

THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



HOW LAW DEFINES ART

DR. DEREK FINCHAM

ABSTRACT

Defining art is both hard and subjective. But in lots of contexts the law must arrive at a just solution to hard and subjective questions. The art community has largely neglected the task of defining artworks. This neglect has crept into legal disputes, particularly those involving conceptual art which has loosened the limits of aesthetics, form, function, and composition. This makes crafting a definition of art even more challenging. Yet the Law has an important part to play in resolving art disputes—courts end up defining art no matter how cautiously they approach the question. They do not set out to do so, and in fact they do all they can to avoid acting as art critics. But paradoxically this creates inconsistent judicial reasoning. The solution offered here, is to acknowledge this critical function, and encourage courts to engage with the visual arts community, and for the arts community to engage back.

Copyright © 2015 The John Marshall Law School



Cite as Dr. Derek Fincham, *How Law Defines Art*, 14 J. MARSHALL REV. INTELL. PROP.
L. 314 (2015).

HOW LAW DEFINES ART

DR. DEREK FINCHAM

| | |
|---|-----|
| I. INTRODUCTION..... | 315 |
| II. DEFINING CONSTANTIN BRANCUSI’S “BIRD IN SPACE” AS A WORK OF ART | 315 |
| III. DEFINING ART UNDER THE VISUAL ARTISTS RIGHTS ACT..... | 317 |
| IV. CAN ART BE ONLY AN IDEA OR SERVE AS ADVERTISING? | 319 |
| V. HOW MUCH CAN ART BORROW FROM ANOTHER WORK? | 323 |
| VI. CONCLUSION | 325 |

HOW LAW DEFINES ART

DR. DEREK FINCHAM*

I. INTRODUCTION

Many artists would perhaps be surprised to learn that it is the law and its practitioners which have been answering the simple question: what is art? Though judges and the law have no stated interest in defining what is and is not art,¹ the law defines art whether we like it or not.² There are others we might prefer to take over this responsibility: art historians, artists, the art market, art critics, and even the art-viewing public. Yet these groups have largely abandoned the task.³ And with good reason perhaps. Defining art is hard, and the variety of artistic expression cautions us against an overly-limiting definition.⁴ A universal definition of art might start with the idea that art is an expression of the creator meant to convey value, emotion, commentary, or instill some feeling or idea in the viewer. More precise definitions may be formulated of course, but this gives us a rough idea of what the concept of art could be for the law moving forward. The important thing to note at the outset is the way in which the law does not start at the center of a definition. Anyone agrees of course that a canvas by Claude Monet or a sculpture by Michelangelo are art. The law serves a function at the outer limits, resolving disputes which may arise and deciding what is art and what is non-art incrementally.

II. DEFINING CONSTANTIN BRANCUSI'S "BIRD IN SPACE" AS A WORK OF ART

As conceptual and contemporary art pushes boundaries, the law will invariably distinguish art from non-art. Consider a dispute which arose in 1928 between an artist and the U.S. government. The United States Customs Court was required to decide if a polished metal sculpture by Constantin Brancusi was a work of art, or an ordinary piece of polished bronze.⁵ The object, titled "Bird in Space" was imported into the United States for an exhibition, but customs officials initially classified the object as only a piece of metal, and not a work of art. This resulted in a 40% duty. The Customs

* © Dr. Derek Fincham 2015. Associate Professor at South Texas College of Law in Houston, Texas. I want to express my thanks to the Editors of the John Marshall Review of Intellectual Property Law, to the organizers of the Symposium, and to all the participants.

¹ *Martin v. City of Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999). "We are not art critics, do not pretend to be and do not need to be to decide this case."

² Though art disputes have arisen with some regularity in the law, it was not until 1972 that a specialized Art and Law Course has been taught at law schools. See John Henry Merryman, *A Course in Art and the Law*, 26 JOURNAL OF LEGAL EDUC. 551, 551 (1973).

³ See e.g., E.H. GOMBRICH, *THE STORY OF ART*, 16TH EDITION 15 (16th ed. 1995). ("There really is no such thing as Art. There are only artists.")

⁴ See e.g., David W. Galenson, *Market Structure and Innovation: The Case of Modern Art*, 86 NOTRE DAME L. REV. 1921, 1930 (2011). "Telling evidence of the acceleration in the rate of radical artistic innovation comes from the plight of art experts. Critics have confessed that they do not understand the development of recent art."

⁵ *Brancusi v. United States*, 1928 Cust. Ct. LEXIS 3 (Cust. Ct. 1928).

Court described the object at issue as “a production in bronze about 4 1/2 feet high supported by a cylindrical base about 6 inches in diameter and 6 inches high.”⁶ Brancusi challenged this ruling, with a lengthy trial and testimony by both sides.⁷ Testifying on behalf of Brancusi was photographer Edward Steichen who purchased the sculpture, and as detailed in a comprehensive account of the trial by Stéphanie Giry, “the sculptor Jacob Epstein; Forbes Watson, the editor of the review *The Arts*; Frank Crowninshield, the editor of *Vanity Fair*; William Henry Fox, the director of the Brooklyn Museum of Art; and the art critic Henry McBride”.⁸ Testifying for the government were “sculptors Robert Aitken and Thomas Jones,” who Giry notes are “now long forgotten,” but “enjoyed great academic reputations at the time”.⁹ Judge Waite, writing for the Customs Court ultimately reached a conclusion that we can plainly see today, that the sculpture was a stylized and beautiful work of art which evokes a bird in flight with only its essential form.

In reaching this decision the court was operating at the outer limits of the art world as it existed at the time. The sculpture was not strictly representational. The court reasoned that the object “is shown to be for purely ornamental purposes, its use being the same as that of any piece of sculpture of the old masters. It is beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental. . .”¹⁰ Apart from the remarkable contrast between the opinions of Brancusi’s work, the judgment stands as a rare example of a court meeting head-on the question of what is and is not art.¹¹

Part of the general reluctance of courts to confront the question head-on may be traced to an oft-cited passage written by Oliver Wendall Holmes Jr. in a Supreme Court decision, *Bleistein v. Donaldson*. In that case he wrote:

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.¹²

⁶ *Id.* at 3.

⁷ For a full transcript and discussion of the trial see MARGIT ROWELL & ANDRÉ PALEOLOGUE, *BRANCUSI VS. UNITED STATES, THE HISTORIC TRIAL*, 1928 (1999).

⁸ Stéphanie Giry, *An Odd Bird*, Sept./Oct. LEGAL AFF., 2002.

⁹ *Id.*

¹⁰ *Brancusi*, 1928 Cust. Ct. at 8.

¹¹ Judge Richard Posner has argued that the job of a judge to interpret involves an aspect of performance in the same way a musician might interpret a piece of music. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 271 (Harvard University Press 1990) (“[I]nterpretation’ is a chameleon. When a performing musician ‘interprets’ a work of music, is he expressing the composer’s, or even the composition’s, ‘meaning,’ or is he not rather expressing himself within the interstices of the score?”).

¹² *Bleistein v. Donaldson Lithographing Co.*, 188 US 239, 251–52 (1903).

In the typical operation of our legal system Courts (and lawyers) are tasked with reaching orderly resolutions when disputes arise. By refusing to embrace the role the law has in defining the limits of art, courts risk performing the same dangerous function Holmes warned about. *Bleistein* was a copyright infringement case in which the plaintiff brought suit to protect three lithographs which advertised a travelling circus. The Supreme Court held that the prints could be copyrighted even if a work had “limited pretensions”.¹³ Justice Holmes must have had discomfort with cutting too narrow a definition of art. Homes wrote that “a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright unless there is a restriction in the words of the act.”¹⁴

Judges certainly claim to shirk away from taking on the role of an art critic or expert.¹⁵ But they are in fact filling this vital role, while often making ad hoc and unpredictable judgments without the benefit of art theory, art criticism, or arts policy.¹⁶ Courts are making determinations which have profound impact on the visual arts without the benefit of any meaningful dialog with the art world. At least part of the blame must also be placed on other groups in the art market which have been either unable or unwilling to engage with questions of commerciality, authenticity, and originality in a formal way. When judges are given the task to look at these definitional disputes, they seldom look to art theory or art history to reach a judgment. Yet Judges and legal scholars rely on other disciplines all the time: neuroscience,¹⁷ behavioral economics,¹⁸ economics,¹⁹ and even empirical research.²⁰ Why cannot art theory and the ways in which audiences and artists engage with each other be a part of the legal analysis? Judges will make a decision either way, and by failing to account for the art world, indeed failing to even acknowledge the critical function a court plays when an art dispute arises, courts are exacerbating the very thing they claim to be wary of: making uninformed decisions about art.

III. DEFINING ART UNDER THE VISUAL ARTISTS RIGHTS ACT

Take the situation where a court is asked to confront head-on the question of the status of a work of art. Jan martin was a metal sculptor, who created a work known as “Symphony #1”, a large steel outdoor work which rested on land held by Martin’s employer and then later the city of Indianapolis from 1987-1995.²¹ In 1995 the work

¹³ *Id.* at 250.

¹⁴ *Id.*

¹⁵ Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 836-39 (2005) (arguing courts avoid taking on the task of evaluating art by employing a number of “avoidance techniques”).

¹⁶ *Id.* at 839 (“These avoidance techniques used by courts lead to unpredictable results. Many of these techniques disguise the real analysis being undertaken by a judge”).

¹⁷ See e.g., Stephen J. Morse, *The Status of NeuroLaw: A Plea for Current Modesty and Future Cautious Optimism*, 39 J. PSYCH. & L. 595, 596 (2011).

¹⁸ See e.g., On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098 (2008).

¹⁹ Consider the large number of legal articles which cite and attempt to work out from Roanald Coase’s initial influential work, Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386-87 (1937).

²⁰ See e.g., PETER CANE & HERBERT M. KRITZER, *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* (2010).

²¹ *Martin v. City of Indianapolis*, 192 F. 3d 608, 611 (7th Cir. 1999).

was destroyed by a City demolition crew. Martin brought suit against the City arguing this destruction of his work violated his moral rights as provided in the Visual Artists Rights Act.²² The Court needed to determine whether Martin's sculpture was of "recognized stature" and thus would entitle him to relief based on the violation of his right of integrity when the city demolition crew dismantled "Symphony # 1".²³ The court relied on a test set forth by the New York federal district court, as VARA itself does not define what kinds of art have achieved recognized stature.²⁴ The test requires a plaintiff to show that "(1) the visual art in question has stature, i.e. is viewed as meritorious, and (2) that this stature is recognized by art experts, other members of the artistic community, or by some cross-section of society".²⁵ In the *Martin* decision the court looked to the testimony submitted by local art scholars, critics, and reviews of "Symphony #1" which appeared in local media. Rather than engaging with the quality of this evidence though, the court focused mainly on the existence of statements of quality, spending time evaluating the City's argument that the statements were inadmissible hearsay.²⁶ Rather than evaluate the quality of the statements to examine what constitutes recognized stature, the court made only a cursory examination of the admissibility of the statements.²⁷ Part of the difficulty the court had may stem from the procedural posturing of the case—the parties had filed cross-motions for summary judgment.²⁸ This is a part of modern discovery-driven litigation and the general vanishing of the trial, and can be seen quite often when art disputes arise.²⁹ The result in the case offers a stark contrast from the reasoning and careful deliberation which took place in the Brancusi trial with "Bird in Space". In that trial the court carefully evaluated the testimony of art experts and reached a decision with the benefit of various opinions in the art community.³⁰

But sometimes those opinions are not valued equally, and courts end up picking and choosing what critical opinions they use. Chapman Kelly is a well-regarded artist whose medium is typically paintings of landscapes.³¹ In 1984 Kelley received permission from the Chicago Park District to install two oval flower beds in Grant Park along the City of Chicago's lakefront.³² Kelley installed up to 60 species of wildflowers native to the region, each chosen so they would blossom sequentially.³³ The installation was entitled "Chicago Wildflower Work".³⁴ The work was maintained by Kelley and a team of volunteers until 2004 when the city wanted to create new

²² Visual Artists Rights Act, 17 U.S.C. § 106A (2012) (hereinafter VARA).

²³ "[T]he author of a work . . . shall have the right to prevent destruction of a work of recognized stature, and any intentional . . . destruction of the work is a violation of that right". *Id.* at §106A (a)(3)(B).

²⁴ *Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 324-25 (S.D.N.Y. 1994).

²⁵ *Id.*

²⁶ *Martin v. City of Indianapolis*, 192 F.3d 608, 612 (7th Cir. 1999).

²⁷ *Id.* at 612.

²⁸ *Id.* at 610.

²⁹ See Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005).

³⁰ *Brancusi*, 1928 Cust. Ct. LEXIS at 6.

³¹ *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 291 (7th Cir. 2011).

³² *Id.* at 291.

³³ *Id.* at 293.

³⁴ *Id.* at 293.

construction projects.³⁵ When Kelley refused to approve the changes, park officials moved forward anyway. Kelley sued the Chicago Park District on the grounds the reconfiguration of “Chicago Wildflower Work” violated his right of integrity under VARA.³⁶ The District Court rejected the VARA claims presented by Kelley.³⁷ On appeal to the Seventh Circuit, the court held that for a work to receive VARA protection, “it cannot just be ‘pictorial’ or ‘sculptural’ in some aspect or effect, it must actually *be* a ‘painting’ or a ‘sculpture.’”³⁸ Not metaphorically or by analogy, but *really*.³⁹ The Court reasoned that Kelley’s work was only a living garden, which lacked the kind of authorship and fixation which copyright requires.⁴⁰ Although the design for the garden was *original* enough to be copyrighted, the design was not an act of authorship because plants “originate in nature, and natural forces—not the intellect of the gardener—determine their form, growth, and appearance”.⁴¹ By ruling that Kelley’s work was beyond the scope of copyright, the Seventh Circuit managed to define these works as non-art.⁴² This means landscape artists and artists who work with natural materials are impacted. And it is not just artists who use wildflowers and plants in the same way as Kelley, but painters, sculptors and others who use organic material. At the District Court Trial Jane Jacob, a Professor of Art History at New York University, testified that “since World War II and since the 1960s in particular, sculpture [has been] defined as any non-two dimensional art form . . . including environmental art and some conceptual art.”⁴³ Yet both the District Court and the Seventh Circuit found this evidence unpersuasive. The standard created by the Seventh Circuit sets up a presumption against granting copyright and moral rights protection to works made of a natural or living medium, which harms artists who work in those mediums.

IV. CAN ART BE ONLY AN IDEA OR SERVE AS ADVERTISING?

In disputes courts will inevitably begin to craft important legal boundaries for works of art. And they need to take that responsibility seriously and anticipate the impact their rulings have on working artists. Consider two recent disputes: one involving roadside installations in West Texas, and another dispute over a Sol LeWitt wall drawing.

State advertising regulations were applied in two very different ways to roadside art installations in the West Texas town of Marfa: one a playboy logo, and another a roadside Prada boutique.⁴⁴ Marfa has, since the 1970s become a destination for art

³⁵ *Id.* at 294.

³⁶ *Id.* at 295.

³⁷ *Kelley v. Chi. Park Dist.*, No. 04C0771504 C 07715, 2008 WL 4449886, *6-7 (N.D. Ill. Sept. 28, 2008), *aff'd in part, rev'd in part and remanded*, 635 F.3d 290 (7th Cir. 2011).

³⁸ *Id.* at 300.

³⁹ *Kelley*, 635 F.3d at 300.

⁴⁰ *Id.* at 303.

⁴¹ *Id.* at 304–5.

⁴² *Id.* at 304.

⁴³ *Kelley*, 2008 WL 4449886, at *5.

⁴⁴ Olivia Fleming, *The End of Prada in Marfa? Designer ‘Store’ Installation in Middle of Texan Desert is Branded ‘Illegal Outdoor Advertising’*, DAILY MAIL (Sept. 20, 2013),

and had an impact on contemporary design.⁴⁵ Donald Judd traveled to Marfa, and deciding that the spare landscape and wide open spaces would be a good place to create has set a precedent for other contemporary artists.⁴⁶ With assistance from the Chinati Foundation he purchased a 340 acre tract of land, which included some abandoned buildings from a former U.S. Army base.⁴⁷ Judd and the Chinati foundation which manages much of the art in Marfa have dramatically changed the town.⁴⁸ When Judd arrived, the town was very small, with little in the way of an economy after droughts and the shuttering of the nearby Army base. But by using the natural landscape, and the availability of wide open spaces, clouds, and landscape, he created a destination for art that few would have envisioned at the time.⁴⁹ This has made Marfa a remote but concentrated place for conceptual works of art.⁵⁰ And the local residents are fiercely protective of Judd and his legacy.⁵¹

A single-building permanent installation called “Prada Marfa” was created in October 2005 by Scandinavian artists Michael Elmgreen and Ingar Dragset.⁵² They created a small version of a Prada store beside U.S. Highway 90, just 26 miles from the city of Marfa.⁵³ The building resembles a Prada store with a nonfunctional door.⁵⁴ The installation serves as a commentary on consumerism, luxury, gentrification, and capitalism.⁵⁵ The installation has been happily resting beside the highway, until another recent installation.⁵⁶

In the summer of 2013, *Playboy* magazine commissioned artist Richard Phillips to install a 40-foot sign, with a neon playboy bunny along with a cement rectangle and a sculpture of a 1971 Dodge Charger.⁵⁷ Some local residents of Marfa, protective of Judd’s legacy, saw the installation as a sloppy lack of respect attempting to undermine the other art and artists in Marfa.⁵⁸ After some residents complained to officials at the Marfa Courthouse, the TxDOT’s Right of Way Management Division in Austin determined that the sign is “illegal”.⁵⁹ Title 43 of the Texas Administrative Code § 21.142 defines an advertising sign as “an object that is designed, intended, or used to advertise or inform, including a sign, display light, device, figure, painting, drawing,

<http://www.dailymail.co.uk/femail/article-2427332/The-end-Prada-Marfa-Designers-store-installation-middle-Texan-desert-branded-illegal-outdoor-advertising.html>.

⁴⁵ See e.g., Laura Fenton, *The Rise of Marfa: How a Texas Town Came to Rule Design*, CURBED (Oct. 22, 2014), <http://curbed.com/archives/2014/10/22/marfa-texas-donald-judd-interior-design-modernism.php>.

⁴⁶ Marianne Stockebrand, *The Whole Judd*, CHINATI FOUNDATION (May 12, 2012), <https://chinati.org/programs/marianne-stockebrand-the-whole-judd>.

⁴⁷ See CHINATI (Marianne Stockebrand ed., 2010).

⁴⁸ Daphne Beal, Sean Wilsey, *Lone Star Bohemia*, VANITY FAIR (July, 2012), <http://www.vanityfair.com/unchanged/2012/07/inside-marfa-artists-donald-judd>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Francesca Mari, *What Is Art?*, TEXAS MONTHLY (2013).

⁵³ *Id.*

⁵⁴ Adam Tschorn, *Prada Marfa: An Outlier Perseveres In The Texas Desert*, LA TIMES (Sept. 5, 2014, 2:00pm), <http://www.latimes.com/travel/fashion/la-ig-0907-marfa-20140907-story.html>.

⁵⁵ Mari, supra note 52.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

message, plaque, placard, poster, billboard, logo, or symbol.”⁶⁰ By not requesting a permit or license, the Playboy installation would violate the Texas Administrative Code, which is tied to Federal highway funding allocations.⁶¹ If roadside advertisements are not regulated by states, then a state would be in jeopardy of losing 10% of its Federal Highway funding.⁶² Yet one doubts that this Playboy installation would have gotten the State of Texas in trouble for not regulating roadside advertising. More likely, the underlying opinion of Marfa residents about the new playboy installation impacted the decision by State officials. The problem became one of equal treatment.⁶³ If the *Playboy Marfa* installation was considered advertising, then the *Prada Marfa* installation would be problematic as well. Except it was not.⁶⁴

After initially declaring the Prada Marfa an illegal installation because it was also an advertisement, State officials announced that the structure would be considered a museum and allowed to remain standing with the *Prada Marfa* as the only exhibit.⁶⁵ Artist Michael Elmgreen noted in an interview that the Prada Marfa should not be considered an advertisement because the work was not commissioned by Prada.⁶⁶ He also pointed out that art and commerce have a long history.⁶⁷ After all Andy Warhol and many other artists use company logos and trademarks in their works.⁶⁸

Texas state officials asked for the playboy installation to be removed, and Phillips and Playboy complied.⁶⁹ The work was moved and was installed for a year in front of the Dallas Contemporary art museum.⁷⁰ Ironically both works have been moved to a museum. In the case of the *Prada Marfa*, Texas officials declared it a standalone museum. And in the case of the Playboy, the installation was moved to an actual established museum in Dallas as a part of that Museum’s exhibition of works by Phillips.

What conclusions can we draw from this? For one, the law perhaps needs to step in and make a stronger statement here about how advertising is or is not regulated. The lines of distinction between art and advertising need to be clarified. And ironically had a judge weighed the decisions by the Texas State officials we would have had better guidance going forward for future works of roadside art in Marfa and beyond.

⁶⁰ 43 Tex. Admin. Code § 21.142 (2014).

⁶¹ See 23 U.S.C. § 103 (2012).

⁶² *Id.*; Juan Carlos Llorca, *Texas: Prada Marfa is Illegal Roadside Ad*, HOUSTON CHRONICLE (Sept. 23, 2013), <http://www.chron.com/news/texas/article/Texas-Prada-Marfa-is-illegal-roadside-ad-4847246.php>.

⁶³ Olivia Fleming, *The End of Prada in Marfa? Designer ‘Store’ Installation in Middle of Texan Desert is Branded Illegal Outdoor Advertising*, DAILY MAIL (Sept. 20, 2013), <http://www.dailymail.co.uk/femail/article-2427332/The-end-Prada-Marfa-Designers-store-installation-middle-Texan-desert-branded-illegal-outdoor-advertising.html>.

⁶⁴ *Id.*

⁶⁵ Aman Batheja, *Prada Marfa Sidesteps Closure*, THE TEXAS TRIBUNE (Sept. 12, 2014), <http://www.texastribune.org/2014/09/12/prada-marfa-sidesteps-closure-museum-classificatio/>.

⁶⁶ Francesca Mari, *So, Is It Art? Talking to Prada Marfa Artist Michael Elmgreen*, Texas Monthly (Oct. 14, 2013, 2:24pm), <http://www.texasmonthly.com/story/so-it-art-talking-prada-marfa-artist-michael-elmgreen>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Terry Wallace, *“Playboy Marfa” Bunny Logo to be Moved to Dallas Museum*, EL PASO TIMES (Nov. 15, 2013, 12:42pm), http://www.elpasotimes.com/latestnews/ci_24531501/playboy-marfa-bunny-logo-be-moved-dallas-museum.

⁷⁰ *Id.*

The law also has a role to play in determining how authenticity impacts the definition of art. Conceptual artist Sol LeWitt developed a wall drawing technique which generated the experience of color and light without any actual physical connection between himself and his works.⁷¹ Instead he would provide detailed instructions and a certificate of authenticity. Someone would then perform the final step in creation with these instructions.⁷² His work acknowledged the increasing use of technology and commercial reproduction, at the expense of drawing. He declared that “The idea is the machine that creates the art”.⁷³

A recent lawsuit filed in New York Superior court between Roderic Steinkamp and Chicago’s Rhona Hoffman Gallery asked a court to decide what the art object is: the work of art or the certificate of authenticity and instructions.⁷⁴ As the complaint argued, Sol LeWitt’s wall drawings are not portable or freestanding like other works of art.⁷⁵ They become much less valuable when they do not carry the certification. These certificates state “This certification is the signature for the wall drawing and must accompany the wall drawing if it is sold or otherwise transferred.”⁷⁶

The work at issue was “Wall Drawing no. 448” which was originally created for a private residence in Cambridge in 1985. Steinkamp, a collector and dealer brought the complaint against the Rhona Hoffman Gallery for \$1.4 million on the grounds that she lost the certificate of authenticity for the Sol LeWitt drawing he had consigned to her in 2008.⁷⁷ She claimed the certificate was “lost and irretrievable” and her insurance company would not cover the mysterious disappearance of the certificate.⁷⁸ Steinkamp brought suit under the theory of a breach of bailment, arguing the gallery had failed in acting as the caretaker of this piece of valuable property.⁷⁹ The parties reached an undisclosed settlement a few weeks after the suit was filed. So we will have to guess at how a court would have valued the certificate as a work of art.

These disputes were resolved short of a final judgment by a court. But both disputes point out how integral the law and judges frequently are in art-related disputes. We may not think courts should be deciding what art is, what constitutes a museum, and where a work of art begins and ends, but because courts are the final say when parties cannot agree, they must answer these questions. And when those decisions are reached we can criticize courts, but we should also give courts the same respect and deference we give them when they render judgments on other matters. I have noticed a surprising lack of decorum and respect paid to courts when they enter judgments in art-related disputes, which is a shame. Judges serve a critical function when art disputes require the finality of a court ruling.

⁷¹ Anabeth Guthrie, *Conceptual Work of Art in Progress at National Gallery of Art*, NATIONAL ART GALLERY (May 18, 2004), <http://www.nga.gov/content/ngaweb/press/2004/sol-lewitt.html>.

⁷² *Id.*

⁷³ ALEXANDER ALBERRO, *CONCEPTUAL ART AND THE POLITICS OF PUBLICITY* 35 (2003).

⁷⁴ Complaint, ¶¶15, 21, *Steinkamp v. Hoffman*, No. 651770, 2012 WL 1941149 (N.Y. Sup. Ct. May 22, 2012).

⁷⁵ *Id.*, ¶5.

⁷⁶ *Id.*, ¶6.

⁷⁷ Jessica Kramer, *Collector Sues Chicago Art Gallery Owner for Losign Sol LeWitt Certificate*, Design & Trend (May 30, 2012, 11:26Am), <http://www.designntrend.com/articles/1675/20120530/collector-sues-chicago-art-gallery-owner-losing.htm>.

⁷⁸ *Id.*

⁷⁹ *Id.*

V. HOW MUCH CAN ART BORROW FROM ANOTHER WORK?

Both the Marfa and Sol LeWitt disputes presented fundamental questions about art. Those disputes were resolved short of judicial action, but the Second Circuit was confronted with the question of just how much one artist can take from another. In *Cariou v. Prince*, the Second Circuit had to weigh the photographs taken by Patrick Cariou of Rastafarians living in Jamaica against Richard Prince's appropriation of those same images.⁸⁰ The Second Circuit held that 25 of the 30 photographic collages at issue constituted a fair use.⁸¹ In reaching its conclusion the court was actively comparing the original images and the appropriated works—serving as art critics.⁸² The court even published images from Cariou, and compared them with Prince's appropriated works on its own website.⁸³

In 2000 Cariou published a book titled *Yes, Rasta* which contained photographic portraits of Rastafarians and Jamaica.⁸⁴ Richard Prince appropriated many of these images and created a collage series, *Canal Zone*. The collages varied widely. Some of the works used only parts of Cariou's photographs, but in others whole photographs were appropriated and only slightly altered, in some cases with colored "lozenges" over the eyes and mouth of the subject's in Cariou's photographs.⁸⁵ Prince claimed his use of Cariou's images was transformative, and as a result would be permissible under the fair use affirmative defense to copyright infringement.⁸⁶ The District Court deemed the appropriation too severe in a 2011 ruling. At the District Court level Judge Batts highlighted Prince's lack of any motivation or justification for his appropriation of Cariou's photographs.⁸⁷ This was the key to the District Court's ruling, that for Prince's appropriation to be considered fair use, it must directly comment upon the appropriated work.⁸⁸ It was this requirement that the Second Circuit found so objectionable in holding that twenty-five of thirty works at issue were transformative to a "reasonable observer" and therefore were fair use, as they presented a new aesthetic.⁸⁹ The five remaining works were remanded back to determine whether they qualified as fair use. The court was forced into acting as art critic, determining which appropriations were fair and which were not. They relied on the size of the works that

⁸⁰ *Cariou v. Prince*, 714 F.3d 694, 698 (2nd Cir. 2013). For a discussion of the legal difficulty posed by appropriation art, see Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1, 7 (1992) ("Art that challenges and explodes established understandings of what may be termed a work of art will not initially (or potentially ever) gain the recognition of the public.")

⁸¹ *Cariou v. Prince*, 714 F.3d 694, 706, 712 (2nd Cir. 2013).

⁸² Sergio Munoz Sarmiento & Lauren van Haften-Schick, *Cariou v. Prince: Toward a Theory of Aesthetic-Judicial Judgments*, 1 TEX. A&M L. REV. 941, 943 (2013) ("[The opinion] highlights the increasing role judges play as art critics and how such aesthetic-judicial judgments unfairly and negatively impact cultural production by relegating certain artists and media . . .").

⁸³ Patrick Cariou v. Richard Prince, 11-1197 Appendix, <http://www.ca2.uscourts.gov/docs/opa1197/11-1197apx.html> (last visited Nov. 3, 2014).

⁸⁴ See *Yes Rasta, Photographs by Patrick Cariou*, <http://www.patrickcariou.com/rasbook.html> (last visited Nov. 3, 2014).

⁸⁵ *Cariou v. Prince*, 714 F. 3d 694, 699–700 (2d Cir. 2013).

⁸⁶ *Id.* at 698–99.

⁸⁷ *Cariou v. Prince*, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011).

⁸⁸ *Id.* at 349–50.

⁸⁹ *Cariou*, 714 F. 3d at 706.

Prince created and the fact that they would appeal to a different audience in holding the twenty-five works were transformative and protected as fair uses of Cariou's work.

The Second Circuit analyzed the images side by side and found that as a matter of law the twenty-five works by Prince were transformative noting the "crude and jarring" nature of Prince's works with the "serene" photographs of "natural beauty" in Cariou's works.⁹⁰ The ruling has generated a great deal of controversy, as is invariably the case in the chaotic legal landscape of fair use disputes.⁹¹ This may be partly because the record was not developed beyond cross motions for summary judgment. The recent string of art disputes which have been decided short of a trial indicates that courts should be conservative when possible as they are evaluating summary judgment claims with respect to art disputes. Legal disputes over works of art occur with some regularity.⁹² In the Brancusi dispute from 1926, the Customs Court had the benefit of testimony and art critics to assist it in making the determination. The object itself sat in the middle of the court room for the entire trial, which may have been the most powerful argument for Brancusi.⁹³ One thing is certain: after the District Court ruling, appropriation art had been dealt a severe blow; but now that Prince has won convincingly on appeal, appropriation artists seem to have wider latitude to appropriate. Yet the Second Circuit did not engage with any contemporary art theory or scholarship. In a critique of the judgment, art lawyer Sergio Munoz Sarmiento and artist Lauren van Haften-Schick point out that the Second Circuit relied too much on the market for Richard Prince's works among the wealthy:

[T]he Second Circuit lays down a disturbing foundation and a premise that artists who do not obtain—or even seek—commercial or spectacular success at the hands of the art market and Hollywood-style celebrity culture should resign themselves to becoming feeders of ideas and creative content for affluent and upper-class artists and art institutions.⁹⁴

One of the best remedies for this is to encourage artists to engage with the law in direct ways. There are a number of avenues and forms this kind of engagement might take. LeWitt's use of certificates of authenticity allowed him as an artist direct engagement with the potential legal disputes which could arise with his wall drawings. Another potential model may be the model agreement created by art dealer Seth Siegelau in coordination with a lawyer named Robert Projansky.⁹⁵ The agreement aimed to define and protect the rights artists have during the transfer of one of their works, and also after. The agreement was originally printed as a fold-out poster and distributed widely in the art community. Provisions in the model contract include: the

⁹⁰ *Id.* at 706–7.

⁹¹ Sarmiento & Haften-Schick, *supra* note 49, at 957 ("In the case of Cariou, the abusive use of Cariou's images by Richard Prince can be equated with any other instance of the exploitation of artistic labor".).

⁹² The prominent art lawyer Leonard D. DuBoff sketched out many of the ways in which the law serves an important function in defining art. See Leonard D. DuBoff, *What Is Art - Toward a Legal Definition*, 12 HASTINGS COMM. & ENT. L.J. 303, 304 (1989).

⁹³ See Giry, *supra* note 8, at 54–55.

⁹⁴ Sarmiento & Haften-Schick, *supra* note 49, at 945.

⁹⁵ ROBERT PROJANSKY & SETH SIEGELAUB, THE ARTIST'S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT (1971).

payment of a royalty by the collector upon the subsequent transfer of the work; the filing of a transfer record by the collector; a restraint on the subsequent sale by the collector to anyone who will not agree to the provisions of the agreement; the creation of a file and record of subsequent transfers and an agreement to furnish, upon request, to subsequent owners, a pedigree and authentication of the work; the reservation of a moral right for the artist. Taken together, these provisions give an artist the means of authenticating her work, and a way for an artist to reap the future economic benefits of the works that have been created. The agreement has been influential,⁹⁶ but due to some of the burdens placed on collectors and subsequent collectors, many artists lack the bargaining power needed to induce a buyer to enter into one of these agreements.

VI. CONCLUSION

Courts and the law have an important role to play in defining art. Rather than avoiding the task, courts should embrace the essential task of definition. When art disputes arise, courts will inevitably define works of art in reaching a decision. Courts should engage with art theory, and art criticism when these disputes arise. Rather than avoiding these areas and producing *ad hoc* analysis which borrows from these fields without acknowledging it, courts need to engage directly with the art world. The art world, in turn, needs to embrace the essential role courts have by participating with legal discourse and judicial reasoning.

⁹⁶ Roberta Smith, *When Artists Seek Royalties on Their Resales*, N.Y. TIMES, May 31, 1987, available at <http://www.nytimes.com/1987/05/31/arts/when-artists-seek-royalties-on-their-resales.html>.