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IS COPYRIGHT BLIND TO THE VISUAL?

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1. ORIGINS

It is now commonly conceded that the origins of modern systems of intellectual property protection lie in the fifteenth century Venetian system of printing privileges,¹ which was subsequently adopted with local variations in a range of other European countries.² The Venetian system, which was designed to stimulate foreign trade rather than to engage in aesthetic debates about forms of creative output, was not concerned with distinctions between written works and images.³ If a work was reproducible through the new(ish) technique of printing then it was an eligible candidate for a privilege. There was, however, a clear distinction between works of visual art considered reproducible by print and other works of visual art. As Stapleton points out, in Renaissance Venice this distinction hinged around portability.⁴ Prints were, of course, not only reproducible but also portable whereas paintings, frescoes and sculptures were considered to be specific to particular locations. The methods by which these forms of visual art generated income for those involved in their production also differed. Whereas income was generated off prints by sale after production, location-specific works were generally made subject to commission prior to production. Thus, the economic effects of copying were quite distinct. Under these circumstances, it is not surprising that the forms of regulation governing production were different: visual art in the form of paintings, frescos and sculptures remained under the control of the guilds, while printed works of visual art became subject to the same general form of regulation as printed words.

Success in obtaining a printing privilege seems to have depended on the abilities of the petitioner to both flatter and convince the Venetian authorities. They were a hard-headed lot and there is little evidence that flattery alone could get a petitioner everywhere, rather considerations of local market stability and foreign trade value were paramount.⁵ In this sense, the origins of the intellectual property system lie in market regulation and not in a particular aesthetic theory. Nevertheless, there is some

¹ See J Stapleton, *Art, Intellectual Property & the Knowledge Economy* (Doctoral Thesis, Goldsmiths College, University of London, 2002), <http://www.jaimestapleton.info/download.htm>, ch 2, Grateful acknowledgment is made of the influence of this work, & of discussions with its author, on a number of the ideas in this paper.

² See further E Armstrong, *Before Copyright: The French Book Privilege System 1498-1526* (Cambridge: Cambridge University Press, 1990, republished 2002).

³ See further D Landau & P Parshall, *The Renaissance Print 1470-1550* (New Haven: Yale University Press, 1994); & Stapleton, n 1 *supra*.

⁴ Stapleton, n 1 *supra*.

⁵ Stapleton, n 1 *supra*.

evidence that in framing their arguments for privileges the petitioners came to reflect the predominant discourse or paradigm of creativity, which was based in theories of rhetoric. The rhetorical paradigm of creativity, which continues to retain considerable purchase in some quarters, focussed upon the labour or creativity of the artist in gathering together and arranging “ideas” into a particular and distinctive end product. Between the Medieval and the Renaissance periods an important alteration had taken place in relation to the origins of the “ideas”, which resulted in an emphasis on the creator’s contribution to the ensuing artistic work:

Medieval accounts of the production of art were based on a Christianised version of the Platonic theory of Ideas. Within such a metaphysical cosmology, the inner “idea” from which an artist created an image was placed in his mind by the “divine intellect” ... In contrast ... Renaissance art theory was practically, rather than theologically, organised, placing its emphasis on the study of nature. In such discourse, the inner “idea” from which the artist worked came to be regarded as the product of external sensory experience. The art theory that ran parallel to the Venetian privilege system then tended towards accounts of idea that stressed an individual’s labour rather than the innate quality of the idea from which they worked.⁶

The famous spat between Dürer and Marcantonio Raimondi,⁷ which resulted in the former’s visit to Venice in 1506, is capable of being construed as an early conflict over authorship in the sense that its resolution turned on an agreement under which Marcantonio signed his copies of Dürer’s works with his own initials rather than Dürer’s monogram. However, less ambiguous instances of the influence of rhetorical thought in the Venetian system were still a few years away. The earliest overt example uncovered by Stapleton occurred in the petition for a privilege issued to Zuan da Brexa in 1514. In this petition, da Brexa pleads that:

Being that I am a scholar of my own virtue, I made one drawing, and that drawing I made cut in wood with my own name in which I consumed a lot of time and effort and expense so that it would be an excellent work ... And as this aforementioned design is beautiful and worthy, it was immediately taken by others who started to want to print it, which would be against any right of justice and gravely to my damage, that I having suffered and made great effort for a long time in such a work, that others should without any effort gain from my own effort and sweat.⁸

Paralleling the developments in the discourse of Renaissance art, by 1566 the “right of justice” to which da Brexa referred, was much more clearly articulated in a petition by Titian for a printing privilege. Titian refers to the “great expense and effort” involved in his printed drawings and requests a fifteen year privilege “[s]o that men with little study of the art, to avoid effort and for lust of gain, might not damage the name of the first author of those prints by worsening them, and take advantage of the fruit of the effort of others; also deceive the people with counterfeit prints of little value”.⁹

⁶ Stapleton, n 1 *supra*, 70-71, citing E Panofsky, *Idea: A Concept in Art Theory* (trans J J S Peake) (London: Harper & Row, 1968), 35-40 & 51; & U Eco, *Art & Beauty in the Middle Ages* (London: Yale University Press, 1986).

⁷ See Stapleton, n 1 *supra*, 53-57. See also L Pon, *Raphael, Dürer & Marcantonio Raimondi: Copying & the Italian Renaissance Print* (New Haven: Yale University Press, 2004).

⁸ Stapleton, n 1 *supra*, 57-58.

⁹ Stapleton, n 1 *supra*, 63, citing D Rosand & M Murano, *Titian & the Venetian Woodcut* (Washington DC: International Exhibitions Foundation, ex. Cat., 1976), ch 1, f 48.

Despite the tortuous and twisting path from the Venetian system to the modern systems of copyright protection, this early history of the protection of the image resonates through modern copyright protection of works of visual art in a number of ways. The result has been the evolution of a system of protection that is, at least, idiosyncratic. In some respects this reflects the general uncertainty that pervades the relationship between copyright law and creativity. Among the myriad consequences of this uncertainty, three stand out. The first is that creativity is protected under copyright law only where its product falls within one of the categories of “copyright work”. Secondly, tensions between creativity and copyright protection result from the way in which copyright must relate to the creative process both by protecting creative output and by allowing the use of that creative output for the purpose of creating other works. Thirdly, it might be argued with some plausibility that copyright’s focus is the protection, not of primary creative works, but of derivative or entrepreneurial works. Thus, the authors of primary creative works, such as literary, dramatic, musical and artistic works, arguably derive less economic benefit from the copyright system than the “authors” of sound recordings, films, broadcasts and published editions.¹⁰ This is consistent with the proposition that a primary function of copyright law is communicative.¹¹ Yet, it leaves the question of what copyright law might be attempting to achieve in relation to the primary creative works in something of a state of limbo.

The relationship between copyright law and forms of creativity in the visual arts refracts these three systemic consequences through the glass of its distinctive history with some noticeably anomalous results. Firstly, like other forms of creative output, works of visual art must fit somewhere within the definition of a copyright work. However, it is clear that the relevant law lacks any central concept of “visual art”. In contrast to copyright’s definition of other forms of creative output, the types of works of visual art protected by copyright law comprise a list. This list lumps together a variety of works, irrespective of critical differences, with some rather perplexing results. At the same time, one major form of visual art is hived off from the list and subject to different copyright treatment. To the extent that any concept holds the list of protected works together, however loosely, it is one derived from the rhetorical discourse of the Renaissance period. In the hands of modern copyright law, this is reduced to a focus on the production of the discrete art object by a recognisable creator (or creators). The growth in the twentieth century of forms of artistic practice based on the discourse of semiotics,¹² which focus on the process rather than just the product, have posed a particular problem for the copyright definition of “artistic works”. Secondly, not only do the effects of rhetorical discourse manifest themselves in relation to the definition of protected works they also have an effect on the way in which the copyright protection of works of visual art searches for a balance between protecting creativity and permitting its use in further creative works. This balance

¹⁰ See R Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar, 2001), esp chs 6 & 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status and control of their work.

¹¹ For a discussion of this proposition, see W van Caenegem, “Copyright, Communication and New Technologies” (1995) 23 *Federal Law Review* 322; & N W Netanel, “Copyright and a Democratic Civil Society” (1996) 106 *Yale Law Journal* 283.

¹² See further Stapleton, n 1 *supra*, ch 3.

seems particularly problematic in relation to works of visual art – not least because of the growth of artistic practices and traditions derived from semiotics that focus on this creative tension. Thirdly, some works of visual art seem to raise different issues in copyright law because, unlike other primary creative works, their connection to particular forms of entrepreneurial copyright work is less clear. This is a consequence of the distinction between material and immaterial works of visual art, that is, a consequence of reproducibility and portability. Modern copyright law, which has stepped in to protect and regulate the production of those works of visual art no longer subject to the guild system or the system of patronage, contains no explicit recognition of this fundamental distinction. Yet, the effects of the distinction, clearly understood by the Venetian system of privileges, echo through its operation.

Underpinning all this, there is an atavistic tendency in copyright law to treat works of visual art with the same broad brush as it treats literary works, or to calibrate its treatment of works of visual art against its treatment of literary works. Overall, it often appears that when the treatment of works of visual art is compared with the treatment of literary works, copyright law makes the simultaneous errors of treating the similar dissimilarly and the dissimilar similarly. Of these two errors, however, that of treating the dissimilar similarly is more marked. To demonstrate these points, this paper now turns to an examination of the current regime for copyright protection of works of visual art.

2. DEFINING ARTISTIC WORKS

The discussion in this paper of the meaning of “artistic works” for copyright purposes is based upon the definition provided in the United Kingdom Copyright Designs and Patents Act 1988. This definition may be regarded as representative of approaches prevalent in common law jurisdictions¹³ and is not more generally atypical. It is found in section 4, which provides as follows:

- (1) In this Part “artistic work” means –
 - (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
 - (b) a work of architecture being a building or a model for a building,
or
 - (c) a work of artistic craftsmanship.
- (2) In this Part –
 - “building” includes any fixed structure, and a part of a building or fixed structure;
 - “graphic work” includes –
 - (a) any painting, drawing, diagram, map, chart or plan, and
 - (b) any engraving, etching, lithograph, woodcut or similar work;
 - “photograph” means a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film;
 - “sculpture” includes a cast or model made for the purposes of sculpture.

¹³ See, eg, the Australian Copyright Act 1968, s 10(1), in which the definition of “artistic work” is very similar.

There are four interrelated aspects of this definition upon which this paper will focus. First, the fact that the creation of a list, even a rather ragbag list of this sort, immediately has an exclusionary effect. Secondly, the paper will consider the problematic reference to “artistic quality”, which is said to be irrelevant to those things mentioned in subsection (1)(a), while no such limitation is made in relation to works of architecture or works of artistic craftsmanship. This creates a contentious relationship between the copyright protection of artistic works and notions of “art” and “artistic quality”. Thirdly, the paper will examine the peculiarity of putting all these different things together under the generic heading of “artistic works” and thus treating them as though they were in some way related or similar. Conversely, the final part of this section contrasts the effect of treating the dissimilar similarly with that of distinguishing between the works of visual art falling within the definition of “artistic works” and those falling within the definition of “films”.

(a) The Exclusionary Effect of the List

Despite the wide appreciation of the fact that there are many different types of literary, dramatic and musical works, it is fairly standard for copyright statutes to give little explanation of the meaning of “literary”, “dramatic” and “musical”.¹⁴ Things are rather different in relation to the category of artistic works. In the case of the UK copyright legislation, the list of artistic works now appearing in section 4 is the product of gradual accretion, beginning with the protection of engravings in 1735.¹⁵ It appears that little regard has been given to the relationship of the listed items with each other, especially the extent to which the various things may overlap with each other.¹⁶

More significantly, the creation of a list is by its nature exclusionary and constricts the flexibility of the law to adapt to new forms of artistic practice. A good example of this occurred in the *Oasis* case.¹⁷ This case concerned the assemblage of various objects along with the members of the British band, Oasis, in a swimming pool. The purpose of this assemblage was to create a photograph for the band’s upcoming album cover. It was argued that the assemblage itself was an artistic work because it was a sculpture, a work of artistic craftsmanship, and/or a collage. All three characterisations were rejected: sculpture because there was no element of carving or modelling; work of artistic craftsmanship because there was no element of craftsmanship; and collage because, surprisingly, there was no glue or adhesive involved.

¹⁴ See, eg, the UK Copyright Designs and Patents Act 1988, s 3(1).

¹⁵ Engraving Copyright Act of 1734. This was followed by the protection of calico designs in 1787; sculptures in 1798 (Sculpture Copyright Act of 1798 as amended in 1814); prints & lithographs in 1852 (International Copyright Act of 1852); drawings, paintings and photographs in 1862 (Fine Art Copyright Act of 1862); works of artistic craftsmanship in 1911 (Copyright Act of 1911); & collages in 1988 (Copyright Designs & Patents Act 1988): L Bently & B Sherman, *Intellectual Property Law* (Oxford: OUP, 2001), 62 & 62n; S Stokes, *Art & Copyright* (Oxford: Hart Publishing, 2001), 23-25.

¹⁶ Eg, the extent of overlap between sculptures and works of artistic craftsmanship is problematic, especially since sculptures are protected “irrespective of artistic quality” while no such limitation applies to works of artistic craftsmanship.

¹⁷ *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 445.

As Stokes points out,¹⁸ a particularly interesting part of the judgment of Lloyd J was his consideration of the argument by counsel for the plaintiffs that section 4 ought not to be construed so as deny copyright protection to new forms of artistic works. Lloyd J considered a range of contemporary art forms that appeared to raise problems of characterisation under section 4, including things such as Gilbert and George's living sculptures, Rachel Whiteread's house, and many forms of installation art. In the end, he did not address the question of whether or not these were "artistic works" for copyright purposes. He simply decided that the assemblage in the *Oasis* case was ephemeral and, therefore, to be distinguished from these other works. This is a point to which this paper will return. What we may, at least, take from this case is that the arrangement of found objects (*objets trouvés*) or ready-mades¹⁹ is outside copyright protection, unless perhaps they are permanently situated. It may be that all ready mades, whether assembled or not, are simply outside copyright protection.²⁰

There are, of course, other explanations for cases like the *Oasis case* and ensuing doubts over the copyright status of works of visual art such as living sculptures, installation art and ready-mades. One of these is that they have fallen foul of what might be called the product/process distinction, which grounds the rhetorical aesthetic tradition in which copyright is based. The effects of this distinction, which focuses protection on the work or product, rather than the creative or artistic practice, are particularly noticeable in relation to works of visual art falling within the definition of "artistic works". Another explanation for cases like the *Oasis Case* is that they are as much a tribute to conservatism and the failure of judicial imagination as they are to the exclusionary effect of a list. Whatever the explanation, however, they raise serious concerns about the relationship between copyright protection and new forms of artistic practice. However, as we are about to see, the difficulty of both legislators and judges in dealing with the concept of "artistic works" is not limited merely to new forms of artistic practice.

(b) The Significance of Artistic Quality

To someone who is not a copyright aficionado, the notion that works are artistic works "irrespective of artistic quality" may be problematic – but this type of oxymoron is not atypical in copyright law. As a consequence, those accustomed to the peculiarities of copyright law bravely face the concepts of the protected literary work with no literary merit and the protected artistic work with no artistic merit. What is alarming, however, about the definition of "artistic works" in s 4 is that only those types of artistic works referred to in paragraph (a) are protected irrespective of artistic quality, suggesting that artistic quality or merit may be relevant to works of architecture and works of artistic craftsmanship.

¹⁸ Stokes, n 15 *supra*, 35-36.

¹⁹ According to Stokes, n 15 *supra*, 2n, citing Chilvers, *A Dictionary of Twentieth-Century Art* (OUP, 1999), "[r]eady-made' is the name given by Marcel Duchamp to a type of work he created which consists of mass-produced article isolated from its functional context and displayed as a work of art".

²⁰ Stokes notes that this would exclude Marcel Duchamp's bicycle wheel attached to a stool, which was exhibited in 1913 with a view to challenging ideas about the nature of art: n 15 *supra*, 124. Cf Bently & Sherman, n 15 *supra*, 63.

The struggles of the English courts with the notion of “works of artistic craftsmanship” are well known.²¹ What is very clear from these cases is that despite the absence of the expression “irrespective of artistic quality” in para (c), which suggests that artistic quality is relevant, the courts have declined to be drawn into the question of whether or not the work of artistic craftsmanship has artistic merit. Rather they have considered issues such as the aim and impact of the craftsman/creator²² and the motivations of those wishing to acquire the work in question.²³ Arguably what they are considering in these cases is whether or not the work has the quality or nature of an artistic work, not whether it has artistic quality or merit. It is clearly the case, that judges have undertaken this same enquiry in relation to artistic works falling within paragraph (a). That is, they have enquired whether or not the work has the quality or nature of an artistic work of the type in question. Arguably, exactly this sort of consideration lay behind the decision of Laddie J in *Metix (UK) Ltd v G H Maughan (Plastics) Ltd*.²⁴ In this case Laddie J held that a sculpture was “a three dimensional work made by an artist’s hand” and that, consequently, casts used for making double-barrelled cartridge syringes were not sculptures because they could not be regarded as the work of an artist.²⁵ Another rather less overt example of the court enquiring into whether a work has the nature or quality of the type of artistic work in question occurred in the *Adam Ant* case.²⁶ Faced with the argument that the make-up on Adam’s face was a graphic work in the form of a painting, Lawton LJ said a painting “is not an idea: it is an object” and as such it must be affixed to a surface.²⁷ Thus suggesting the notion that one of the qualities of a painting, if not artistic works more generally, is permanent fixation. There is no obvious reason why a painting or a work of art must be permanently affixed and it is argued below that the result of such a determination is to exclude particular types of visual art from the protection of copyright law. Of course, the influence of rhetoric discourse is startlingly clear.

(c) Treating the Dissimilar Similarly I: the permanence requirement

In relation to the copyright definition of an “artistic work”, one of the primary manifestations of the phenomenon whereby the dissimilar is treated similarly is the requirement of permanent affixation derived from the *Adam Ant* case. As discussed above, in this case Lawton LJ held that facial make-up was not a painting as it was not permanently affixed to a surface. Even as a dictum on the definition of a painting for the purpose of the copyright definition of artistic works this is problematic enough in terms of the relationship between copyright law and artistic practice. There has, however, been considerable confusion about how widely this troublesome dictum applies. That is, does it apply just to paintings, just to graphic works, just to works falling within the first paragraph of the definition of artistic works, or to all artistic

²¹ See, eg, *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd* [1975] RPC 31, *Merlet v Mothercare plc* [1986] RPC 115, *Vermaat v Boncrest Ltd*, *The Times*, 23 June 2000.

²² See *Hensher v Restawile*, n 21 *supra*, per Lord Simon of Glaisdale; & *Merlet v Mothercare*, n 21 *supra*.

²³ See *Hensher v Restawile*, n 21 *supra*, per Lord Reid & Lord Simon of Glaisdale.

²⁴ [1997] FSR 719.

²⁵ Cf *Hi-Tech Autoparts Ltd v Towergate Two Limited* [2002] FSR 15, in which the court refused to extend this reasoning to graphic works.

²⁶ *Merchandising v Harpbond* [1983] FSR 32.

²⁷ *Ibid.*, 46.

works? It is clear that the more widely one applies this rule, the more limiting its effects become. If it applies only to paintings or other graphic works, it might exclude, for example, impermanent chalk drawings. If applied more widely, the concept of permanence might exclude from the definition of artistic works things like sand sculptures, ice sculptures and much installation art. Despite this (or perhaps because of it), the general trend in judicial approaches in common law countries has been to read the requirement widely. So, for example, in the *Oasis* case,²⁸ one of the reasons why the collection of *objet trouvés* was held not to be a sculpture, collage or work of artistic craftsmanship was that it was not intended to remain permanently in its particular arrangement. In the Australian case of *Komesaroff v Mickle*²⁹ the requirement of permanence was extended to the category of works of artistic craftsmanship with the result that so-called sand pictures, the contents of which move and change appearance depending upon the angle at which the picture is placed, did not qualify as artistic works. However, just to complicate the situation, contemporaneously with the *Oasis* case, the UK case of *Metix v Maughan*³⁰ questioned the requirement of permanence in relation to, at least, sculptures. Laddie J noted that such a requirement would, for example, exclude ice sculptures.

One might argue that the somewhat uncertain state of the law with respect to the application of the permanence requirement is the inevitable result of taking a characteristic that may possibly apply to one form of artistic work and attempting to extend it through the whole diverse category of artistic works. The discomfort of Laddie J in *Metix* with the idea that ice sculptures might be excluded from copyright protection may demonstrate a laudable awareness of the consequences of the over-extension of the permanence requirement. Generally, however, it is arguable that the more common discomfort that members of the judiciary feel in relation to the whole category of artistic works has resulted in the misapplication of an inappropriate but comprehensible rule. The tendency to extend such a rule to such a range of different forms of artistic expression is clearly encouraged by the lumping together of widely diverse forms of artistic creativity under one generic heading of “artistic works”. It is also likely that the rule is, again, a reflection of the apparent emphasis of copyright law on product/work rather than process/practice.

(d) Treating the Similar as Distinct

Outside the boundaries of copyright law, there seems to be little doubt that film forms part of the visual arts. However, copyright law has always treated films separately from the “artistic works” considered above. Separating film as a distinct category from other works of visual art made some sense when the usual assumption was that the producer of a film was the first holder of copyright. This did not sit particularly uncomfortably with the idea that, as with sound recordings, typographical arrangements and broadcasts, copyright was protecting those who invested in communication or dissemination of the relevant creative works. It also contrasted with the position in relation to “artistic works” (and literary, dramatic and musical works), in relation to which the first owner of copyright was the creator, rather than the disseminator, of the work. However, the recognition of the creative input of the

²⁸ Note 17 *supra*.

²⁹ [1988] RPC 204.

³⁰ Note 24 *supra*.

director in relation to both copyright ownership and moral rights has muddied this water.

The significance of the anomalous copyright treatment of films is unclear. It seems, however, that it may have resulted in one of the more egregious disjunctions between copyright and creativity. One might have hoped that the separation of film from the historical accretion listed under the sobriquet “artistic works”, might have freed films from the product/process distinction derived from rhetorical aesthetic theory that seems to plague the copyright protection of those artistic works. Not only has this proved a false hope, but it also the case that the formal ordering of the legislation, under which film is grouped together with entrepreneurial works rather than works of primary creativity, seems to have nullified concerns about visual creativity in the process of film-making. These points are illustrated by the case of *Norowzian v Arks (No 2)*,³¹ in which an independent film-maker sued the maker of a Guinness advertisement. In the original film a process of “jump-cutting” had been used in order to get a highly distinctive form of movement in the character depicted. The Guinness advertisement produced an identical effect, without the use of jump cutting. That the Guinness advertisement had “copied” the look of the film was not in dispute. (The makers of the Guinness advertisement had requested permission to “copy” the film one more than one occasion and that permission had been refused.) However, the court held that the copyright in film could only be infringed by a direct mechanical reproduction, hence no infringement. The result is that a genuinely distinctive, innovative and creative use of a visual medium was denied copyright protection. That the process responsible for producing a distinctive visual effect was ignored by the court as being outside the realm of copyright concerns is consistent with the usual copyright approach to works of visual art. That visual similarity with the original work of visual art counted for nothing is not so consistent, as the discussion below demonstrates.

3. STRIKING THE COPYRIGHT BALANCE

A major theme of copyright law lies in striking the appropriate balance between the protection of creativity and the stimulation of further forms of creativity. This is a notoriously difficult task in relation to all types of creativity protected by copyright law. It is nevertheless essential that copyright law recognise that the creative process draws upon the influence of earlier works³² with the result that overprotection of those works will stifle creativity. In the context of actions for infringement of copyright, the main tools for achieving this balance are said to be the so-called idea/expression dichotomy and the fair dealing defences to an action for infringement. It is arguable, however, that in relation to artistic works these concepts have failed to achieve the necessary balance. The discussion below posits three related reasons for

³¹ [2000] FSR 363 (CA).

³² In relation to the influence of earlier literary works on later literary works, see H Bloom, *The Anxiety of Influence: A Theory of Poetry* (Oxford: Oxford University Press, 1973). In relation to the influence of earlier music on later musical works, see S Vaidyanathan, *Copyrights & Copywrongs: The Rise of Intellectual Property & How it Threatens Creativity* (New York: New York University Press, 2001), ch 4. See generally, F Macmillan Patfield, “Towards a Reconciliation of Free Speech and Copyright” in E Barendt (ed), *The Yearbook of Media and Entertainment Law 1996* (1996) 199.

this. First is the fact that idiosyncratic copyright rules on infringement in relation to artistic works unnecessarily lower the threshold for copyright infringement. Secondly, particular difficulties have been encountered in applying the idea/expression dichotomy in relation to artistic works. Thirdly, much modern artistic practice specifically seeks to challenge either the dominant artistic canon or the proprietisation of artistic works through copyright law and its neighbouring law of moral rights.

(a) Treating the Dissimilar Similarly II: shape shifting

If the permanence requirement was the only example of the dangers of grouping together dissimilar things as though they were essentially similar, the argument that this was a matter of concern might ring rather hollow. It seems, however, that the permanence requirement is only one example of a mindset in copyright law that is seriously out of kilter with the reality of artistic practice. Another pertinent example of the tendency to treat the dissimilar similarly in relation to artistic works arises in relation to the particular rules governing the infringement of copyright in artistic works. In most common law jurisdictions there is a statutory provision to the effect that the reproduction of a two dimensional artistic work in three dimensions, or the reproduction of a three dimensional work in two dimensions, constitutes an infringement of the work.³³ This rule only applies to the infringement of artistic works so that, for example, the three dimensional reproduction of a literary work (such as the knitting of a jumper in accordance with a written knitting pattern) is not an infringement. The exclusivity of this rule immediately raises problems in relation to works that seek to challenge the boundaries between artistic works and other types of copyright works.³⁴ However, even in the context of works that recognisably fall within the copyright definition of artistic works, this rule is problematic.

This two dimensional/three dimensional rule was, of course, at the heart of the famous (or infamous) case of *Rogers v Koons*,³⁵ in which Jeff Koons was found to have infringed copyright when he created a sculpture based upon a well known photo by Art Rogers of a couple holding seven puppies. Koons' sculpture, "String of Puppies", which was produced for the purpose of his exhibition, "The Banality Show", was anything but a close copy in three dimensions. In both intention and effect the sculpture was a parody of the photograph. This case is ordinarily seen as raising serious issues about the utility of fair dealing/fair use defence,³⁶ upon which some comment is made below. However, it is also worth noting that there would not have been an infringement in the first place, but for the two dimensional/three dimensional rule. The visual artist, JSG Boggs, has noted that the result in this case demonstrates that copyright law fails to understand that sculpture and photography are quite distinct disciplines. As a result, a sculpture can no more be reasonably regarded as a copy of

³³ See, eg, the UK Copyright, Designs and Patents Act 1988, s 17(3).

³⁴ This is a persistent trend in modern artistic practice. Eg, on works that seek to erase the distinction between art and literature, see A Julius, *Transgressions: The Offences of Art* (London: Thames & Hudson, 2002), 122.

³⁵ 751 F Supp 474 (SDNY 1990), aff'd 960 F 2d 301 (2d Cir), cert denied, 113 S Ct 365 (1992).

³⁶ See, eg, W Landes, "Copyright, borrowed images and appropriation art: an economic approach" in R Towse (ed), *Copyright in the Cultural Industries* (Cheltenham: Edward Elgar, 2002) 9, 24-25

a photograph than can a written description of that photograph.³⁷ However, copyright law has created a false commonality or similarity between different artistic disciplines that allows results that appear meaningless to practitioners of art. What is more, if this is correct, these sorts of results cast serious doubts over the role of the idea/expression dichotomy in relation to artistic works.

(b) Treating the Dissimilar Similarly III: idea and expression

Famously, the idea/expression dichotomy provides that copyright protects, not the idea underlying the work, but rather its expression.³⁸ As already noted,³⁹ this dichotomy is clearly a key concept in rhetorical aesthetic theory, which distinguished between the idea and its realisation in the artwork. The dichotomy is inherently problematic, but it has retained a life in copyright law as a useful mechanism for balancing the interests of copyright holders and users. Even if one accepts the validity of the distinction as applied in copyright law, how can the notion that copyright protects the expression of an idea rather than the idea itself be maintained when the two dimensional/three dimensional infringement rule means that copyright is protecting a completely dissimilar expression of the idea in question? That is, where it is protecting an expression that is as dissimilar to the copyright work as is a written description of the content of a photograph.⁴⁰ It is, of course, the case that to make an adaptation of a literary, dramatic or musical work is to infringe copyright in that work,⁴¹ but the concept of adaptation does not catch works that are fundamentally dissimilar to the copyright work in question. Adaptations of literary works, for example, are still literary works.

It is clear that cases like *Rogers v Koons* show the two dimensional/three dimensional rule in its worst light. There may be other cases in which the making of a two dimensional copy of a three dimensional work (and vice versa) involves the making of a close copy and the consequent unjustifiable and non-creative exploitation of another's work. This suggests that a significant part of the problem here is the failure to make the application of the two dimensional/three dimensional infringement rule subject to the overriding principle that an infringement only takes place where the copier takes the whole or a substantial part⁴² of the expression, not the idea, of the work. Depressingly, however, a review of the judicial application of the idea/expression dichotomy in the context of artistic works does not suggest that it would do much to ameliorate the excesses of the two dimensional/three dimensional infringement rule.

In general, the notion that an idea can be divorced from its expression is not an easy one to embrace, except at the most banal level. The reason for this is that the way an idea is expressed is part of the idea itself.⁴³ This is particularly so in relation to a

³⁷ J S G Boggs, "Who Owns This?" (1993) 68 *Chicago-Kent Law Review* 889, 898-900.

³⁸ See, eg, *Donoghue v Allied Newspapers* [1938] Ch 106; *Ravenscroft v Herbert* [1980] RPC 193; *Fraser v Thames Television* [1983] 2 All ER 101; *Green v Broadcasting Corporation* [1989] RPC 469 & 700 (PC).

³⁹ See text acc n 6 *supra*.

⁴⁰ See text acc n 37 *supra*.

⁴¹ See, eg, the UK Copyright Designs and Patents Act 1988, ss 16(1)(e) & 21.

⁴² See, eg, UK Copyright Designs and Patents Act 1988, s 16(3)(a).

⁴³ For an elaboration of this argument, see Macmillan Patfield, n 32 *supra*, 216-219.

wide range of artistic works and it means that even fatuous examples are difficult. We might say that the fact that one person paints a particular scene does not prevent someone else also painting it, but we would say it with some caution in the UK after a case such as *Krisarts v Briarfine*.⁴⁴ In this case, which was an interlocutory judgment, the defendants used paintings of certain views in London as one of the influences in creating their own paintings of the same scenes. The defendants' paintings were not particularly similar to the paintings in which the plaintiffs owned copyright, nevertheless the court held that an arguable case of copyright infringement existed.

As already noted, consideration of the idea/expression dichotomy in copyright cases is closely associated with the question of whether or not the defendant has copied a substantial part of the plaintiff's copyright work. A UK case that considered this matter in relation to artistic works is the House of Lords decision in *Designer Guild Ltd v Russell Williams (Textiles) Ltd*.⁴⁵ This case concerned fabric designs. The plaintiff's design, "Ixia" was based on a painting by one of its employees. Said to be inspired by the "handwriting and feel" of Matisse, the plaintiff's painting and consequent fabric design was constituted by stripes overlaid by impressionistically scattered flowers. The defendant's design, "Marguerite" also had stripes and impressionistically scattered flowers. The plaintiff argued that the defendant's design copied a substantial part of its "Ixia" design and, consequently, constituted an indirect copying of the original painting of the design. The Court of Appeal took the view that "Marguerite" did not copy a substantial part of the expression of the idea of "Ixia". That is, even though the elements (stripes and flowers) were similar and the means of executing the ideas were similar (similar brushwork and resist effect), the overall "visual effect" was different.⁴⁶ The House of Lords unanimously rejected the approach of the Court of Appeal and found, like the original trial judge, that an infringement had taken place. All the members of the House of Lords considered the question of whether or not substantial taking had occurred. Lord Hoffman specifically considered this in relation to the idea/expression dichotomy. He took the view that different ideas expressed in the copyright work can be abstracted from the whole and thus form a substantial part, which if annexed by someone else, will result in an infringement. Thus, the stripes and flowers together form a substantial part of the work with the result that when they are used without authorisation an infringement occurs. The end result in this case was that, despite the fact that the defendant's "Marguerite" design is not all that visually similar to the plaintiff's "Ixia" design, an infringement was said to have occurred.

When judges struggle with the meaning of the words and expressions like "artistic" and "artistic quality", when they lay down arbitrary rules about what constitutes a painting or an artistic work, when they struggle with the idea/expression dichotomy and concepts of substantial taking in relation to artistic works, what they may be demonstrating is a particular discomfort with the nature of creativity in the visual arts. Where these struggles result in a decision that copyright is infringed by a piece of visual art that is visually dissimilar to another work, then copyright law may start to have a serious impact on the way in which visual artists exercise their creativity.

⁴⁴ [1977] FSR 577.

⁴⁵ [2000] 1 WLR 2416 (HL).

⁴⁶ [2000] FSR 121 (CA), 134 per Morritt LJ.

Further, such unequal struggles give little confidence in copyright law's ability to deal with artistic practices that challenge the very concepts of copyright law.

(c) *Challenging copyright*

The practice⁴⁷ of appropriation art, based in the discourse of semiotics, in which a familiar image is relocated and recontextualised in a new work of visual art is well exemplified by Jeff Koons' use of Art Rogers' photograph. Appropriation art might, itself, also be located within the wider context of subversive or transgressive art, involving what Julius has described as "art crimes":

Though art crimes are a constant in the history of art-making it is only in the modern period that the committing of art crimes against art works becomes an aesthetic project, and criminal artworks, objects of aesthetic interest. There are two types of these art crimes: offences of reproduction and offences of destruction.

Offences of reproduction are at or near the terminal point of a notional arc that begins with an original work, and then travels through pastiche, plagiarism, breach of copyright, misattribution of authorship and passing off, to forgery. Offences of destruction are at the terminal point of an arc that begins with an original work, and then travels through adaptations, then parody, then breach of moral rights, trespass, suppression or other breach of speech rights, to criminal damage.⁴⁸

Both types of "art crimes" involve challenges to a wide range of copyright concepts. Some of these challenges are illustrated by a consideration of subversive or transgressive art practices in the context of the law on fair dealing/fair use and moral rights.⁴⁹

Hutcheon has noted that "[r]eappropriating existing representations that are effective precisely because they are loaded with pre-existing meaning and putting them into new and ironic contexts is a typical form of postmodern ... critique".⁵⁰ Consistently with this approach, in *Rogers v Koons*, Koons argued that he was entitled to the protection of the fair use doctrine on the basis that his work was a parody for the purpose of criticizing the banality of popular cultural images. The US Supreme Court held, however, that the fair use defence only applies where the infringing work has used a copyright work for the purpose of criticising that copyright work, rather than for the purpose of criticising society in general. This suggests that the fair use

⁴⁷ It may be argued that this practice has its roots in Dadaism, Surrealism and Pop Art: see B Sherman, "Appropriating the Postmodern: Copyright and the Challenge of the New" in D McLean & K Schubert (eds), *Dear Images: Art, Copyright and Culture* (London: Institute of Contemporary Arts & Ridinghouse, 2002) 405, 405 citing A Bonnett, "Art, ideology and everyday space: subversive tendencies from Dada to postmodernism" (1992) 10 *Society and Space* 69. See also, Stokes, n 15 *supra*, 125 & 125n.

⁴⁸ Julius, n 34 *supra*, 87.

⁴⁹ These are not, of course, the only copyright concepts challenged by postmodern art practices. Particular challenges are also made to the concepts of originality and authorship: see K Bowrey, "Copyright, the Paternity of Artistic Works and the Challenge Posed by Postmodern Artists" (1994) 8 *Intellectual Property Journal* 285. See also, A Wilson, "'This is Not by Me.' Andy Warhol and the Question of Authorship" in McClean & Schubert, n 47 *supra*, 375.

⁵⁰ L Hutcheon, *The Politics of Postmodernism* (London: Routledge, 1989), 44. This passage is also quoted in Stokes, n 15 *supra*, 125n.

defence will avail appropriation artists in only a very limited range of cases. Julius has identified transgressive art as falling within three general groups: art that questions the meaning or methods of art; art that breaks taboos; and, art that has a political motivation.⁵¹ If the fair use/fair dealing defence protects only a critique of a particular work of art, it seems unlikely that it will offer much protection to transgressive forms of appropriation art. In particular, appropriation art that breaks taboos or has a political motivation appears to be outside the protection of the fair use/fair dealing defence. Optimists may argue that subsequent decisions on both sides of the Atlantic in cases like *Campbell v Acuff-Rose Music, Inc*⁵² and *Time Warner Entertainments Company LP v Channel 4 Television Corporation plc*⁵³ repair or mitigate some of the damage that *Rogers v Koons* has done to the vitality of the fair dealing/fair use defence. It is true that *Time Warner*, in particular, would appear to permit the use of the fair dealing defence for the purpose of making a wider social comment. However, not only has this mish-mash of case law created confusion about the scope of the defence, there is some concern in the UK context that even a more generous application of the fair dealing defence than that allowed in *Rogers v Koons* might be undermined by a robust application of the original artist's moral rights.

Two aspects of moral rights law are in the frame here. The first is the copyright author's right of integrity⁵⁴ and the second is the right against false attribution.⁵⁵ In relation to the right of integrity, the right to object to a distortion of a copyright work seems to have a somewhat fatal effect on exactly the type of appropriation for the purposes of pastiche or parody that *Rogers v Koons* suggests would fall within the protection of the fair use defence. That is, an appropriation for the purposes of parody or pastiche that has the intention or effect of criticising the copyright work may very well be deemed a distortion of the work prejudicial to the honour or reputation of the author. There is some basis for arguing that some parodic appropriations for the purpose of making a social comment, rather than commenting on the appropriated work, would fare better under moral rights law. The Swedish case of *Svanberg v Eriksson*⁵⁶ considered the exhibition of a reproduction of an artistic work to which printed comments and printing instructions had been added for the purposes of making a comment on the commercial exploitation of graphic art. This was not regarded as a breach of the original artist's right of integrity as there was no material alteration to the central elements of the work.⁵⁷ On the other hand, one might have thought that the sort of distortion involved in a case like *Rogers v Koons* would raise an arguable case of a breach of the right of integrity. It is interesting to note, however, that the distortions in both *Svanberg v Eriksson* and *Rogers v Koons* were not to the original artwork.⁵⁸ There are some grounds, examined below, for supposing that the courts will only find a breach of the right of integrity where the original work is distorted. If this is correct then this may pose some problems for

⁵¹ Julius, n *supra*, ch III.

⁵² 114 S Ct 1164 (1994). For a fuller discussion of this case in the context of the relationship between copyright & free speech, see Macmillan Patfield, n 32 *supra*, 226-230.

⁵³ [1994] EMLR 1. For a fuller discussion of this case in the context of the relationship between copyright & free speech, see Macmillan Patfield, n 32 *supra*, 226-230.

⁵⁴ UK Copyright, Designs and Patents Act 1988, s 80.

⁵⁵ UK Copyright, Designs and Patents Act 1988, s 84.

⁵⁶ [1979] *European Intellectual Property Review* D-93.

⁵⁷ See further Stokes, n 15 *supra*, 137.

⁵⁸ Whatever that might be considered to be in the case of a photograph.

some types of transgressive art, but would seem to leave appropriation art largely unscathed by the right of integrity.

So far as breaches of moral rights in relation to appropriation art are concerned, it only remains to note that the recontextualisation of the appropriated image might raise the possibility of a breach of the right against false attribution. It seems likely, however, that this right will only be infringed where the paternity of the appropriation artist is not clear.⁵⁹

4. THE SIGNIFICANCE OF THE ORIGINAL

The materiality of visual art echoes through much of the above discussion. The apparently philistine epigram of Lawton LJ in the *Adam Ant* case that a painting “is not an idea: it is an object”⁶⁰ may have been (subconsciously) influenced by the materiality issue. Perhaps Lawton LJ meant what Teilmann has said much more elegantly: “Visual art is not separable from its materiality, from the physical entity of the painting, or the drawing, or the sculpture. Texts on the contrary are characteristically immaterial”.⁶¹ Similarly, when Boggs expresses incredulity at the idea that a sculpture can constitute a copy of a photograph,⁶² perhaps he is partly getting at the same sort of thing as Kant who suggests that to make, for example, an engraving of a painting is not to make a copy of it because the painting is a unique object, which cannot be copied by an engraving.⁶³ As Teilmann has noted, Kant is also making the point that some types of artistic works are not susceptible to the dangers of copying in the same ways that others are because the original will always be more valued and valuable than any copy.⁶⁴

The materiality of some types of visual arts contrasts, especially these days, with literary works, which are immaterial.⁶⁵ The first manuscript is a step in the process of the expression of the idea to the public rather than an end in itself. In terms of the expression of the literary work, one copy of a book is as good as another. On the other hand, a painting or sculpture, for example, cannot be separated from its own materiality and is, therefore, an end in itself rather than merely a means to an end.⁶⁶ Of course, there are a number of types of artistic works protected by copyright law that lack the characteristic of materiality. This would be true, for example, many of the forms of artistic works falling within the definition of “graphic works”.⁶⁷ It is true of many photographs. It is also true of some things categorised by copyright law as

⁵⁹ See *Clark v Associated Newspapers Ltd* [1998] 1 All ER 959. See further, M Blakeney & F Macmillan, “Journalistic Parody and Moral Rights under Australian Copyright Law” (1998) 3 *Media & Arts Law Review* 124.

⁶⁰ See n 27 *supra*, & acc text.

⁶¹ S Teilmann, “Framing the Law: Authorship of Images”, Paper presented at the *Crossroads in Cultural Studies Conference*, Tampere, Finland, June 2002

⁶² See n 37 *supra*, and & acc text.

⁶³ See Teilmann, n 61 *supra*, citing I Kant, “Von der Unrechtmäßigkeit der Büchernachdrucks”, *Berlinische Monatsschrift* 5 (May 1785), 403-417.

⁶⁴ Teilmann, n 61 *supra*.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ See, eg, UK Copyright Designs and Patents Act 1988, s 4(2).

sculptures.⁶⁸ This distinction between material and immaterial works seems to go to the heart of copyright law, which is after all, just like the system of Venetian printing privileges, a right to prevent copying. The meaningfulness and operation of such a right must surely be qualitatively different for material and immaterial works.⁶⁹ If this is so then for copyright law to be relevant to artistic practice the protection that artists need from both copyright law and its neighbouring moral rights law may be different depending upon whether or not they are creating works intended to be unique one-off pieces or whether they are creating works that are purely for the purposes of reproduction.

It might be argued that as a right against copying, copyright is irrelevant to works of visual art in which the value resides in the original one off work. On the other hand, it is also arguable that the creators of such works are entitled to protection from unauthorised commercialisation of such works in the form of, for example, photographs. At the least copyright law needs to find a mechanism for treating the copyright owners of unique one-off pieces like other copyright owners by giving them a financial stake in the work based on the demand for the work in the marketplace. For other copyright owners that demand will be reflected in the demand for reproductions. For the copyright owner of the unique one off artistic work, the demand for such work in the market place is largely reflected in the price put on the one-off item.⁷⁰ This might be reflected in the introduction of a resale right for the copyright holder. To be consistent with the general tenor of copyright law this economic right should belong to the copyright holder, not to the artist-author, in order to put the copyright holder of a one-off artistic work in an economic position that reflects the economic position of other copyright holders. The artist will, of course, be the beneficiary of this, provided he or she retains copyright in their work. The economic loss suffered by the artist who transfers his or her copyright along with the physical ownership of the item is, in many ways, no different to any other author of a copyright work who transfers away their copyright only to find that the work subsequently becomes much more valuable. It is interesting that the *droit de suite*, which exists in most EU countries, confers a resale right on the artist not the copyright holder. This is not surprising given the (obvious) origins of the *droit de suite* in a *droit d'auteur* system.⁷¹ Resistance to the *droit de suite* in Anglo-American copyright systems may owe something to the fact that, inconsistently with the usual tenor of copyright law in such systems, it benefits the author rather than the copyright owner with increases in the market value of the work.

So far as the moral rights of the author of a one-off work are concerned, as suggested above, there is some basis upon which to suspect that judges implicitly take into account the distinction between works that are intended to be an end in themselves

⁶⁸ See, eg, *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1985] RPC 127; & *Breville Europe plc v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77.

⁶⁹ In fact, the very idea presents a challenge to notions of intellectual property, which is usually characterised as non-rivalrous and non-crowdable: see, eg, J Waldron, "From Authors to Copiers: Individual Rights & Social Values in Intellectual Property" (1993) 69 *Chicago-Kent Law Review* 841, 870-874.

⁷⁰ If a painting or sculpture becomes particularly famous there may be a demand for reproductions of the painting on postcards, in books and so on. However, such the return on such demand will ordinarily be a poor reflection of the increase in value of the original item.

⁷¹ On the differences between the *droit d'auteur* system and the Anglo-American conception of copyright, see generally J A L Sterling, *World Copyright Law* (London: Sweet & Maxwell, 2003).

and works that are intended or designed to be exactly reproducible. In making this argument, Teilmann⁷² cites the UK cases of *Tidy v Trustees of the Natural History Museum*⁷³ and *Pasterfield v Denham*⁷⁴ concerning the moral right of integrity.⁷⁵ In both of these cases the distortions to which the artists objected were to reproductions of the work, rather than the originals. The courts declined to follow the Canadian case of *Snow v The Eaton Centre Ltd*,⁷⁶ in which the distortion occurred to the original work. Teilmann suggests “cautiously” that there may be significance in the fact that English cases concerned treatment of the reproductions while the Canadian case concerned the original and unique work. This suggestion is also consistent with the outcome, if not the dicta, of *Svanberg v Eriksson*.⁷⁷ If the suggestion is correct, then it may be that this distinction between works that are an end in themselves and other copyright works is being recognised in a way that prejudices the artists of one-off works. On the other hand, it may also be responsible for ensuring that the right of integrity in relation to artistic works does not undermine possible gains for artistic practice arising from the fair dealing/fair use defence.⁷⁸

It seems rather unsatisfactory that the possible clash between the fair dealing/fair use rights and the right of integrity of authors can be solved in the case of one off artistic works, but not other copyright works, by taking away the moral right of the artist to exercise any control over the treatment of copies of the work.⁷⁹ In general, a more coherent resolution of the tension between the concepts of fair dealing and the right of integrity is necessary. More specifically, the law of copyright and neighbouring rights needs to give attention to the question of the applicability of its general concepts to works that are unique one off pieces, copies of which will always be qualitatively different from the original. If the logical conclusion of such a consideration is to deny to the authors of such works the protection of the right of integrity in relation to copies, then the corollary of this must be that such authors of such works are entitled to a moral right to prevent the destruction of the unique original physical object in which their creativity is embedded.⁸⁰ It is not impossible that the right of integrity in fact gives this protection, but it not clear. Giving such protection will, of course, impact upon the type of transgressive art that involves the destruction of original art works.⁸¹ However, such work is of such an order of conscious transgression that any inhibition provided by a moral right against destruction of an original art work would be likely to be balanced by the stimulating effect of transgressing not only artistic convention, but also moral rights law.

⁷² Note 61 *supra*.

⁷³ [1998] 39 IPR 501.

⁷⁴ [1999] 26 FSR 168.

⁷⁵ See the UK Copyright Designs and Patents Act 1988, s 80.

⁷⁶ 70 CPR (2d) 105 (1982), in which it was held that a breach of the author’s right of integrity occurred when a shopping centre altered the appearance of a sculpture depicting Canadian geese in their migratory pattern by tying putatively festive red and green ribbons around the necks of the geese.

⁷⁷ See nn 56-58 *supra*, & acc text. The Supreme Court of Sweden appeared to accept that a breach of the right of integrity might have occurred as a result of a distortion of a copy of the work.

⁷⁸ See text acc nn 54-58 *supra*.

⁷⁹ At least in the case of some types of artistic work, it also seems inconsistent with the provisions of, eg, the UK Copyright Designs and Patents Act 1988, s 80(4).

⁸⁰ See also Teilmann, n 61 *supra*, who cites as an example of such an approach the right to “protection against destruction” in Article 15(1) of the Swiss Federal Law on Copyright of 9 October 1992, as amended.

⁸¹ See, eg, Julius, n 34 *supra*, 87, & text acc n 48 *supra*.