction is presented as being the work of the artist. Artists like Levine, who transform work of their predecessors, like Duchamp, must bring themselves within the narrow scope afforded them by the fair use doctrine and avoid the traps of federal and state incorporations of the moral rights doctrine.

As applied to painting and the fine arts, copyright law may be lagging behind cultural developments. That law's idea-expression dichotomy fits a cultural context where artists related to each other through shared ideas, but differentiated themselves through subtle differences of texture but it is less well adapted to a postmodernist world in which the prevailing customs tolerate wholesale appropriation. Although the relevant text of the Copyright Act itself remains the same as it was at the time of the Koons decision, the increasing recognition in the case law of the social value of transformation may ultimately free most artists working in the post-modernist idiom.

B. Artistic Development and the Law: Trademark and Trade Dress

While copyright law gropes for a way to cope with postmodernism, trademark law has been impinging upon the areas of artistic protection traditionally reserved exclusively for copyright. This expansion in the scope of trademark protection is the direct result of the judiciary following the logic of that law. The traditional function of trademark law has been to facilitate the identification of a product's source to purchasers. In the past, producers have identified their products through names, labels, or symbols. More recently, producers have increasingly relied upon product design to identify the source of their product to customers. As a result, the courts have been pressured to bring product design under the aegis of trademark protection. The resulting expansion of trademark law has occurred in the area generally referred to as "trade


129 As manufacture has become increasingly separated from distribution over the last century, trademarks have increased in importance, because it is through trademarks that customers are able to identify the producer or other entity that stands behind the product and is responsible for its quality.

130 For example, the unique designs of the Coca-Cola bottle and the Rolls-Royce grille are recognizable to many consumers as "signatures" of those companies.
dress."131

The law of trade dress traditionally was concerned with how the packaging might identify the source of the product to ultimate buyers.132 Increasingly, producers have begun to produce products that identify their source through their distinctive design. Mogen David wine bottles,133 Fotomat kiosks,134 spray gun containers,135 chair design,136 fishing reel design,137 and the ambience of restaurants138 have been held protectable under trade dress law. So long as the design is distinctive and confers no inherent functional advantage, the courts have been willing to protect the design as a trademark.

The logic of trade dress protection has taken the courts into areas that, in the past, were unprotectable.139 Not only has trade dress protected the design of mundane products like spray guns and fishing reels, but its protection also extends into areas that border the province of creative artists and their concerns. Thus, the protection of a chair design in Krueger International, Inc. v. Nightingale Inc.140 enters an area where Ludwig Mies van der Rohe and the artists of the Bauhaus worked. I.P. Lund Trading ApS v. Kohler Co.141 involved a faucet design that was exhibited in the Museum of Modern Art. In that case the manufacturer sought protection for the faucet under both trade dress and antidilution theories.142 Although the manufacturer was unsuccessful, the case illustrates the potential for trademark law to provide broad protection for product design. The court rejected the defendant’s contention that the antidilution law does not apply to product design,143 thereby signif-
icantly extending the potential protection accorded to design. Despite the faucet's display in a prominent museum, however, the court was not satisfied that the design was sufficiently "famous" as a trademark to merit antidilution protection.\footnote{144} In \textit{Hartford House, Ltd. v. Hallmark Cards, Inc.},\footnote{145} the court ruled that the esthetic style of a line of greeting cards was protectable trade dress, thus broadening protection not only to particular designs but also to the "overall appearance or look" of a line of cards.\footnote{146} When the U.S. Supreme Court upheld a trade dress claim based upon the ambience of a restaurant in \textit{Two Pesos, Inc. v. Taco Cabana, Inc.},\footnote{147} it ratified the expansion of trade dress law into esthetics.\footnote{148} Finally, in \textit{Romm Art Creations, Ltd. v. Simcha International, Inc.},\footnote{149} another court ruled that the artistic style of an artist could be protected by trade dress law, especially when the same galleries carried works by the original artist and subsequent imitators.\footnote{150} Although an expert in art history testified in that case that he could find no basis for confusion between the original artist and a later imitator, the court ruled that because the sophistication of buyers of fine art posters might be less than that of art collectors, the potentiality of confusion by the former could be enough to bar later imitators.\footnote{151}

We may have reached the limits of trademark law's expansion into areas of artistic creativity. Only one aspect of this expansion is relevant here. As evidenced by cases like \textit{Hartford House}, \textit{Two Pesos}, and \textit{Romm Art}, trademark law, as distinguished from copyright law, protects whole styles. This is consistent with the most recent developments in the creative arts, where each particular artist is expected to, and does, work in a style unique to that artist. Yet these superficial resemblances between the subject matter involved in \textit{Hartford House} and \textit{Romm Art}, and the creative arts, should not blind us to the fact that those cases involved mass-produced subject matter.

The expansion of trade dress into areas traditionally covered by copyright emphasizes the difference between copyright's role in

\footnote{144} See id. at 47. 
\footnote{145} 846 F.2d 1268 (10th Cir.), cert. denied, 488 U.S. 908 (1988).
\footnote{146} Id. at 1272.
\footnote{147} 505 U.S. 763 (1992).
\footnote{148} Trade dress "involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." \textit{Id.} at 765 (quoting \textit{John H. Harland Co. v. Clarke Checks, Inc.}, 711 F.2d 966, 980 (Ga. 1983)).
\footnote{150} See id. at 1140. "A combination of visual features that creates a distinct visual impression is not functional and is protectable." \textit{Id.} at 1136.
\footnote{151} See id. at 1139.
the fine arts and copyright protection for objects of popular culture. Copyright protection for the latter fits the economic-incentive model set forth in the constitutional provision\textsuperscript{152} and repeatedly referred to in the cases.\textsuperscript{153} Trade dress protection is available in commercial settings where products are mass-produced or in franchise settings where identical services are provided at multiple locations.\textsuperscript{154} Trade dress protection thus partially impinges on copyright's core domain, where its incentive rationale ensures that its protection extends to the mass provision of goods or services.

Design work, which is undertaken with a view towards trade dress design protection, fits the core intellectual property model and is necessarily subject to market constraints similar to those governing all applied research.\textsuperscript{155} Since protection under trade dress law is limited to designs that do not confer competitive advantages,\textsuperscript{156} the resources that can be spent in development work will be limited as well. At best, the producer of a product protected by trade dress law possesses the advantages of product differentiation.

C. Design Patent Protection

Several intellectual property laws can protect artistry in the design of utilitarian products. Trade dress, copyright, and design patent law all provide some protection to designs.\textsuperscript{157} Copyright protection is limited in that the protected design must be physically or conceptually separable from the utilitarian aspects of the product.\textsuperscript{158} That requirement produces the anomaly that the fabric design of a woman's dress is protectable but not the cut of the cloth.\textsuperscript{159} Similarly, the figurine base of a lamp is protectable under copyright law\textsuperscript{160} but not a pole lamp or other "modernist" lamp design where form follows function.\textsuperscript{161} Trade dress can pro-

\textsuperscript{152} U.S. Const. art. 1, § 8, cl. 8.
\textsuperscript{153} See supra note 1 and cases cited therein.
\textsuperscript{155} See supra Part III.
\textsuperscript{158} See 17 U.S.C. §§ 101, 113 (protecting pictorial, graphic and sculptural works but excluding from that category designs which cannot be identified separately from and which are incapable of existing independently of the utilitarian aspects of the article).
\textsuperscript{159} See Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (protecting fabric design). Cf. Belding Heminway Co. v. Future Fashions, 145 F.2d 216 (2d Cir. 1944) (noting that makers of women's dresses have no available copyright protection).
\textsuperscript{160} See Mazer v. Stein, 347 U.S. 201 (1954).
\textsuperscript{161} See Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964). The pole lamp, which
tect product design that is employed to identify the product’s source, but only if the design does not confer a competitive advantage on its user.\(^{162}\)

Under design patent law, protection is extended to an “ornamental” aspect of a utilitarian product.\(^{163}\) There is no separability requirement analogous to that of copyright law, but design patent law does incorporate an analysis similar to that of trade dress law’s approach to (utilitarian) functionality. To prevent design patent law from encroaching upon the domain of the law governing utility patents, design patent protection is unavailable for any design that provides a utilitarian advantage.\(^{164}\) Note, however, that design patent protection is specifically intended to protect designs that confer competitive advantages because of the esthetics of the design.\(^{165}\) Thus design patents, like trade dress, exclude from protection products that confer competitive advantages because of their superior utilitarian designs, but unlike trade dress, design patents confer protection on products whose design advantages them over competing products.

VIII. CONCLUSION: ARTISTIC WORK AND THE INTELLECTUAL PROPERTY LAWS

Our tour through the intellectual property laws has emphasized the importance of the economic-incentive model said to underlie those laws. That model has application not only in the industrial sector, where utilitarian goods are marketed, but also in sectors where artistic and cultural goods are sold. However, in the latter sectors, the relevance of the economic-incentive model is narrowly circumscribed. Much creative activity takes place unaffected by the prospect of an economic reward. Much scientific and other writing appears to be engendered by incentives not directly

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the Supreme Court held unprotectable under Illinois law, could not be protected under federal copyright law either because of the impossibility of separating function from design. See supra note 158.

\(^{162}\) See, e.g., Qualitex Co., 514 U.S. at 165 ("[A] product feature is functional, and cannot serve as a trademark, 'if it is essential to the use or purpose of the article or if it affects the cost or quality of the article,' that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage.") (quoting Inwood Laboratories, Inc. v. Ives Laboratories, 456 U.S. 844, 850 n.10 (1982)).


\(^{164}\) See, e.g., Best Lock Corp. v. Ilco Unican Corp., 40 U.S.P.Q. 2d 1048, 1050 (Fed. Cir. 1996) (refusing design patent protection for the shape of an object that was dictated by function).

connected with the market. Similarly, the economic-incentive model does not provide a good fit for artistic creation in the fine arts.

We have observed that the limited application of the intellectual property laws in the artistic and cultural sectors rests upon two factors, which may sometimes overlap. First, as noted above, much creative activity in the artistic and cultural fields is not economically motivated. Second, the economic-incentive model assumes that the protected work is sold in multiple copies. In such circumstances, intellectual property laws are necessary to protect intellectual property owners against diversion of their sales to copyists. Since much work in the fine arts generates unique works, that model does not fit. When those works are sold, they are sold in a market for unique works and thus not in a market in which copying poses a major threat. Moreover, because a significant part of artistic work is commissioned work, intellectual property law is not necessary to prevent copyists from diverting revenue away from the artist.

Intellectual property laws may provide incentives for publication of scholarship and scientific writing. They also provide incentives for publishers to produce, publish, and distribute works that reproduce works of fine art. Those laws, and the economic-incentive model underlying them, probably help guide the publishers in selecting works for reproduction and distribution. As we further enter into commercial sectors, intellectual property laws increase in importance. In the area of mass-cultural products, such as motion pictures and popular recordings, the economic-incentive model guides both creation and distribution. The economic-incentive model may also play a significant role in industrial and product design where aesthetic considerations are selling points.

Institutional mechanisms for winnowing an oversupply of cultural products provide a necessary means for bringing desired artistic and cultural products to the public. Where the economic-incentive model does not guide the production of artistic products, those products are likely to be overproduced, and the public will thereby face an insurmountable informational burden in attempting to sort out those deserving of its attention. These institutional mechanisms—the "gatekeepers" of which Diana Crane has written—perform a rationing function that the market, in the absence of the economic-incentive model, is unable to perform. In the area of the fine arts, they help identify artistic products that meet the criteria of acceptability. These gatekeeping institutions play a needed role, even in the areas of mass culture where the economic-
incentive model is fully operative. There, as in the case of the fine arts, they perform functions of collecting and synthesizing information. In the latter circumstance, however, the information is about the tastes of the broad public, rather than of a cultured elite. The function of the so-called gatekeeping institutions is to bring that information to bear on the creation of cultural products that satisfy the tastes of the broad public. The success of these institutions is the reason why critics often find these products vacuous: The objective of the institutions performing the information collection and synthesizing is to develop products that have mass appeal, and this means satisfying the lowest common denominator.