The Art Conundrum:
Defining Art in Law

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The City Law School
July 2020
Thesis Submitted to City, University of London for the Degree of Doctor of Philosophy

Acknowledgements

To my parents Gerry and Cleo; my supervisor David; my siblings Jade and Tara;
and to Clare, Francis, Lily and Sean;
thank you for your support throughout these last four years.

Abstract

For law, art is a conundrum which needs to be solved. Art in law is littered with inconsistent judgments due to the judicial avoidance of overtly debating art theory. As consequence, it has been difficult to succinctly identify a legal definition of art. Previous literature has highlighted that there is a lack of appreciation for art theory in law. Generally, art is defined through legal formalism and the reduction of art to a commodified form of property. Consequently, legal judgments tend not to appreciate the significance of art and often stop short of delineating a legal definition of art. With art law often being restricted to a case-by-case basis, it has previously been hard to draw clear trends in the legal definition of art. However, through the comparative analysis applied in this thesis, it is clear that the court undeniably relies on the subtle application of a variety of art theories. The extent to which these theories are applied is dependent on the requirements of the legal context. Law is capable of defining art and although the default approach is one of avoidance, it must be possible to reach a clear understanding on how law defines art. This understanding can only be met through the realisation of the Art Conundrum Theory.

As no singular art theory is appropriate for defining art in law, the Art Conundrum relies on a cluster approach to art. This facilitates the consideration of multiple art theories only insofar as is necessary to reach a binding legal judgement. The parameters of this consideration are set by the legal context in which the art arises. This allows the court to reframe the problem of art to a specific legal issue to reach a judgment. Through addressing the various key legal approaches to art in both English law and other jurisdictions, it is clear that the application of the Art Conundrum is both inevitable and necessary. As an amalgamation of the previous approaches to art in law, the subtle application of the Art Conundrum cannot be ignored. The conclusion is met that the Art Conundrum is the most appropriate legal approach to defining art and should be understood as the primary approach to art in law.

Contents

Abbreviations

Artist's Resale Right	ARR
Capital Gains Tax	CGT
Copyright, Designs and Patents Act 1988	CDPA
Indecent Displays (Control) Act 1981	IDCA
Obscene Publications Act 1959	OPA

Cases

English Law

European Law

American Law

Australian Law

Legislation

English Law

European Law

American Law

International Law

I

Art vs. Law

An Introduction to Art in Law

> 'Like law, art was once a rule-based activity. In classical antiquity, the word "art" (Greek, "tekne", Latin, "ars") was the name given to any activity governed by rules.'[1]
>
> Paul Kearns, 1998

> 'Every major country has a wide range of laws that apply to art transactions. [In 2015], for example, the British Art Market Federation found that 167 different laws governed art transactions, some bespoke to the trade and others covering broader commercial and criminal issues.'[2]
>
> Bruno Boesch & Massimo Sterpi, 2016

Art and law have a long and complicated history. These two fields of research are often perceived to be in conflict, with art embracing the abstract and creative while law embraces certainty and rules. Because of these opposing natures, the relationship is understandably tumultuous. Yet these two seemingly incompatible concepts have been forced to reconcile and co-exist because art must be defined, regulated and dictated by law for legal process. The premise of the following research is to analyse the current definition of art in law to decide if a) there is a clear definition and b) to see if it is fit for purpose or requires reform, whether that be partial or a complete overhaul. In short, the research aim can be reduced to the question, 'what is the legal definition of art and is it sufficient for legal process?'. In assessing the legal definition of art, the critical hypothesis was to assess whether law creates a simple and holistic definition of art or whether art remains a complex and fractured concept, even in a field where certainty is valued above theory. The risk of a fractured or unworkable definition was not improbable because of the contentious relationship between art and law.

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[1] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) xiii

[2] Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016) xi - xii

Douzinas notes that 'the law has displayed a long history of hostility or ambiguity towards art and aesthetics.'[3] This hostility, he argues, comes from art being a hard concept to define.[4] This has led to an area of law which does not immediately present itself as an isolated practice. The field of 'Art Law' is a collage of several distinct areas of law. Art law encompasses core elements from both law and art respectively. Within the study of art law, art theory and legal practice are no longer treated as separate but rather as co-dependent. As a consequence, the art lawyer must not only be proficient in law but also in art and its terminologies. It comes as no shock that lawyers have historically attempted to remain impartial in cases which handle art stating that they are not proficient in those matters and therefore unqualified to comment on the underlying art theory. This approach, which is explored in depth in later chapters, originates from Justice Holmes' statement in *Bleistein*[5] that '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.'[6]

When looking at art in law overall, there is a general consensus that art can often be a special property because of art's status as an openly acknowledged legal concept. Statutory provisions, such as those found in the Copyright Designs and Patents Act,[7] delineate art as different to other chattels and therefore award it some form of 'otherness'. It is this 'otherness' which begs the question, why is art considered to be a special or different property which deserves to be acknowledged as such? Moreover, how is the distinction drawn in delineating works of art? Can anything be art if we say so? The legal definition of art is, by the end of this thesis, proven to be malleable and dependent on legal context. This question of "what is art in law" is critically significant because it facilitates an exploration of how we define legal concepts, the extent to which statutory definitions must be followed and the degree of interpretation available to the judiciary.

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[3] Costas Douzinas, "Signing Off" (8 Tate: The Art Magazine 1996) 80 - 126
[4] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016) 56
[5] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903) at 251 - 252
[6] Ibid
[7] Copyright, Designs and Patents Act 1988

The definition of art will be shown to be a malleable and fragmented concept encapsulated within a singular procedural theory of art, coined the Art Conundrum.

Assessing the legal definition of art is a staggered process. To begin this exploration of art law, it is critical to determine what is considered to be art in art theory. Assessing art in art theory will highlight the omnipresent and Sisyphean issue of defining art, while also outlining the key art theories considered within the legal definition of art. Second, some functional definition of art in law must be proposed, which I present as my legal theory, the Art Conundrum. The Art Conundrum dictates that the legal definition of art is a combination of several art theories that are intrinsically linked to the legal context in which it arises. Once this is completed, the legal primary source material will be evaluated and assessed to reach the final conclusion that the application of the Art Conundrum is the most suitable way for law to define art.

For law, art is a problem which must be solved only when required by the individual legal circumstance. A sample of various areas of law is evaluated in later chapters to highlight the contextually dependent discrepancies in defining art in law. Analysing how art operates in law highlights both the role of the judiciary in defining art, while also reinforcing the sporadic approach and the unwillingness of law to create a finite and concrete definition of art. Throughout, the trends which arise in the treatment of art by law are assessed to illustrate the vital significance of the Art Conundrum in the legal definition of art. The Art Conundrum is the only viable process by which to define art in law and is already, often unconsciously, being applied by legal actors. The final outcome of this research indicates that the Art Conundrum facilitates the ability of law to avoid an unworkably concrete definition of art. Instead, the Art Conundrum ensures there is enough flexibility to reach a suitable definition of art, regardless of the area of law in which it arises.

i. Why Art?

What is it about art that makes it worth protecting? Why should the law bother in protecting art? Why is art valuable? Who values art? These questions originate from the impossible question of 'what is art?'. However, to begin to answer any of these questions,

or any question considering art, it is crucial to ask why art? What is it about art that makes it worth deliberating, analysing and criticising? Before we can begin on the line of enquiry concerning the legal definition of art, there is some merit in briefly establishing the significance of art before addressing how to approach art in law. However, these questions are theses in their own right, which means that the subsequent exploration is a light commentary on the significance of art to establish its importance.

To most, art is significant, economically valuable and carries a level of prestige or holds an inherently important status in society. The dominant ideology that art is important is critical to its perceived value. By establishing this significance, one can understand why art is both important and worth granting legal protection. The most simplistic way to address art is to directly challenge art itself, asking why is art important? However, both the question 'why art?' and its subsequent answer will always be inevitably subjective. Asking any definitional question of art requires an understanding of the context in which the art is being considered and the viewpoint from which it is being asked. An art dealer or gallery owner will return a drastically different answer to the question than a lawyer or an economist. Really, I should ask 'why art for the sake of this thesis?'. The focus of this thesis rests largely in the legal significance of art, so we must ask the question 'why is art significant in law?' or 'what properties does art have that makes it legally significant?'.

The legal significance of art is a complex spectacle. It is difficult to pin art's value to one element or factor because the legal approach to art is so enigmatic. Several different factors, explored throughout this thesis, influence and impact the legal dealings of art. They all endeavour, despite their differences, to prove the importance of art. The largest arguments for appreciating the significance of art lie in two distinct camps, the first being cultural and the second economic. Art's ability to be perceived as inherently valuable undeniably marks art as a commodity which requires legal sanctions. Whether it be in the creation of art, transactions around art or justification for why something is art, all works of art are undeniably fertile grounds for the application of law. Each different area of art law highlights a distinct interpretation on the concept of what can be considered to be art in law. Assessing these different areas reveals that the legal approach to art aims to solve the problem of art specific to legal interests of each area of law.

In summary, the value in art requires law to reach a legal definition that is applicable when claims are brought against art. As later chapters will show, through supporting statutory provisions and case law which delineate art as special property, art cannot always simply be reduced to a commodity or chattel in law. The argument presented is that law justifies and weighs art theories, case law and statutory provisions dependent on the legal context to recognise the special properties of art only where necessary for the court to reach a binding judgment. By assessing the current approach to the legal definition of art, it will be revealed that art is a complex conundrum which law must be capable of solving.

ii. Approaching Art in Law

Art law is a particularly interesting area of law because of its commodity value and globally coveted nature. As the art market transcends the boundaries of currency and value, art is not bound to a singular legal system. Consequently, outcomes in one jurisdiction directly affect the outcomes in another because of cross-referencing in judgments. The impact of judgments across jurisdictions is further compounded as most legal cases concerning art do not reach the adjudication stage. With parties on both sides often choosing to settle outside of court, there are a sparse number of legal judgments which become fixtures in all art law cases. As a result, the field of art law and what constitutes the legal definition of art has been spearheaded by a small pool of scholars who dominate the field. These individual voices have delineated the prominent lines of enquiry in art law.

This thesis aids in further developing an understanding of the legal definition of art, namely through the creation of a new legal theory of art, The Art Conundrum, and the acknowledgement of its unwitting use. The current research in this area is grounded in the American legal system. The most recent research, from Farley[8] and Soucek[9] centre on the issues surrounding the extent to which the law understands, processes and is

[8] Christine Haight Farley, 'Judging Art' [2005] 79 Tulane Law Review 805

[9] Brian Soucek, 'Aesthetic Exports and Experts' (The Future of Aesthetics and the American Society for Aesthetics Essay Competition, Spring 2016) <https://aesthetics-online.org/page/futureaesthetics> accessed 16 April 2019; Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 281

influenced by aesthetics. However, the approach within this research is to reframe the question of art in law to focus on the legal definition of art and the impact of art theory within the English legal system. This will draw on the significance of art on a global scale while predominantly referencing English law. This will build upon previous literature and open new avenues of commentary, particularly through my theoretical definition of art, the Art Conundrum. Through the Art Conundrum, the legal approach to art is restructured to acknowledge that law engages, both overtly and subconsciously, with art theory to reach a definition of art that is both sufficient and fit for purpose.

Within the Art Conundrum, legal actors define works of art dependent on the legal context in which it arises and then apply the corresponding art theories as required to achieve a workable legal outcome. The Art Conundrum is favourable because it is malleable and adaptable for purpose. It is only through applying the Art Conundrum that it is possible to process and control the movement of art within law because art is such a fluid concept. In turn, the definition of art remains sufficient for process because it can be applied as necessary to reach the desired outcome in practice, even though it may not survive when subtracted out of these exemplary conditions.

As art is interpreted differently dependent on the area of law, definitions of art can vary, even within the same legal system. Different areas of law seek specific approaches for their preferential outcome. For example, definitions of art in copyright are much more legally formalist and concerned with the physical representation of the artwork[10] whereas obscenity concerns the ability to deprave or corrupt and is more concerned with the content of the work.[11] Surplus to the multitude of legal approaches to defining art, the approach of the English legal system is much less developed than American counterparts which has led to an influx of American cases being considered within English law. The sporadic nature and staggered evaluation of art, even within the English legal system alone, brings art to the forefront as an area of law which needs further clarification and exploration. Consequently, the current literature surrounding art law has begun to highlight its significance as an emerging area of law which still requires more

[10] Copyright, Designs and Patents Act 1988, Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229
[11] *R v Hicklin* [1868] LR 2 QB 360

development, particularly under English law, if it is to be comparable to the American standard.

iii. Art in Theory vs. Art in Law: Competing Literary Ideals

Defining art in theory is completely different from defining art in law. Drawing this distinction is a fundamental step in understanding the relationship between law and art. In the following chapter, various art theories are explored to provide a foundation for creating a legal definition of art. This is necessary because finding adequate legal criticism of art is more challenging than discussing art in art theory. The fragmented nature of art law, sporadic reporting and limited published research leads to a skewed analysis which favours traditional research questions, largely those concerning copyright or the transactional implications and regulations surrounding art. The literature concerning the assessment of the legal definition of art is particularly light with very few scholars directly addressing this as a primary issue. Consequently, the outcomes I draw in this thesis are critically important because they consolidate the gap between the art theory approach to defining art and the legal approach. Through the Art Conundrum, I identify a clear and concise theory of art which is both adequate for the purposes of this research and sufficient for subsequent studies.

The largest area of art law literature concerns the transactional implication of art within global legal systems and the art market. Thus, it comes as no surprise that the vast majority of literature comes in the form of guides,[12] articles or chic editorials[13] aimed at the art collector, estate planner or legal trustee. The other predominant area in art law deals with sensationalism and controversy, namely in the presence of art as a symbol possessing cultural significance. Examples include the ongoing controversies involving the retention of foreign cultural property,[14] art which causes shock and offence or even

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[12] Ralph Lerner & Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers & Artists* (4th edn, Vols 1&2, Practising Law Institute, 2012); Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016)

[13] Lawfully Chic (*Lawfully Chic*, Mischon De Reya LLP, 2017) <https://lawfullychic.com> accessed 11 Dec 2017

[14] John H Merryman, *Thinking About the Elgin Marbles*: Critical Essays on Cultural Property, Art and Law (Kluwer Law Int Ltd 2000); Andrew T Kenyon & Simon Mackenzie, 'Recovering Stolen Art: Legal Understandings in the Australian Art Market' [2002] 21 2

art which solves crimes.[15] When the fame and provenance of the institutions, artists and collectors is added into the mix, it leads to a research field which is plagued by blind spots because cases either become overreported due to their sensationalist aspects or hidden due to the impact of non-disclosure agreements and out of court settlements. In turn, research based on an unevenly reported field must be approached with caution and understood, from the outset, to be limited. In the case of art law, the importance of interpreting primary sources cannot be understated, with this limited secondary commentary simply assisting a largely primary assessment of art in law.

The limited applicability of art law literature is worsened by the specificity of some areas of art in law which must be removed from consideration within this research because they are not appropriate to draw evidence from. For example, 'Holocaust art' and cultural property must be removed from the scope of analysis because of the specialised statutes applicable only to these works of art that is not afforded to others. The focus of this research is art on a much more general level, establishing the general approach to defining art in law. As is shown in the subsequent two chapters defining art and establishing my theory of art, the Art Conundrum, art is not an easily determinable subject and without structure, it is an unruly concept.

Approaching the legal definition of art must be done in two steps. First a definition of art must be established using art theory which can then be applied and assessed within the realms of law. The first step concerns establishing a definition of art by investigating various art theories. These are distilled down into five clear theories of art – i. Imitation Theory, ii. Aesthetics Theory, iv. Institutional Art Theory, v. Cladistic Art Theory & vi. Artist Led Theory. These five theories of art create a workable image of the various approaches to defining art and highlight their respective strengths and weaknesses. This achieved, it will be established that no art theory is adequate in its own right to be utilised as the overall legal definition of art. The outcome of this process underpins the hypothesis of this work. I argue that the judiciary, when deciding upon art law cases, apply several theories of art under one procedural theory. I have called this theory the Art Conundrum.

University of Tasmania Law Review 1; Karolina Kuprecht, *Indigenous People's Cultural Property Claims: Repatriation and Beyond* (Springer 2014)

[15] David E Gussak, *Art on Trial* (Columbia University Press 2015)

iv. Approaching Art in Law – Methodology vs. Creativity

Although it is clear that art as a concept and as an object is culturally and economically significant, distilling art into a physical or malleable concept becomes increasingly difficult the more you consider what can be art. From Socrates[16] to Danto,[17] the discourse surrounding art is controversially contested. For most actors within the Art World – a term referred to by both Dickie[18] and Thornton[19] as a grouping tool for those who work with art – there is still no single correct and universally accepted definition of art. In short, when we refer to the concept of 'art', it generally returns more questions than answers. With relative ease, one runs the risk of falling into semantic traps where art begins as a painting in a museum and ends as a hypothetically imaginary commentary on human existence. To avoid this, discussions should be framed with the question 'what do we *really* mean when we talk about art?'. When utilising this question as a foundation to build a study on art, it is possible to reduce the fragmentation of art as a concept to a quantifiable figure or object.

To begin this study of art in law, art must be distilled into some workable concept. For the purposes of this research, it has been reduced to refer to the 'plastic' or 'visual' arts, noted by Danto as the form most generally associated with the word art by those outside of the art world.[20] The areas of music and literature, which as Danto notes should also be considered to be art are outside of the scope of consideration.[21] Artworks in visual or plastic form are usually physical and/ or malleable objects which are often presented within the context of the museum or gallery. It is also important to note, for terminology purposes, that words synonymous with the term 'art', such as 'artwork' and 'work of art', will be used interchangeably to refer to art, ignorant of the individual connotations carried by each of these terms. The following chapter is dedicated solely to understanding and framing the theoretical definition of art in its own academic field. This is then

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[16] Cynthia Freeland, *But Is It Art?* (OUP 2001)
[17] Arthur C Danto, *What Art Is* (Yale University Press 2013)
[18] George Dickie, *Aesthetics, An Introduction* (Pegasus 1971) 101
[19] Sarah Thornton, *Seven Days in the Art World* (Granta Books 2009), xi
[20] Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 17
[21] ibid

contrasted with my theory, the Art Conundrum, to highlight the difference in law. This two-step process aims to reduce the risk of cross contamination of ideas in understanding what is meant by the term art throughout this research. Only once that is completed, will it be possible to understand how the legal definition of art operates in practice.

Only once a workable definition of art has been established can we assess the way in which law adjudicates on art. By utilising comparative analysis of approaches to art in different legal systems, parallels and discrepancies can be drawn. Such comparative analysis is achieved through doctrinal and qualitative assessment of the relevant case law and statutory provisions which propose or indicate an existing definition of art in law. The doctrinal assessment is contextualised through the relevant case law and statutes to reveal the staggering difference between theoretical definitions of art in law and the reality of these provisions when applied. This doctrinal approach must necessarily be applied across a number of jurisdictions due to both the lack of literature within the English legal system and the significant international influence and repercussions of art law judgments. The principle jurisdiction is the English legal system, from which the majority of primary statutory provisions are drawn. This constrains most of the analysis within English law and reflects the historically dominant impact of English law in art law, often linked back to the Engraving Act of 1734.[22] But, as the decisions in one system directly influence those in another, as evidenced in the infamous *Brancusi*[23] case, it is important to also look to notorious legal cases in other jurisdictions which might have influenced the English approach. These cases will largely be drawn from jurisdictions which are either based in common law principles or are referred to by English law cases to reduce issues concerning incompatibility between jurisdictions. This comparative analysis will be used to highlight just how sporadic the legal definition of art is. By relying on these similarities, it will provide the best possible basis for a consideration of art in law with a specific focus on the English legal system.

It is imperative to consider the various areas of law which incorporate or discuss art systematically. As noted from previous work within the field, art law cannot be assessed without considering a variety of ways in which art interacts with law. Thus, art in law

[22] Engraving Copyright Act 1734
[23] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

must be reduced to a small number of fields of study. These areas of law, namely copyright, taxation, obscenity, moral rights and the artist's resale right, have historically been recognised as fundamental areas of art law. These areas have shaped the definition of, and approach towards, art in law.[24] Through a qualitative analysis of various cases and statutory provisions within these areas, critical issues concerning the legal definition of art can be highlighted.

Approaching the legal definition of art in this way will document the vastly sporadic approach to art in law whilst also highlighting that the legal approach to art is more complex than relying on a purely singular theory of art. As each area of law has a specific legal issue, the approach to art is dependent on resolving the individual issue rather than holistically addressing the nature of art itself. Thus, legal outcomes in copyright are greatly different to those in taxation or obscenity because they utilise different perspectives and have contrasting aims. A varied sample of different fields of law will create a good basis from which to establish and evaluate the legal definition of art. This will draw to the close the inevitability that art in law is not a simple cookie cutter definition. The legal definition of art is a complex web of art theories and legal interests that are applied through the Art Conundrum.

v. Concluding with the Art Conundrum

The relationship between art and law is one littered with discrepancies, disagreements and dysphoria. Art is an incredibly valuable commodity and holds significant social and cultural influence. Thus, it must inherently be subjected to legal sanctions and protections. The way in which these legal interventions develop is directly correlated to the interpretation of art and its recognised significance within the legal system. The contentious dynamic between art and law is only eased through the already unconscious application of my theoretical definition of art, the Art Conundrum. This definitional approach to art is utilised by the judiciary and legal actors to contain the problem of an

[24] John Henry Merryman, 'Art and the Law Part I: A Course in Art and the Law' [1975] 34 Art Journal 332; Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998); Michael E Jones, *Art Law: A Concise Guide for Artists, Curators and Art Educators* (Rowman & Littlefield 2016)

indefinable concept to one which is constrained by legal context. In turn, this allows art to become relative to law, rather than self-reflective within the realm of art theory. Within the Art Conundrum, art is defined by the legal context in which it arises, and the appropriate theoretical basis is created based on the requirements of the legal issue. The judiciary becomes an arbiter of taste by applying the appropriate theoretical definitions to define the work of art, often unwittingly doing so.

The Art Conundrum is undeniably the way in which law defines art. As will be established throughout this thesis, defining art requires a multistrand approach which can account for the intricacies of both art and law respectively. As two concepts which are seemingly disparately different, to reach harmony between them is a monumental task which requires a special approach. This specialist approach is applied by utilising the Art Conundrum and is already being engaged in in law, although often unconsciously. Thus, this thesis establishes the Art Conundrum as a new interpretation on the process of defining art in law. The following chapter engages the first step of our analysis by assessing various art theories to establish different approaches to defining art. The next chapter will then be succeeded by an introduction to the Art Conundrum and the significance of my theory on how law interprets art. Only once this has been completed can the primary study of the relevant case law and statutes be carried out. Throughout this study, the evident trends and attitudes towards art in law will be evaluated to reinforce the significance of the Art Conundrum.

II

Defining Art

The Importance of Understanding Art in Theory

> 'The word "art" is not easily defined. New forms of art are continuously born: thus, the meaning of the word "art" changes with time and context.'[1]
>
> Lorenzo Servi, 2016

> 'But art in the strict sense begins with definition – with the passage from vagueness to outline. And indeed, we find that the first kind of art – the art of cavemen – begins with an outline. Art began with the desire to delineate and still so begins in the child.'[2]
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> Herbert Read, 1931

Law regulates art in a number of fields, from tax codes to obscenity, land use to intellectual property rights.[3] Where possible, law will treat art like any other chattel.[4] Predominantly this is done by assessing art through legal formalism, listing the physical outputs in which something can be considered to be art. By reducing art to simply property, it removes some of its supposedly 'special' nature and creates a malleable legal concept. Law also largely focuses on art as property because defining artists or the activity of creating art requires further conceptual development, so these elements of art are 'largely ignored by statutes'.[5] Where law must deliberate on art, it is hostile and critical of art theory[6] because defining art using art theories returns a complicated and

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[1] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016) 56
[2] Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 50
[3] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 382 - 384
[4] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 481
[5] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 51
[6] Costas Douzinas, "Signing Off" (8 Tate: The Art Magazine 1996) 80 – 126; David Booton, 'Art in the Law of Copyright: Legal Determinations of Artistic Merit under United Kingdom Copyright Law' [1996] 1 Art Antiquity and Law 125, 126

insufficient legal definition of art. This hostility implies that art can be reduced to its physical form and that the consideration of art theory is a further complication in an already 'highly complex commercial world fraught with legal complications'.[7] By attempting to remove these elements from the consideration of art in law, it can be reduced to something which is manageable and functional. However, art cannot be divorced from art theory and the only way to achieve this manageable state is through the Art Conundrum, my interpretation of the current legal treatment of art which is established in the next chapter.

It is far easier for law to focus on art as a commodity and reduce the consideration of art theory in legal judgments on art. By treating art as a commodity, in which it is purely an object used in a transactional way, artistic concerns are prevented from becoming the focus of legal debate. This ensures that, for the purposes of law, the focus remains on the relevant legal issues which arise in these transactions. The principle of art as restricted to this formalistic nature is made clear in the legislation relating to art. Art law legislation has been enacted in many different areas, both in Britain and internationally.[8] The specificities of each of these statutes restricts the definition to the singular statutory context[9] under which the claim is brought, allowing for radically different interpretations of art dependent on the area of law. This is confirmed by case law where art is defined on a case by case basis, reaching an outcome on art which often differs wildly from that of the art world.

Kearns is very critical of the current approach to art in law, stating that applying general legal provisions to art leads to an asymmetric relationship under which art is greatly disadvantaged.[10] Restrictive formalist definitions, such as the lists found within the CDPA[11] or those within HMRC Tax codes,[12] are preferable because they create a unified

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[7] Peter H Karlen, 'What Is Art?: A Sketch for a Legal Definition' [1978] 94 The Law Quarterly Review 383, 383 - 384
[8] ibid 384
[9] ibid 386
[10] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 27
[11] Copyright, Designs and Patents Act 1988
[12] HM Revenue & Customs, 'Trade Tariff' (19 July 2020) <https://www.trade-tariff.service.gov.uk/sections> accessed 20 July 2020

standard for art. However, the limitations to these definitions leads to a law that is not equipped to deal with art which does not hold every listed element, where only some are held, or holds identifying elements which are not exclusive to art.[13] Statutory provisions based upon listed characteristics often do not appreciate that art can be a multifaceted concept. Such an essentialist legal definition of art risks misunderstanding the dynamic state of art[14] by undervaluing the ability of law to comprehend the complex nature of art theory and threatening law's stability when art does not fit into these simplified categories.

The primary issue here is that of separating art from its inherent theoretical value. Quantifying this value has always been a problem for the study of art as debate on the value of art within art theory is extensive.[15] Farley notes that 'what makes art, art, has confounded art historians for centuries. Art is often considered to be indeterminable'.[16] This is a monumental issue for law because it operates on recognisable certainties.[17] As art is difficult to define, institutions within the art world have aided in its interpretation to mixed results. The art world often offers a classical standard of interpretation, guided by their own interests and those of the wider art market.[18] These traditional critiques have often failed to be accommodating of both legal interests and modern evolutions in art,[19] which has resulted in the criticism that law cannot keep up with new developments in art.[20] Moreover, such a heavy dependence on institutional interpretation would also suggest that art cannot be understood by those outside of the artworld. Yet, art is not

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[13] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)
[14] Kerstin Mey, *Art & Obscenity* (I B Tauris & Co Ltd 2007) 3
[15] Inan Keser & Nimet Keser, 'Social Roots of Defining Art: Sample of Art Students' [2012] 51 Social and Behavioural Sciences 321, 321
[16] Christine H Farley, 'No Comment: Will Cariou v. Prince Alter Copyright Judges' Taste in Art?' (2015) 5 Intellectual Property Theory 19, American University, WCL Research Paper No. 2014-53 <https://ssrn.com/abstract=2529170> accessed 12 Dec 2018, 34
[17] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 294
[18] Cynthia Freeland, *But Is It Art?* (OUP 2001) 108
[19] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)
[20] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 116

incomprehensible for non-artworld actors as the cultural and social significance of art exists regardless of how it is interpreted.[21] Consequently, Mey argues that art is not 'in an ivory tower' but 'embedded and enmeshed in the cultural make-up of society at large.' [22] Analysis such as this is critical because it eradicates the debate that art and law are fundamentally incompatible[23] as they operate within this same mesh. Although they may conflict, law must be able to and ultimately already can reach a workable definition of art. But how does law define art when art struggles to define itself?

i. Limiting Art to Define the Undefinable

Arthur C. Danto, one of the most influential scholars within the field and a critical voice in the debate on defining art, stated that 'the simple word "art" is most usually associated with those arts which we distinguish as "plastic" or "visual", but properly speaking it should include the arts of literature and music'.[24] Danto's observation suggests that when we call something art, we assume the popular definition: art is the physical objects which can be found in a gallery, such as paintings, ceramics or sculpture rather than those which would appear in libraries or concert halls. Danto is accurate in his claims regarding the popular understandings of art – most people think of art as physical objects in a museum or similar art world setting. However, Danto's expansion beyond the 'plastic' is tempting us into enquiring whether art is 'more than just the popular definition', a question that he answers by stating that a definition of art 'should include the arts of literature and music'.[25] Therefore, our initial understanding of art is one which is based on incorrect presumptions. If art is more than just the *plastic* or *visual*, then what is it? Returning to Danto's criticism, approaching the concept of 'art' in order to create a definition requires an understanding of art as an 'umbrella concept'. We must look beyond physical attributes and instead engage with the underlying tensions within art theory. Through

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[21] Christine H Farley, 'No Comment: Will Cariou v. Prince Alter Copyright Judges' Taste in Art?' (2015) 5 Intellectual Property Theory 19, American University, WCL Research Paper No. 2014-53 <https://ssrn.com/abstract=2529170> accessed 12 Dec 2018
[22] Kerstin Mey, *Art & Obscenity* (I B Tauris & Co Ltd 2007) 2 - 3
[23] Simon Stokes, 'Law, Ethics and the Visual Arts by John Henry Merryman - Publication Review' [2004] 15 Entertainment Law Review 61, 61
[24] Arthur C Danto in Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 17
[25] ibid

addressing art theory, it will be exposed that complications consistently arise when attempting to define art thanks to each respective theory's inability to be sufficiently applicable when applied alone. To define art is to accept a level of ignorance dependent on the basis upon which a definition of art is founded. The most basic approach to defining art would be to state that 'art' is a subjective phenomenon that cannot be easily defined.[26] Yet law continuously defines art enough to reach a judgment and thus it must be asked how this is possible.

To define the seemingly undefinable, limitations must be accepted and restrictions become common place. Any definition of art is a regurgitation of a particular viewpoint, from the existence of the Divine to the critic's explanation to the artist's imagination. For law, this viewpoint is that of the Art Conundrum, established in the next chapter, which argues that art must be defined relative to the legal context in which it arises. Each viewpoint, irrespective of its basis, creates a way in which art can be perceived, defined and explored. As each individual definition of art competes against another, authors often choose to discuss the paradox of defining art before attempting to establish a definition themselves.[27] By establishing art as a paradox, it creates a foundation for a critic to argue why their definition is superior to another. However, this always results in a limited definition which, although useful, can only be utilised to advance an individual interpretation of art. Applied alone, it cannot form the legal definition of art because it is entrenched in the viewpoint of its original author and is therefore restricted in its ability to grow and adapt when challenged.

As art cannot be easily defined, art has become a multi-layered concept which is hard to separate. Therefore, to define 'art' as a term, a concept and a malleable legal entity, one must look at the various theoretical, philosophical and sociological arguments for the identification of what can be considered 'art'. To unpack the concept of 'art', one must first accept the inevitability of engaging with several crucial subcategories which

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[26] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016) 56

[27] Such as Leo Tolstoy, *What Is Art* (Penguin Classics 1995); Arthur C Danto, *What Art Is* (Yale University Press 2013); Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375 - 384

encompass elements important to an understanding of the artistic.[28] These elements may seem, at first glance, to be indistinguishable because they may be co-dependent or assumed. For example, assuming that anything which can be considered 'plastic' should be art does not suggest a difference between painting and sculpture. It is only through closer analysis that each category of art also proves to be highly dissimilar. Consequently, any study of art, and the various definitions of art, must either be very in-depth or be more assumptive about the theory that is being discussed.

In the following section, I have summarised a small sample of some of the largest schools of art theory. The main theoretical approaches, which shall be discussed are the Imitation, Aesthetics, Institutional, Cladistic and Artist Led theories. From this cross-section, I highlight key commonalities and trends for identifying what constitutes art whilst also indicating the limitations from which each theory suffers. These theories are introduced to further establish the difficulty with defining art in theory while establishing art as an indeterminate cultural phenomenon; a situation profoundly difficult for law to approach. These theories are a small cross-section of the numerous theoretical definitions of art and are chosen on the basis that they represent fundamental developments in the dialogue of art theory. It is not necessary that these assessments be very in-depth as they are being utilised to illustrate the different approaches to art rather than to suggest superiority. Through highlighting the limitations and restrictions in applying each theory of art, it will emphasise that law cannot rely solely on one singular theory of art. In turn this will illustrate the magnitude of the multiplicity of defining art, supporting my theory that defining art in law requires the umbrella approach applied in the Art Conundrum.

ii. Five Theories of Art and Why Their Insufficient Legal Application

When examining the five theoretical justifications for art within this chapter, I rely strongly on the assumption that the form of art referred to is the common understanding of fine art,[29] with a particular focus on works that would appear in a gallery setting, such as the 'plastic' and 'visual' arts as Danto identified.[30] This technique of limitation is one

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[28] Dana Arnold, *Art History: A Very Short Introduction* (OUP 2004) 8
[29] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 45
[30] Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 17

which is often deployed by authors engaged in the task of defining art, largely because from the outset '"Art" is a big word, and it's not really safe to assume we all mean the same thing when we say it.'[31] Imposing an intentional constraint on the concept is a practical necessity in order to create a workable body of content. This constraint shall also be reflected in the case law considered in subsequent chapters to ensure a balanced and reasonably comparable approach. Although this approach may have begun as a subconscious prejudice, it is reflected in the case law that is explored in the subsequent chapters, and it also reflects a dominant ideology which demands attention and acknowledgement.

a. Imitation Theory

Imitation theory is one of original theories of defining art. It is based in both logical and obvious principles and provides a clear definitional foundation. Within Imitation Theory, an object must be an imitation or representation of reality. It is a fairly intuitive and linear interpretation. Freeland encapsulates both the longstanding history of Imitation Theory and its definition in a succinct observation:

> 'Ancient discussion of tragedy introduced one of the most persistent of all theories of art, the imitation theory: art is an imitation of nature or of human life and action'[32]

Freeland's definition encapsulates the essence of Imitation Theory. A definition which dictates that 'art is an imitation' validates anything as art when it tries to imitate reality. It creates both a clear definition and a limitation. If a work does not resemble the reality of the natural world, then it is not art. This would also suggest that whenever something is created and can be viewed as a direct imitation, it should *always* qualify as art. Founded in a philosophical commentary,[33] Imitation Theory dealt with a much smaller quantity of art. Consequently, Imitation Theory is reluctant to embrace new and emerging forms of art and creates a "traditional" view of art which resists the modern developments made in art.

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[31] Bridget Watsaon Payne, *How Art Can Make You Happy* (Chronicle Books LLC 2017) 11
[32] Cynthia Freeland, *But Is It Art?* (OUP 2001) 31
[33] Arthur C Danto, *What Art Is* (Yale University Press 2013) 47

Imitation Theory, as a foundational theory of art is certainly credible because of its antiquity. It is based in some of the oldest dynamics in human thought. Socrates,[34] Plato and Aristotle had all emphasised the notion of art as imitation[35] or '*mimesis*'.[36] It is evident that art was historically considered to be a 'reflection of things… they are made of visible qualities, but they may not be real.'[37] Here, Danto is emphasising the qualitative understanding of art as something which in and of itself is not real, which cannot stand alone from what it tries to imitate or exemplify. This ties all artworks to the natural world. For an artwork to be legitimate, it must aim to resemble something already real and through this requirement, it can only imitate or reflect reality. Art becomes representative rather than expressive as a painting of a vase of flowers is a mere representation of the real flowers which rest in their vase on the desk in front of the artist. Consequently, in its most basic form, Imitation Theory appears to be a natural and ocular based definition of what constitutes art.

Imitation Theory is a useful and simple definition of art. The definition is just as applicable to Michelangelo's '*David*' as it is to Van Huysum's '*Flower's in a Terracotta Vase*'.[38] As two traditional forms of art, they are easily accepted as such under Imitation Theory. Therefore, in the classical setting, imitation theory works very well. For example, traditional paintings would reflect landscape scenery, still-life settings or portraiture while sculptures would attempt to capture the human figure or biblical scenes. Imitation Theory is very good at classifying this form of art. However, with modernity came an increase in new forms of art which varied from this classical concept of imitation. The creation of seminal works like Duchamp's '*Fountain*',[39] Warhol's '*Brillo Box*'[40] and

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[34] ibid
[35] Cynthia Freeland, *But Is It Art?* (OUP 2001) 31 – 32
[36] ibid 31
[37] Arthur C Danto, *What Art Is* (Yale University Press 2013) 47
[38] The National Gallery, 'Jan Van Huysum | Flowers in a Terracotta Vase 1736-7' (The National Gallery Archives 2017) <https://www.nationalgallery.org.uk/paintings/jan-van-huysum-flowers-in-a-terracotta-vase> accessed on 17th May 2017
[39] Tate, ''Fountain', Marcel Duchamp, 1917, replica 1964' (Tate Collection 2017) <http://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> accessed on 12th May 2017
[40] Museum of Modern Art, 'Andy Warhol, Brillo Box (Soap Pads) (MoMA Collection, 2017) <https://www.moma.org/collection/works/81384> accessed on 17th May 2017

Brancusi's '*Bird in Space*'[41] all directly contravene this classical treatment of art. Warhol's '*Brillo Box*'[42] is a crucial test of Imitation Theory. As Danto records, upon seeing them in their form of polymer paint upon constructed wood and their similarity to the machine-made and mass produced commercial Brillo box, 'the question was not whether one could tell the difference, which was an epistemological question, but rather it was what made them different, which is what philosophers call and ontological question, calling for a definition of art'.[43] The long-standing definition of imitation was pushed to the limit by this new presentation of art as closely imitative of real life. The inability to easily draw a distinction between Warhol's creations against the original Brillo box highlights the weakness in relying upon such a literal definition of art that is incapable of explaining divergence from pure imitation.

The downfall of Imitation Theory is inherently based in the notion that if art is imitation of life, then only those works which directly imitate life can be considered to be art. Thus, when dealing with reproductions of art or of objects which do not resemble life, Imitation Theory is unable to accept these objects as art. It does not easily remedy a situation in which an object resembles life so closely that they no longer appear to be imitations but actual objects – as was the case for the *Brillo Box*. By allowing anything which resembles the natural world to be considered art, it creates a specific category of art. This category is good for traditional art, but it does not deal well with the ambiguity of modern or contemporary art. The implications of relying on *mimesis* as the organising principle of art definition is undeniably problematic. A definition of art as imitation is too specific to the traditional or classical and does not accept artistic evolution easily. It raises the question as to whether Imitation Theory can cope with art which extends beyond classical imitative painting and whether it can handle the development of the modern artistic trajectory. Such a trajectory baffles the theory of *mimesis* and underscores the necessity for an alternative theory which can cope with these changes.

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[41] The Met Museum, 'Constantin Brancusi | Bird in Space' (MET Collections 2017) < http://www.metmuseum.org/art/collection/search/486757> accessed on 4th August 2017

[42] Museum of Modern Art, 'Andy Warhol, Brillo Box (Soap Pads) (MoMA Archives 2017) <https://www.moma.org/collection/works/81384> accessed on 17th May 2017

[43] Arthur C Danto, *What Art Is* (Yale University Press 2013) 114 - 115

This proves to be the greatest limitation on Imitation Theory, as it requires an acknowledgement in the content of the artwork that it possesses this imitative characteristic. When objects begin to confront reality, such as in the case of Warhol's '*Brillo Box*', or no longer aim to imitate reality, as in the cubist and surrealist movements, then the idea of art as imitation becomes frozen. Consequently, Imitation Theory is no longer a sufficient definition of art and it is to no surprise that theories of art have developed beyond this foundational pinnacle. As will be shown through the *Brancusi*[44] case explored in Chapter V. on Taxation, law has already disregarded mimesis as suitable for the sole legal definition of art. In *Brancusi*[45] the court explained that expansion beyond Imitation Theory was not only logical but necessary in direct response to its own limitations as a theory of art. As a consequence, new schools of art emerged in response to these limitations, including the school of aesthetics. Like Imitation Theory, Aesthetic Theory is a historically classical approach to artistic definition. Yet it reframes the question of 'what is art' to evade purely *mimetic* reproduction to emphasise the importance of the Divine, beauty and aestheticism in the creation of art.

b. A Simplified Approach to Aesthetic Considerations

The theory of Aesthetics is not a singular theory of art like Imitation Theory. Rather, it is comprised of several different schools of thought which can be described as concerning themselves with aesthetic questions. With origins in philosophy, aesthetics has been theorised repeatedly to return different arguments within the broader school. As the theory of Aesthetics is not a singular theory, it is important to be aware that the following discussion of Aesthetics theory by necessity is a condensed analysis. As Aesthetics Theory has held such a prominent position in the theoretical definition of art, it would be a disservice to not attempt to explore it in some capacity. As a response to this, I have approached Aesthetics Theory at the most general level:

> 'Aesthetic theories of art take the defining purpose of art to be the creation of aesthetic properties that provide a rewarding aesthetic experience'[46]

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[44] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[45] ibid
[46] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375, 381

In relation to art and a rewarding aesthetic experience, aestheticism resonates with the concept of, and the appreciation, of beauty. Art is often considered to be beautiful. Consequently, it is not surprising that the notion of beauty as a defining feature of art is both obvious and dominant in many theories of aesthetics. For example, Freeland talks extensively on Aesthetics Theory within '*But Is It Art?*' and draws on the various philosophical arguments which underpin the aesthetics position. When doing so, Freeland presents a theory of aesthetics which closely links beauty, art and the Divine in the definition of art. Freeland begins with Kant's theory that 'judgements in aesthetics are grounded in features of good artworks themselves.'[47] Kant highlights the correlation between "good" art and aesthetic appreciation. It can be broadly deduced that theories based in aesthetics promote aesthetically pleasing works as legitimate works of art due to this correlation. This is a direct reflection on the human connection between value and beauty. For example, art sales and institutional bias indicate that beautiful works fare much better than those considered unbeautiful.[48] Thus, it is not surprising that Read reinforces that 'a whole school of aesthetics is founded on [the notion of beauty]'[49] alone.

The human fascination with beauty, too, has philosophical and historic origins. Both Kant and Hume have noted the importance of beauty within defining art, determining that it is undeniably a defining element.[50] Additionally, Aquinas extended this to argue that beauty is not just an element of art but a representation of God in art.[51] To many, particularly at Aquinas' time of writing, the Divine was the most beautiful aspect of existence. By equating art with the work of God, art is not only beautiful, but also immaculate and unsullied by the realities of the world. This position encapsulates the basic human fixation with beauty: that that which is attractive is *good* and that which is *good* is art. A definition such as this, based in beauty, is good at categorising classical interpretations of art. It is also malleable enough to recognise modern art which is attractive enough to be

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[47] Cynthia Freeland, *But Is It Art?* (OUP 2001) 10
[48] Michael Findlay, *The Value of Art* (Prestal Verlag 2014); Katy Kelleher, 'Ugliness is Underrated: In Defense of Ugly Paintings' (*The Paris Review* 31 July 2018) <https://www.theparisreview.org/blog/2018/07/31/ugliness-is-underrated-in-defense-of-ugly-paintings/> accessed 21 August 2019
[49] Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 21
[50] Cynthia Freeland, *But Is It Art?* (OUP 2001) 10
[51] ibid 35

considered beautiful. Perry indicates that the *old* definition of art is 'art as a visual medium, usually made by the artist's hand, which is a pleasure to make, to look at and to show others.'[52] In this definition, he directly draws on the notion of beauty and how it gives legitimacy to the work. If it is a pleasure to look at it is likely to be beautiful. Therefore, through this beauty, it is art. However, the concern with this measure, and with aesthetic beauty in general, is that it does not quantify how we decide what is beautiful.

Not all art is a pleasure to look at. For example, some would argue that Damien Hurst's '*The Physical Impossibility of Death in the Mind of Someone Living*'[53] is neither beautiful nor a pleasure to look at. Instead, they would reduce the work to being merely a shark carcass suspended in a tank of formaldehyde. Even those who would say it was initially beautiful would struggle to defend it as perpetually beautiful as the original artwork began to decay, the skin of the shark began to sag and the tank began to take on a murky colour.[54] What may have begun as something beautiful is arguably destroyed as the shark begins to rot but this does not remove the status of '*Physical Impossibility*' as a work of art. Hirst's '*Physical Impossibility*' is a challenge for the theory of beauty in aesthetics. Initially, it was easy to detect the beautiful, but the development of artistic forms has meant that this is increasingly challenging. As history has shown, although these classical interpretations of beauty were certainly true of the early years of art, the applicability has waned over time. This alteration over time has occurred largely due to the shifting medium and content which has resulted in a new interpretation of what can be beautiful. "Good" art is no longer that which fits the mould of classical interpretations of art and beauty.

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[52] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 45

[53] Damien Hirst, 'The Physical Impossibility of Death in the Mind of Someone Living 1991' (Damien Hirst, 2018) <http://www.saatchigallery.com/artists/artpages/aipe_marcus_harvey_myra.htm> accessed 8th January 2018

[54] Carol Vogel, 'Swimming With Famous Dead Sharks' (New York Times, 01 Oct 2006) <http://www.nytimes.com/2006/10/01/arts/design/01voge.html?ex=1317355200&en=6fcefeb8359f9748&ei=5088&partner=rssnyt&emc=rss> accessed 6th January 2018

Marcus Harvey's '*Myra*'[55] is arguably a *good* work of art. Exhibited in Saatchi's 1997 Sensation exhibit at the Royal Academy in London, it drew international criticism.[56] The artwork consists of a portrait of Myra Hindley's face painted entirely with children's handprints. Considering the context of Hindley's legacy much of the criticism stated that the work was unattractive, disrespectful and abhorrent. '*Myra*' was not classically beautiful, nor was it beautiful for much of society. However, it did not mean it was not any *good*. The work reveals artistic skill, labour and expression. Moreover, it implores debate and a reaction from the viewer. For many, that is the result of a *good* work of art. Both '*Myra*' and '*The Physical Impossibility of Death in the Mind of Someone Living*' are still considered art, even though they may not be aesthetically or generically beautiful. Of course, some would argue that they are beautiful, irrespective of traditional or classical beauty. Craftsmanship and presentation, too, become beautiful elements within a work of art. However, it is not ultimately the beauty element which makes these works of art. They are works of art for a multitude of reasons, of which beauty is only one consideration. To suggest that beauty is the defining pinnacle of art creates too specified a view of art. One which continues to be challenged and proven insufficient.

Considering another famous example, the legal ramifications of which are later assessed in Chapter VI. on Obscenity, are Mapplethorpe's explicit photographs.[57] These works were declared obscene and offensive by the public to the extent that their entire merit rested on 'fulfill[ing] the "beauty" expectation'.[58] Mapplethorpe's photographs depicted male bodies in acts of homosexual sex and self-gratification. The photographs were denounced as works of art by the press and legal action was brought against the gallery displaying them.[59] From this it can be deduced that the community standard of beauty

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[55] Saatchi Gallery, ''Myra, Marcus Harvey, 1995' (Saatchi Gallery Collection 2017) <http://www.saatchigallery.com/artists/artpages/aipe_marcus_harvey_myra.htm> accessed 8th January 2018

[56] Tamsin Blanchard, 'Arts: Sensation as Ink and Egg Are Thrown at Hindley Portrait' *The Independent* (19 September 1997) <https://www.independent.co.uk/news/arts-sensation-as-ink-and-egg-are-thrown-at-hindley-portrait-1239892.html> accessed 11 July 2018; Sarah Lyall, 'Art That Tweaks British Propriety' *The New York Times* (20 September 1997) <https://www.nytimes.com/1997/09/20/arts/art-that-tweaks-british-propriety.html> accessed 11 July 2018

[57] *City of Cincinnati v Cincinnati Contemporary Arts Center* 57 566 NE2d 214 (1990)

[58] Cynthia Freeland, *But Is It Art?* (OUP 2001) 17

[59] *City of Cincinnati v Cincinnati Contemporary Arts Center* 57 566 NE2d 214 (1990)

was at odds of that of the museum and the subsequent trial only drew further divisions in these opinions.[60] Mapplethorpe's photographs were undoubtedly works of art to some, but to others they were not. Clearly there is a key problem with couching the definition of art within the theory of beauty in aesthetics. This approach relies on a preferential standard of beauty and aesthetics which is not easily identifiable as standards of aesthetics, beauty and pleasure, vary from person to person. For the court, their artistic value meant they were protected as works of art. This highlights that Aesthetics Theory is not suitable as a sole legal definition of art because law must be capable of choosing between competing aesthetic ideals and cannot rely on a hope that there is a homogenous view of beauty or the aesthetic value of a work. Moreover, the court itself may reach a judgment which contradicts with the generally held aesthetic value of an object. Therefore, it appears that to legally define art, there is more at hand than solely aesthetics when deciding whether something is to be considered art.

These additional considerations beyond beauty can include craftsmanship, artistic expression and intention. This suggests the need for an additional theory, such as Hume's concept of intersubjective tastes to equate for these additional considerations.[61] If taste is intersubjective then 'people with taste tend to agree with each other'[62] meaning that artworks are defined when groups agree that they are legitimate. This embraces the notion of a communal understanding of beauty and aesthetics but extends the appreciation beyond this to other elements in the work of art. Whether it be the craftsmanship, the artistic merit or the historical importance, Hume embraces utilising communal standards to decide if something is art. If enough people say something is art it should be art, irrespective of whether it is beautiful. As with '*Myra*' and the work of Mapplethorpe, the influence of the art institution played a crucial role in creating a prestigious communal standard which argued that they were both legitimate works of art, even though there were polarising arguments concerning their beauty and aesthetic significance. The interpretation of the communal standard held by these institutions

[60] *ibid*
[61] Carolyn W. Korsmeyer, 'Hume and the Foundations of Taste' [1976] 35(2) The Journal of Aesthetics and Art Criticism 201; Cynthia Freeland, *But Is It Art?* (OUP 2001) 8
[62] Cynthia Freeland, *But Is It Art?* (OUP 2001) 8

brings us to the consideration of Institutional Art Theory, a definition of art based directly on the intersubjective tastes of the art world.

c. The Institutional Art Theory

Within Institutional Art Theory, an object is deemed to be art when it is recognised as such by those within the art world. Developed by George Dickie, Institutional Art Theory utilises the position of those within the so-called world of art by defining them as wards of artistic definition. In short, Dickie's theory holds that:

> 'A work of art in the classificatory sense is 1) an artefact 2) on which some person or persons acting on behalf of a certain social institution (the artworld) has conferred the status of candidate for appreciation'[63]

Dickie's approach dictates that institutional approval plays a crucial role in verifying something as a work of art. When a work is 'honoured, dubbed, or baptized'[64] as art by someone in the art world, this act grants legitimacy to the work. Thus, Dickie argued that 'arthood… is not an intrinsic property of object, but a status conferred upon them by the institutions of the art world'.[65] Prior to receiving this status, the object is not a legitimate work of art. Institutional Art Theory legitimises the creation and confirms its status as art. This requirement for confirmation provides the foundation for Institutional Art Theory. The second requirement in Dickie's theory, can be expanded as follows:

> 'For [the sixties philosopher George] Dickie, the Art World is a sort of social network, consisting of curators, collectors, art critics, artists (of course), and others whose life is connected to art in some way. Something is a work of art, then, if the Art World decrees that it is.'[66]

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[63] George Dickie, *Aesthetics, An Introduction* (Pegasus 1971) 101
[64] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375, 382
[65] Edward Skidelsky, 'But is it Art? A New Look at the Institutional Theory of Art' [2007] 82 Philosophy 259, 259
[66] Arthur C Danto, *What Art Is* (Yale University Press 2013) 33

Therefore, under Institutional Art Theory, anything can be art if its approved by the institution. This is more expansive than either Imitation Theory or Aesthetic Theory. Institutional Art Theory embraces the fluidity of art through its situational context. Therefore, there is no physical or visual requirement to receive status as art, rather it relies on the intersubjective tastes[67] of the artworld as the standard of qualification. Consequently, Institutional Art Theory can progress in ways that Imitation Theory or Aesthetic Theory cannot because it can accommodate this developmental movement. Under Institutional Art Theory, the institution becomes an incredibly powerful authority in defining what is and is not art.

The institution within Institutional Art Theory consists of the actors within the Art World. Arnold divides this World into six roles: 'artist, dealer, curator, critic, collector or auction-house expert'.[68] An actor within the art world may hold more than one of these roles at any given time. Through entering the art world and assuming one of these roles, an actor can be seen to be empowered with a certain level of artistic knowledge or creativity. Dickie suggests that it is this empowerment which enables the institution to dictate what is art. Consequently, there is an expectation, and arguably a high level of trust, in the ability of the art world to verify works of art which are and should be legitimate. For example, one of the most basic principles taught to students of Art History is that when an artwork is sold for a large sum of money, or it appears in a large museum, there is an legitimate authority granted to the work.[69] This expectation and subsequent admiration is born from a respect for the expertise of those who make up this prestigious group of art world actors. Under Institutional Art Theory, anything can be art and only a select few have the power to decide what is art. It is useful in that it accepts a fluid approach to art and does not limit art to the 'plastic' or 'visual', a common error in defining art.[70]

Therefore, Institutional Art Theory cannot provide a holistic definition of art. Rather, it deliberates on what is perceived as "good" art by those within the minority of the art world and deems a minority of art as worthy of art status. Consequently, this can and

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[67] Cynthia Freeland, *But Is It Art?* (OUP 2001) 9 - 11
[68] Sarah Thornton, *Seven Days in the Art World* (Granta Books 2009), xi
[69] Dana Arnold, *Art History: A Very Short Introduction* (OUP 2004) 72 - 74
[70] Arthur C Danto in Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 17

often leads to a polarised battle between the art world and public opinion,[71] in which the aesthetic tastes of the art world clash with the 'values [of] a more democratic wider audience'.[72] Relying on the opinions of the institution can often create a skewed definition of art which does not align with that of the public and leads to the uneven promotion of 'canon' artists[73] that are favoured by the institution, at the expense of others. This seemingly 'parasitic'[74] approach leads to the glorification of artists who play to the institution and the condemnation of those who oppose it. The artist plays to the institution and the institution then plays to the artist in a circular manner. This circularity often leads to the ridicule of high-profile exhibitions such as the Turner Prize, a highly respected establishment signifier that is almost always annually mocked in the press.[75] The artists begin to play to the panel and the panel looks for artists who they believe promote their understanding of art.

A clear example of the inadequacy of institutional definition is prevalent in the rise of 'readymades'. Perhaps the most famous example of challenging this authority, and the traditional approach to art, was the emergence of the 'readymade' in the form of Duchamp's '*Fountain*' in 1917. This was a pivotal moment in the history of art. Readymades are the presentation of objects as works of art themselves.[76] Readymades were originally rejected as art, as per Duchamp's urinal in the early 20th century.[77] Duchamp's '*Fountain*', the first of his readymades, which to the untrained user is simply an upturned and signed urinal,[78] was submitted to the Society of Independent Artists in 1917 and was intended for exhibition. However, the institution in this instance

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[71] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 9
[72] ibid 39
[73] Bridget Watsaon Payne, *How Art Can Make You Happy* (Chronicle Books LLC, 2017) 27
[74] Edward Skidelsky, 'But is it Art? A New Look at the Institutional Theory of Art' [2007] 82 Philosophy 259, 268
[75] Marie-Claire Chappet, 'The Turner Prize's Most Controversial Moments' *The Telegraph* (20 Oct 2011) <http://www.telegraph.co.uk/culture/art/turner-prize/8834871/The-Turner-Prizes-most-controversial-moments.html> accessed 06 Jan 2018
[76] MoMa Learning, 'Marcel Duchamp and the Readymade' (Museum of Modern Art 2017) <https://www.moma.org/learn/moma_learning/themes/dada/marcel-duchamp-and-the-readymade> accessed 08 January 2018
[77] Tate, ''Fountain', Marcel Duchamp, 1917, replica 1964' (Tate Collection 2017) <http://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> accessed on 12th May 2017
[78] ibid

determined that the work did not satisfy the requirements for art and vetoed its display. However, Duchamp's *Fountain* is very much a work of art and is defended fiercely by an extensive amount of modern literature.[79] Thus, the readymade example highlights that reliance on the institution as the sole voice of authority has been proven to be an insufficient basis for determining what is art. *Fountain* directly illustrates that the institution is not always the best judge of art.

Skidelsky's criticism of Institutional Art Theory as generating false art consolidates the reality that the Institutional Art Theory is inadequate as the sole definition of art. False art is art which is glorified by the institution without paying due regard to the integrity of art itself.[80] If the institution is to dictate what is art, then the art which is created does not reflect artistic integrity – it becomes hollow and self-serving. Skidelsky states that the institution gains legitimacy in the mastering of 'the system of reasons which constitutes art. Their power is not arbitrary, but subservient to the intrinsic discipline of art itself.'[81] The role of the institution is not as the sole authority on what is art but rather it is a ward or servant of a greater power, in this instance, the integrity of art itself.

Institutional Art Theory suggests that materially speaking, art is as broad as the institution will allow. However, the problem with relying on the notion of a singular approved status is simple. Enfranchising a small minority in the vote for art leads to an elitist determination of whether a work is art. When translated across to law, the court cannot be at the mercy of an independent and unregulated authority. The judiciary must be capable of reaching a definition on art that may contradict that of the institution. It is not sufficient to state that an object is not accepted as art until it is deemed so by the institution because law cannot rely solely on institutional interpretation. Although there is much legitimacy in stating that the institution can dictate what is art, it is not the sole arbiter of art. The leverage given to the institution is greater than that given to a lay person, but it does not leverage as a veto. Therefore, although there are many benefits to

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[79] Alan Kaprow, 'Art Which Can't Be Art' (Reading Between 1986) <www.readingbetween.org/artwhichcantbeart.pdf> Accessed 21st November 2016
[79] Arthur C Danto, *What Art Is* (Yale University Press, 2013, 26
[80] Edward Skidelsky, 'But is it Art? A New Look at the Institutional Theory of Art' [2007] 82 Philosophy 259, 260 - 263
[81] ibid 263

the promotion and protection of the art world influence, there are also necessary limitations. Consequently, the power of the institution must be limited or harnessed. The institution must not be revered as the sole authority on art, but rather as an additional consideration in the definition of art, utilised where and when it is required.

d. The Cladistic Art Theory

As shown through the consideration of *Fountain* as a response to the limitations of Institutional Art Theory, it is possible to suggest that once recognised as art, an object or style can be replicated several times and does not face the same struggle for legitimacy as the first. For Cladistic Art Theory, what can be considered art is that which is accepted within the historical trajectory of art. Previously accepted forms of art dictate the validity of what is to be accepted as the norm in the future. When something is recognised as art, all subsequent art which is similar to the original is recognised. This Cladistic theory is based on the biological concept of a *clade*, in which a link is drawn between 'a group of organisms and the common ancestor they share'.[82] Cladistic Art Theory encapsulates the historical progression of art, delineating all art as evolutions of previous works of art. Cladistic Art Theory was proposed by Stephen Davies in recent years:

> 'Artworks other than the first ones occupy a shared line of descent from their first art ancestors, and that line of descent comprises an art tradition that grows into an art world... Call this a cladistic theory of art'[83]

The cladistic theory of art is not a new or novel idea. Davies' highlighting of the shared line of descent is the basis for one of the most widely undertaken academic art degrees, History of Art. Davies' reiteration of the importance of understanding how all art descends from an ancestor indicates evolution from an original as the crucial defining feature of art. This theory can be used to illustrate how art has developed in movements, through '*-isms*'.[84] The grouping of art into '*-isms*' or, to an extent, the process of curation

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[82] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375, 384
[83] ibid 379
[84] Susie Hodge, *Art in Minutes* (Quercus Publishing Ltd 2015); John A. Parks, *The Universal Principles of Art* (Rockport Publishing 2018)

fits well with the cladistic model of defining art by shared ancestors and features. Art which is similar in style or content can be grouped together, reinforcing the recognised artistic qualities and emphasising that the title of 'art' is made of an intricate web of related elements and forms.

Cladistic Art Theory relies heavily on the assumption that once something is verified as art, any work which follows and sports similar features is presumed to also qualify as art. By default, it creates a definition of art that requires all art to have some form of similarity or link to previous works. However, when taken to extremes, Cladistic Art Theory may dictate that all art must be susceptible to being pinned down to the timeline of art history in which its roots must be traceable back to an originally accepted work. It is only where no correlation can be drawn between the work in question and previously accepted artworks that a proactive decision must be made as to whether this new original should be decreed as art.

To suggest that a work of art is how it is because of its relation to an original is an intuitively appealing argument. If something is declared as art, then surely something which closely resembles it must also be considered to be art. A modern example of how the shared line of descent can create a newly recognised art form is the acceptance of photography. Photography was long resisted as art because it did not require the skill or physical labour previously associated with accepted art forms, such as sculpting or painting.[85] However, as artists began to utilise photography in their work and the market for photographic works developed,[86] eventually even law would also accept photography[87] as a legitimate art form. Consequently, photography now is an often-praised art form with an increasing number of exhibitions in major museums and

[85] Ming Thein, 'The Line Between Art and Photography' (Huffington Post 06 December 2017) <https://www.huffingtonpost.com/ming-thein/art-and-photography_b_4297646.html> accessed 08 January 2018

[86] Jay Bochner, *An American Lens: Scenes from Alfred Stieglitz's New York Secession* (MIT Press 2008)

[87] Molly Ann Torsen Stech, 'Beyond Oil on Canvas: New Media and Presentation Formats Challenge International Copyright Law's Ability to Protect the Interest of the Contemporary Artist' [2006] 3(1) SCRIPT-ed 45, 49

galleries revolving solely around photographic works.[88] This approach simplifies the problem of defining art to a logical based algorithm – all which follows the original in form, medium or style must, too, be art. Only when there is no prior original, must the potential artwork be thoroughly examined and debated to determine its status as art and always where possible, references must be drawn to already existing art forms. It is a presumptive theory which attempts to simplify the process of defining art.

However, as recognised by Davies, the greatest issue with Cladistic Art Theory is that 'the past direction of the art tradition constrains what can be art in the present.'[89] In other words, a purely cladistic theory of art dictates that art which differs greatly from previously recognised art does not immediately gain the recognition or status it deserves. It favours the traditional and easily categorised. Cladistic Art Theory does not like the unique or different, it likes homogeneity and similarity. The art which has come before sets a precedent and the emerging arts are not considered art because they do not fall into the 'shared line of descent'.[90] This is again illustrated by the rejection and subsequent hesitant acceptance of readymades as a legitimate art form. It is arguable that their acceptance already denotes that we do not apply a purely cladistic theory of art, it is diluted to allow the inclusion of these new works. This dilution is necessary to negate the problem with the cladistic theory of art being too slow to accept new works and prevent the subconscious discouragement to develop new or controversial art forms outside of the established trajectory.

Cladistic Art Theory often fails to, or at best is slow to, account for changing perceptions, attitudes and context, something which is surely integral to the determination of whether a work constitutes art.[91] It deals rather with a static understanding of art, in which the

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[88] Tate, 'The Radical Eye: Modernist Photography From the Elton John Collection' (Tate, 'The Radical Eye: Modernist Photography From the Elton John Collection' (Tate Modern 10 Nov 2016 – 21 May 2017) <http://www.tate.org.uk/whats-on/tate-modern/exhibition/radical-eye-modernist-photography-sir-elton-john-collection> accessed 06 Jan 2018; Whitechapel Gallery, 'Thomas Ruff Photographs 1979 – 2017' (Whitechapel Gallery, 27 Sept 2017 – 21 Jan 2018) <http://www.whitechapelgallery.org/exhibitions/thomas-ruff/> accessed 06 Jan 2018)

[89] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375, 379

[90] ibid

[91] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016)

roots of originality are slow to grow. By contrast, contemporary attitudes and views of art are in a constant state of change and development. They progress beyond the original to consider the new and impossible. Yet, Cladistic Art Theory has little capacity to deal with such progress because it relies so heavily on the concept of an enshrined original. It struggles to accept these new forms as art. Again, the emergence of photography and the introduction of mechanics into composing and capturing an image altered the way in which art can be viewed and therefore what was required for something to be qualify as art.[92] A deviation such as this was not openly welcomed by Cladistic Art Theory. Rather, it was resisted for as long as possible, to avoid an art form without a historically recognised ancestor as gaining art status. Applying a cladistic theory of art lens to the acceptance of photography as a legitimate art form reveals a hesitant and precarious approach to art which is not adequate to adapt to modern evolution. It takes a long time for a cladistic theory of art to account for deviations from the norm. This is problematic as a legal definition because it would render law unable to account for new forms of art without excessive difficulty.

Cladistic Art Theory reduces the necessity for debating the definition of a work as art when the art being considered is comparable to a recognised work that has come before. For law, this is a useful analogy because it can be compared to the importance of precedent and following binding judgments. Therefore, in law, Cladistic Art Theory can be used to simplify the process of acknowledging recognised art forms without extensive legal consideration but cannot be used alone to dictate what is art because it does not accommodate for deviations from the set norm. Although this is a useful threshold, similarities cannot in themselves provide the basis for a complete definition of art because not all art is similar. As a result, Cladistic Art Theory appears to be a theory which should only ever be used in conjunction with another. Cladistic Art Theory becomes a tool in the arsenal of defining art which hints at the tricks and assumptions that do indeed inform definitions of art.

e. The Artist Led Theory

[92] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (Penguin Books 2008)

All the theories so far discussed have focused on external or observational interpretations of art. They interpret the object before them to decide whether it is art after it has been created. In contrast, the Artist Led Theory considers the object before, during and after the creation. It is not concerned with the physical output, rather it focuses on the process. It states that art is art because it is created by artists. This theory is, on the surface, the simplest of those we have considered. It's primary focus on whether the artist considers the object to be art is one which has emerged in recent times and is continuing to gain traction amongst art theorists. It is a direct response to the inability of previous theories to reach a definite definition of art whilst conceding that the diversity of art itself prevents art from being a self-contained phenomenon. In short, under the Artist Led Theory, art is near impossible to define except in relation to the one shared characteristic, namely that it is created by artists. This Artist Led Theory is summarised succinctly by Kearns:

> 'The artist is no longer expected to respond to his fellow man's sense of beauty and it is said that there is no longer such a thing as art, there are only artists'[93]

The focus on the power of the artist is a well explored research question. Within this body of scholarship, several authors emphasise the importance of understanding the artist's intention or viewpoint when assessing the meaning of the work in question.[94] To illustrate but one example, Perry emphasises art as defined by the '*where, who or why*'[95] rather than the '*what*' or '*how*' which we have considered in other theories. The focus always rests on the artist, their viewpoint and their contextual position, rather than on the external interpretation of others. There is a degree of separation between artists and the rest of society. As artists are the creators, they are subject to processes that others are not. As consequence, they become both the guardians and the arbitrators of meaning. A good example of this consequence is the wide use of captions within museum displays. Here, the biography and intention of the artist is presented as crucial both to how we view and understand an artwork. The historical and institutional significance of captions and curationism logically progresses towards assuming the role of the artist as crucial to

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[93] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 84
[94] Michel Foucault, 'What is an Author?' in Paul Rainbow, *Essential Works of Foucault* (Vol 2, New York Press 1998); Cynthia Freeland, *But Is It Art?* (OUP 2001) 162
[95] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 73

the definition, identification and justification of art. The artist becomes the central focus of the artwork, art is simply an extension of their ideas, expression and definition. It is the artist who understands their creation and therefore the artist who dictates if it is art.

The Artist Led Theory empowers the artist to irreversible levels. It suggests that without the artist, there is no art. This phenomenon of recognising how the artist is different or better than the lay person is apparent in contemporary book titles, such as *Why Your Five Year Old Could Not Have Done That*[96] and *Think Like an Artist*.[97] These works emphasise the artist's perspective in both creating art and in seeing the world differently from a non-artist. But to suggest the artist is so different does not improve the ability to define art, rather it creates an imbalanced reality in which an art world actor is, again, too powerful. A purely Artist Led approach does little to meaningfully assist in the process of defining art because it does not create any rules or guidelines. It can be argued that the Artist Led Theory when taken to these extremes is little more than a subset of Institutional Art Theory in which the artist is the sole arbiter of determining 'what art is'. This undermines the legitimacy of art history as critical to artistic development and suggests that all artists exist independently of history, contexts, the art market and so on. However, artists are not exempt from these influences and external pressures. Artists are impacted by these external aspects prior to, during and after completing the creative process. Thus, the artist cannot be said to be so far removed that only they can define the work of art.

The Artist Led Theory is perhaps the most accommodating theory of art because anything can be art as long as it is decreed so by an artist. Yet, the Artist Led Theory is also plagued by limitations. It relies heavily on a sole artist's intention but does not account for the defining impact of external interpretation or influence. It also largely hinges on being able to construe that what the artist created is intended to be art – a feat which would be seemingly hard if the artist has died. If something is found in an artist's studio, how can it be decided if that object is or is not art if the artist is not there to confirm it. It is debatable as to whether the Artist Led Theory can be applied posthumously, especially if

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[96] Susie Hodge, *Why Your Five-Year-Old Could Not Have Done That* (Thames and Hudson 2012)

[97] Will Gompertz, *Think Like an Artist: … and Lead a More Creative, Productive Life* (Penguin 2015)

the suspected work has not been displayed or indicated to a third party as the work of the artist.[98] The Artist Led Theory, though emerging as the prominent frontrunner in contemporary art theory, does not seem to be a complete and watertight definition of art, rather it very much seems like a work in progress. A work in progress that is far from being complete.

Although seemingly simple, the Artist Led Theory is one of the most extreme definitions of art. It eradicates the previously conceived objects of art to enshrine the artist with the highest status in the art world. This is particularly problematic for law because the Artist Led Theory circumvents Danto's question, ''where are the boundaries of art? What distinguishes art from anything else, if anything can be art?'.[99] The Artist Led Theory dictates that there are no boundaries, the artist giveth and taketh away. If the artist can dictate what is and is not their art, then the parameters of art does not have a fence. If there is no fence, then law cannot draw any conclusions on art. Defining art becomes a self-serving act in which artists reinforce and preserve their importance within the art matrix – to either the benefit or detriment of art theory and criticism and to the detriment of legal cohesion.

iii. Applying Theories of Art in Law

The debate between art and law often centres around the inability for law to appreciate theories of art because fundamentally they seek different things, art boasts creativity and beauty but law seeks certainty and justice.[100] However, Harmon states that we only 'pretend'[101] that the two are not compatible, when in reality they interact often. Certain areas of law lend themselves more naturally to the consideration of art in the law, such as tax, copyright and public funding, while many struggle with the concept of art.[102] As

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[98] Karen E Gover, 'Artistic Freedom and Moral Rights in Contemporary Art: The Mass MoCA Controversy' [2011] 69(4) The Journal of Aesthetics and Art Criticism 355, 359
[99] Arthur C Danto, *What Art Is* (Yale University Press 2013) 26
[100] David Booton, 'Art in the Law of Copyright: Legal Determinations of Artistic Merit under United Kingdom Copyright Law' [1996] 1 Art Antiquity and Law 125, 126; Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 84
[101] Louise Harmon, 'Law, Art and the Killing Jar' [1994] 79 Iowa Law Review 367, 368
[102] Stina Teilmann, 'Art and Law: An Introduction' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 10

art fluctuates in law, the judiciary prefers to avoid overt engagement with art wherever possible by referring back to the American decision in *Bleistein*,[103] which is explored in the following chapter. Judge Holmes' admission that legal professionals are not trained in art, nor are they art critics, and therefore should not be able to comment on art theory has created a global yet unofficial judicial precedent in which judges avoid commenting on art and art theory.[104] The *Bleistein*[105] approach is the central Western legal approach to art[106] and the most prominent way for the judiciary to avoid engaging with art theory.[107] So much so that Markellou states that we should not underestimate the ability of Justice Holmes' statements to curve modern developments in the legal approach to art.[108] Holmes' statements have created a fear culture within the judiciary to avoid overtly commenting on the artistic theories which underpin art in law. This has led to the legal definition of art remaining hidden and shrouded in secrecy. However, law does indeed engage with art theory because art is an inherently aesthetic object The theory in art can never truly be removed so it is often subverted by law to ease the legal process.

Although judges' aim not to judge art's worth, courts undoubtedly do and must[109] define art on a 'regular basis'.[110] However, judgments often do not justify *why* the court has reached its decision on art as this would require overt engagement with art theory. Consequently, the failure of the court to explain the *why* element in art law cases has led to vast criticisms of law that, throughout the case law, there is a vast amount of 'inconsistent judicial reasoning'.[111] As will be shown the subsequent chapters of this thesis, the wide spectrum of judicial decisions further confuses the assessment of how law defines art, with the prominent trend in defining art being the desire to avoid

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[103] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[104] Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314
[105] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903) at 251 - 252
[106] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 59
[107] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 386
[108] Marina Markellou, 'Rejecting the Works of Dan Flavin and Bill Viola: Revisiting the Modern Boundaries of Copyright Protection for Post-Modern Art' [2012] 2(2) Queen Mary Journal of Intellectual Property 175, 181
[109] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 1
[110] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808
[111] Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314

engaging with art theory. This has led to criticism that judgments on art are 'conceptually rather unsatisfactory'.[112] Thus, often the circumstances arise where public opinion on the state of an artwork and the legal outcome directly contrasts with the judgment of the court.[113] However, the focus of the judiciary is to solve the legal problem and not the theoretical one. Law will continue to define art based on legal considerations which may directly conflict with public opinion because the aim is to solve the legal issue at hand, even where it reaches a seemingly illogical outcome, such as that of *Henderskelfe*[114] where Reynolds' '*Portrait of Omai*' was declared 'plant and machinery' and not art for legal purposes. This contestation further fractures the dynamic between art and law and continues to facilitate the desire to keep these two seemingly incompatible fields separate.

Farley[115] notes that the subjective nature of art clashes with the objective nature of law which leads to unjustified criticisms that law cannot pass judgment on art. Fincham also makes a critical statement on the ability of law to define art as '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.'[116] Fincham's statement is supported by the fundamental nature of law which is to provide clarity and guidance to remove ambiguity and ensure that legality is certain.[117] Thus, art cannot be, and is not, indeterminable in law. Rather because defining art is difficult to comprehend, the courts will often not explain their definitions. For example, the originality requirement is a fundamental element of copyright law but the failure to expand on what type of skill or labour is needed for the originality requirement as set by *LB (Plastics) Ltd v Swish Products Ltd*[118] was regarded as a failure by the Privy Council in *Interlego*.[119] Generally, law will always avoid defining art where necessary, focusing on the legal issue rather than the art theory one and often only

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[112] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 29
[113] Jens Schovsbo, 'How to Get it Copy-Right' in Rosenmeier M & Teilmann S (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 32
[114] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[115] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808
[116] Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314
[117] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 66
[118] *LB (Plastics) Ltd v Swish Products Ltd* [1979] FSR 145 (HL)
[119] *Interlego AG v Tyco Industries Inc* [1989] AC 217

suggest a definition where it is an absolute requirement for the case to proceed. As a result, the legal definition of art is has become littered with inconsistences[120] and cases have been criticised as 'frustrating'[121] for not elaborating on whether art theory played a role in reaching the judgment. However, law is not concerned with creating fast and hard rules on art. Rather, the judiciary would prefer to reach a legal outcome which fulfils the expectation on them to remain objective.[122]

Teilman notes that 'over the course of time, the spheres of art and law have never been entirely separate'[123] which suggests that law has always defined art in some way or form. The lack of separation will be made abundantly clear in the following chapters which explore several areas of law in which art and law interact. As art law has continued to emerge as an area of legal practice,[124] so has the multiplicity of art spread from art theory into legal theory. Law is often in denial of its aesthetic appreciation of art and art theory[125] and distrusts the subject.[126] Yet law cannot entirely avoid engaging with the subjectivity of aesthetics and art theory[127] because it is integral to art. Wherever possible, law and the judiciary will reduce the ability to engage with art theory. This can be seen through the variety of zoning techniques used by law, such as legal formalism and commodification, to reach judgments on art which are not obviously linked to theoretical considerations. Through these zoning techniques, the court can 'remake' the image[128] and focus only on the areas which are necessary to reach the judgment and thus reduce the impact of art theory upon law.

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120 Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 59
121 Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1176
122 Christine Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 812 - 813
123 Stina Teilmann, 'Art and Law: An Introduction' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 9
124 James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 481; Ira M Lowe & Paul A Mahon, 'The General Practice of Art Law' [1990] 14 Nova Law Review 503, 504
125 Brian Soucek, 'Aesthetic Exports and Experts' (The Future of Aesthetics and the American Society for Aesthetics Essay Competition, Spring 2016) <https://aesthetics-online.org/page/futureaesthetics> accessed 16 April 2019, 1
126 Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 294
127 Christine Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 845
128 Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 12

However, law cannot truly avoid art theory. Case law repeatedly shows that law must have some appreciation for art theory otherwise the judgment does not reflect an accurate portrayal of facts. Both *Haunch of Venison*[129] and *Henderskelfe*[130] highlight that where law ignores the theoretical significance of an artwork, it returns a heavily criticised judgment that is not sustainable. Legal literalism, where art is read literally and doctrinally, is not a sustainable approach to art.[131] The theory behind why it is art must be considered somehow. As shown by *Brancusi*[132] and the various Koons trials,[133] where law has some appreciation for the value of art theory, the court is able to reach a justified and supported judgment which forms a lasting precedent. Soucek notes that considerations of art theory and aesthetics occur in several other areas of law outside of those considered within this paper, such as 'design patents, trade dress... land use, zoning, and historical preservation decisions… anti-discrimination law, vendor permit regulations, and even criminal statutes.'[134] Soucek argues as much as law attempts to deny that it engages with art theory and aesthetics, these 'first-order, "retail decisions" are unavoidably made by law when determining 'whether particular objects counts as works of art or as aesthetically valuable'.[135] Art theory cannot be divorced entirely from art and the court chooses to remain ignorant to its engagement with art theory in the legal definition of art.[136] Thus, to reach a sustainable definition of art, there must be an ability to appreciate the art theory if and where it is required.

I argue that the only way to ensure a sustainable definition of art is through the Art Conundrum. Law will only trust a stable definition of art.[137] However, neither art nor

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[129] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[130] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[131] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 40
[132] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[133] *Rogers v. Koons* 960 F2d 301 (2d Cir 1992); *United Features Syndicate Inc v Koons* 817 F Supp 270 (SDNY 1993); *Blanch v Koons* 467 F3d 244 (2d Cir 2006)
[134] Brian Soucek, 'Aesthetic Exports and Experts' (The Future of Aesthetics and the American Society for Aesthetics Essay Competition, Spring 2016) <https://aesthetics-online.org/page/futureaesthetics> accessed 16 April 2019, 1
[135] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 281, 384
[136] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808
[137] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 298

interpretation of art theory are stable concepts. They rely on personal tastes and judgements. Thus, any legal definition of art must be flexible enough to accommodate this fluidity. Only through the Art Conundrum is this possible. As will be shown in the next chapter, law need only reach sufficient legal judgments on art. It does not need to account for all of the nuances of art theory. Rather, it must be able to cope with each artistic element as is necessary, but it does not need to volunteer to do so. The Art Conundrum encapsulates the current approach to art to reveal that it operates at a capacity which is sufficient for process and rather than create a new definition of art, the current approach to art needs to be compressed into one clear theory for ease of process. This one clear theory is the Art Conundrum Theory which solves the problem of art relative to the specific legal context in which it arises. Through the Art Conundrum, the court is able to adhere to the prevailing trends in defining art, such as legal formalism and commodification, while also ensuring that when questioned, there is a clear definition of art.

iv. Conclusion

Defining art is no easy feat. It is a concept which relies on viewer interpretation which means that its definition is fundamentally inconsistent because it hinges of individual tastes. Consequently, art has become a multi-layered concept that requires substantial knowledge to be understood. It is no surprise that an entire area of literature in art theory has developed on both the notion 'what is art?' but now extends to how we should be interpreting art.[138] With increased interest in the art market,[139] it is inevitable that art and law will continue to clash. The issues faced in the realm of art law are significant not just for lawyers, jurists and artists but also the wider public.[140] With the field of Art Law

[138] Liz Rideal, *How To Read Paintings* (Bloomsbury, 2014)
[139] Robert E. Duffy, 'Art and the Law. Part II: A Review of Franklin Feldman and Stephen Weil's "Art Works: Law, Policy, Practice", New York, Practicing Law Institute, 1974' [1975] 34 Art Law Journal 335, 335
[140] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 112

becoming a rapidly developing speciality in recent years,[141] further development and clear guidance on the laws concerning art is required. It is clear that the legal system has begun to respond to this development as most laws relating to art stem from the late nineteenth century through to today. However, this is still a relatively modern response to art, a subject which has existed long before the modern legal system.[142]

Anchoring a definition of art to one viewpoint leads to a skewed view which promotes particular aspects at the expense and limitations of others. A definition of art which is rooted in just one theory leads to a limited approach to art that is not compatible or sufficient for law. It risks art not being labelled as such because it does not fall within the scope of the singular theory. Each singular definition continues to provide too many strict limitations that cannot be mitigated where necessary. This reinforces the contentious nature of art and law as incompatible because law cannot expand beyond the limits of the singular theory. As will be established in the following chapters, the law cannot, and does not, apply just one theory which means that these variables continue to be problematic but are managed. It is *how* and *when* the law applies each of these theories that becomes the focus for investigation within this research. It is only through compiling the approach of each of these individual theories into one large umbrella theory for defining art, through the Art Conundrum, that some order can be brought to the chaotic process of defining art.

Like the fields of art theory, law defines art in several different ways, dependant on the area of law in which the problem arises. For example, the way in which the law defines art for the purposes of copyright is not the same as to how the law defines art for the purposes of taxation or for the sale of goods. As a consequence, I argue that the legal definition of art cannot rely on any of the established theories of art alone. The limitations that occur when utilising a singular theory to define law leaves the legal system which without the adequate tools to deal with the evolving nature of art. In response, I have established my own theory, the Art Conundrum Theory, to suggest a remedy to how we

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[141] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 481; Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 179

[142] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 51

understand the way in which law defines art. Within the Art Conundrum Theory, the law can be seen as utilising a more purposive approach which removes the confusion surrounding how law defines art. The purposive nature of the Art Conundrum succinctly establishes how law deploys several different theories of art dependant on the legal area being considered. It enables the law to embrace the multiplicity of art rather than be fearful of it. I have developed the Art Conundrum as a direct response to the way in which the law has consciously, and unconsciously, interpreted art. It is through the Art Conundrum that we can explore ways in which law and art interact while also allowing us to logically reflect upon the theories discussed in this chapter.

Consequently, with mounting pressures and desire for certainty, law will define art because it now has no choice otherwise.[143] Law must pressingly provide a definition because art continues to expand and push the bounds of what is already recognised as art by the artistic institution[144] but it cannot do so at the risk of creating a precedent which would prejudice all later transactions involving art. In the next chapter, I argue that that definition of art can only truly be found in the Art Conundrum because it appreciates the nuances of law and allows for a flexible approach to art. It accepts that law does not prioritise art theory above legal interests and aims to solve the legal problem at hand rather than deal directly with defining art. Ultimately, law will only define art where it absolutely must and when art and law are at loggerheads, 'law trumps art'.[145]

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[143] Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314, 315

[144] Peter H Karlen, 'What Is Art?: A Sketch for a Legal Definition' [1978] 94 The Law Quarterly Review 383, 385

[145] Louise Harmon, 'Law, Art and the Killing Jar' [1994] 79 Iowa Law Review 367, 399

III

The Art Conundrum Theory

The Legal Approach to Defining Art

> 'Inconsistencies have arisen as a result of statutory and case law treatment of the works of art classifications. These result partly from the shifting nature of art with time (what is art tends to change according to époque) but mainly from the variety of tests that have been legally employed to decide what qualifies as art. Courts have tended to focus on the occupation of the person producing it, the purpose for which the object is made, and, if the object is editioned, like certain sculptures or prints, the method of execution or number of pieces in the series[1]
>
> Paul Kearns, 1998

> 'The artistic is not closed, and the artistic thing thus moves in and out of the discourses that are creative of it. The moving and the shifting in, about and around cause discomfort in legal discourses requiring closure and certainty, and for this reason law has not found an effective way to connect the artistic thing itself in its material form as it connects with its intangible value, identity or status. In other words, unlike the passe-partout, the law attempts to sever the link between material and the intrinsic or the special aspect of the artistic thing that makes it what it is and, in so framing it, denies it its validity through forcing the boundaries that it imposes on the artistic[2]
>
> Marett Leiboff, 2001

Due to the vast and sporadic nature of defining art, the impact of individual tastes and the asymmetrical understanding of art amongst the public, art cannot be easily defined. The answer to what is art in theory cannot be applied directly to what art is in law. Consequently, no theoretical explanation of art is adequate enough to provide a singular statutory or precedential basis for art in law. With this idea in mind, it is no surprise that

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[1] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 161
[2] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 304

the judiciary consistently avoids deliberating on art theory in the art courtroom, limiting art to a mere chattel to reduce the consideration of art theory.

Historically, legal issues involving art have been recognised, interpreted and solved as required.[3] The Engraving Act of 1734[4] presented a stark recognition of the economic and legal value of art.[5] Under this act, art was defined based on either economic interests and principles or its physical form and creation by a recognised artist. The centuries old legal significance of copyright law[6] provides further acknowledgement that art has, for a long time, been recognised and considered within the law. Ultimately, definitions of art within the legal context are reached and are plausible. The court is capable of reaching binding judgments on art by relying on common processes for defining art, predominantly utilising legal formalism and the *Bleistein*[7] approach. However, although the court attempts to avoid deliberating on art, it is clear that such deliberation is both inevitable and necessary. Art cannot be said to be indeterminate or undefinable, in law. It is *how* law reaches this determination which is the integral focus of this research into the legal definition of art.

Van Camp argues that there have been clear historical examples of the consideration of art in law. Copyright being the most obvious. However, Van Camp draws attention to the challenging nature of art in law with definitions largely arising in response to modern legal concerns, such as those of 'copyright, entertainment law, freedom of expression, invasion of privacy, taxation and incorporation of non-profit arts organizations, to name but a few'. [8] Additionally, Leiboff indicates that the scepticism of law towards art began to emerge in response to the growth of intellectual property law,[9] which required a more aggressive interrogation of the legal definition of art. The law has never returned to the

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[3] Julie Van Camp, 'The Philosophy of Art Law' [1994] 25 Metaphilosophy 60, 65
[4] Engraving Copyright Act 1734
[5] Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017
[6] Julie Van Camp, 'The Philosophy of Art Law' [1994] 25 Metaphilosophy 60, 65
[7] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903) at 251 - 252
[8] ibid
[9] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 297

simplistic position of the Engraving Act, which drew the basic distinction between original design and copy to protect artists above mere craftsmen.[10] As art has diversified, the issues have become more complex and the initial legal formalist definitions[11] of art are less useful, resulting in increasingly forced engagement with art theory.

As engaging with art theory is increasingly unavoidable, the court often simply avoids acknowledging that it has engaged with art theory. The way that the court deliberates on art is undoubtedly through the utilisation of a variety of zoning techniques and minimum thresholds in order to decide whether something is or is not art. I argue this process can be summarised through the Art Conundrum Theory. The Art Conundrum is my approach to encapsulating the legal treatment of art into one framework or theory. It is utilised by the judiciary and a majority of legal systems to reduce art to a manageable concept that is restrained within the context of the law. The application of the Art Conundrum solves the problem of defining art efficiently by placing the definitional question within the individual case's deliberations. Consequently, I argue that the Art Conundrum Theory is already applied unwittingly by the judiciary.

Where possible, the judiciary will avoid openly deliberating on art. The huge variety of theoretical justifications for defining art risks overwhelming judicial process, resulting in a confused and unreliable approach to art. By avoiding openly deliberating on art, the judiciary have developed several coping tactics to reach a definition of art without openly considering art theory. Thematically, law defines art based on nominal notions, such as the tangibility of the object, the nature of art as too subjective and the ability to avoid profound philosophical debate. This allows the judiciary to simply identify art as and when is necessary for the legal question at hand, instead of prescribing a wider definition of art. Through this, art can be constrained to a specific legal context which has resulted in an influx of legal outcomes which define art in sporadically different ways.

As will be shown within this chapter, the ways in which law deliberates on art has led to the definition of art becoming context heavy and dependant on the legal problem at hand.

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[10] Engraving Copyright Act 1734

[11] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 231

Thus, law dictates that this be the foundational base for the Art Conundrum Theory. The Art Conundrum considers art to be a problem which must be solved and constrained within the legal context in which it arises. Law, often unconsciously, defines art by considering the legal problem before addressing the artwork itself. This leads to inconsistent yet binding judgments on art which only assess art theory and the artistic merits of the work where absolutely necessary. This often allows the judiciary to avoid deliberating on art at all. Where possible, law will reduce art to basic definitions through techniques such as using legal formalism, which is addressed in the following section. The Art Conundrum has developed as a direct response to the hesitation held by the judiciary and law in defining art and it is this continuous hesitation which has created confusion and doubt within the legal definition of art. The purpose of this chapter is to reiterate and exemplify exactly how and why law avoids deliberating on art before highlighting the fundamental importance that the Art Conundrum plays in all legal considerations on art, even though it often operates subconsciously.

Art can be pragmatically defined in law when considering art within a specific legal context. By utilising the parameters of the Art Conundrum, art can be contained to a manageable concept in each instance it arises. It is within these instances of art appearing within a specific legal context that the Art Conundrum operates and reaches a legal definition of art. Although the judiciary claims to avoid deliberating on art, they undoubtedly utilise the Art Conundrum to reach appropriate definitions of art that are dependent on the legal context in question.

i. The Bleistein Approach to Defining Art

By failing to elaborate on the wider art theory within art, the courts rely heavily on simplistic zoning definitions of art, such as those found in legal formalism. These zoning approaches allow art to be identified purely on physical or commonly agreed characteristics rather than requiring some aesthetic, academic or critical theory-based engagement with the work. Zoning techniques such as those found in legal formalism are largely utilised within art law legislation, which allows the court to refer to established and static principles without much expansive comment. Thus, when examining art in the first instance, the object in question often only needs to *look* like an artwork to be

considered art for legal purposes. But what happens when art doesn't look like art? Or where the object's status as art is disputed?

Adler argues that with Post-Modern art which doesn't always look like art, courts will struggle to identify the work of art.[12] Leiboff echoed these sentiments years later, emphasising that 'problems arise when art does not look like art.'[13] These scenarios consistently force the court to consider that art is an aesthetically and theoretically charged concept and thus simplistic approaches to art may not always suffice. Yet, there is an ongoing trend that courts do not want to make any critique in art theory beyond that which is absolutely necessary. Moreover, when art is in question, the judiciary consistently attempt to avoid creating legal precedent and often adhere to the belief that the courts have no business pronouncing what is or is not art.[14] This inherent reluctance to comment on aestheticism or acknowledge art as a complex web of art theories can be traced back to the famous statement[15] made by Justice Oliver Wendell Holmes in the 1903 case of *Bleistein v Donaldson*.[16]

In *Bleistein*,[17] Bleistein and his employer, Courier Lithography Company, brought a claim for copyright infringement against their competitor, Donaldson Lithography Company. Bleistein had designed and produced several chromolithographs for Benjamin Wallace, the owner of a travelling circus. When Wallace ran out of posters, he instructed the Donaldson Lithographing Company to produce copies of three of the original posters. Bleistein claimed for copyright and Donaldson argued that, as advertisements, they were not protected under copyright law. The United States Court of Appeals for the Sixth Circuit found no infringement, but this decision was reversed in the Supreme Court. The crucial statement from this case, which has shaped the judicial approach to art, came from Justice Holmes. In his opinion, Justice Holmes famously stated that:

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[12] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1377
[13] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 7
[14] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 806
[15] ibid 807
[16] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903) at 251 - 252
[17] ibid

> '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.'[18]

This statement is referenced extensively in the case law and literature which comment on the legal approach to art. The *Bleistein* approach has become the foundational starting point for most legal approaches towards art.[19] So much so that it has become 'central to all Western Legal Systems',[20] developing alongside early scepticism towards intellectual property.[21] The magnitude of this cannot be understated, with equivalent sentiments appearing throughout a vast number of art law cases. It is therefore not surprising that a similar sentiment was echoed in 1987 in the case of *Pope v Illinois*,[22] where it was stated that 'for the law courts to decide 'What is Beauty' is a novelty even by today's standards.'[23] Under an approach which delegates the legally trained professionals as incapable or inept at defining art, the judiciary cannot pass comment on art because they are perceived to be incapable of understanding the work in question. As the judiciary are not art experts, nor are they recognised as legitimate actors within the art world, the *Bleistein* approach has become the most prominent judicial get-out clause in art law cases.[24]

Bleistein is quoted time and again to justify this avoidance to enter into artistic debate and facilitates an approach to art which does not focus on these perennial issues[25] but rather restricts the focus to the legal implications of the trial. Thus, it is not surprising that the case law which concerns art is 'conceptually rather unsatisfactory'[26] as judges avoid making strong comments and hide behind perceived ineptitude. The judiciary must be, and is, capable of reaching definitional outcomes on art. Although the *Bleistein*

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[18] ibid
[19] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 8
[20] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 59
[21] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 297
[22] *Pope v Illinois* 481 US 497 (1987) at 505
[23] ibid
[24] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 386
[25] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 337
[26] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 29

approach is often the first reaction to art in law, it does not mean that the judiciary are actually incapable of, or do not regularly, pass comment on art and art theory. Farley, one of the most contemporary writers in the field of aesthetics and law, notes that courts decide what is art on a 'regular basis'[27] whether they choose to or not. It is not possible to avoid art theory in art law cases because art inherently requires some recognition that it is different.

All legal cases involving art engage in art theory, regardless of whether its intentional, because the theory in art cannot be fully ignored.[28] Therefore, Farley argues that Holmes' statement is not a complete red tape for the ability of the judiciary to make judgements on art. As Holmes' statement applies only to judges trained *only* in the law and includes the qualifying statement of 'narrowest and most obvious limits'[29] judges who are trained in art theory or are operating within the narrow and obvious limits of art can and should pass comment on art in law. Ultimately, Holmes' sentiment has 'become a refuge for judges who do not want to engage with aesthetic questions'[30] but this does not entitle judges to be ignorant of their ability to engage with art theory. The judiciary must pass comment on art, and unavoidably judge, even if they try not to.[31] So logically, the question of *why* the judiciary avoid commenting on art comes to the fore. This begs the question as to why Justice Holmes would come forward with such a statement and why has it become such a common feature within the realm of art law?

ii. Subjectivity and Ignorance in Art Law

The biggest issue in defining art in law originates from the perceived incompatibility between art and law. They are often considered to be separate and incompatible, with law being objective and art, subjective.[32] This relationship could be said to be causative. As art is too subjective for law, the judiciary are overly restrictive to combat the breadth

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[27] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808
[28] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 6
[29] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 818
[30] ibid 818 - 819
[31] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 1
[32] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808

of interpretation. To do this, law becomes increasingly ignorant of the relationship between art and art theory. One of the biggest obstacles in the legal definition of art is that the question 'what is art' is subjective and will always return a subjective and highly personal answer. However, for law, the judiciary is expected to be objective.[33] Consequently, the impact of individual tastes has left the definition of art in law littered with inconsistences.[34] As judgements in art and art theory are 'hopelessly subjective',[35] the definition of art can vary drastically dependent on the opinions of the judiciary and the jury in any specific instance. This is exemplified in the Chatterley obscenity case,[36] where the judicial opinion heavily influenced the jury's verdict.[37] Thus, the *Bleistein* approach, which removes the necessity for the judiciary to even engage with art theory, is neither surprising nor unexpected.

Kearns suggests that judges are not empathetic to artists and often fail to fulfil their duty to adjudicate fairly in art cases[38] and artists worry that judges are too restrictive in their interpretations of art.[39] For Kearns, judges return very literal interpretations of art rather than grasping the cultural significance of the work in question.[40] Moreover, criticisms of the discordance between judicial and artistic subjectivity also leak into judicial commentary. In the case of *United States v Playboy Entertainment,*[41] it was stated that judgements in art 'are for the individual to make, not for the Government to decree.'[42] Perhaps the habit of avoiding artistic deliberation in judgments is not born from the inability of law to comprehend art but rather the desire of the legal system to avoid skewing judgments in art based on the individual tastes of members of the judiciary.[43] In

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[33] ibid 812 - 813
[34] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 59
[35] Brain Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 386
[36] *R v Penguin Books* [1961] Crim LR 176
[37] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 42
[38] Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1776
[39] William Landes & Daniel B Levine, 'Economic Analysis of Art Law' in Victor A Ginsburg & David Throsby (eds), *Handbook of the Economics of Art and Culture* (North-Holland 2006) 215
[40] Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1776
[41] *United States v Playboy Entertainment Group Inc* 529 US 803 (2000) 818
[42] ibid
[43] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 296

those cases where judges have commented, such as that of *Re Pinion*,[44] the subjective commentary from the judge returned a comment that Pinion's work was 'junk' and 'rubbish',[45] a personal comment which did not perpetuate the objective standard of law.

The hesitance of the judiciary to comment on art theory reveals the underlying concern that judicial involvement in judgements on art will inevitably return a subjective outcome, even if it is based on objective legal standards. The subjectivity of judgements is further compounded by the combination of the individual tastes of each member of the judiciary, the nature of the work in question and the specific legal context in which the work arises. As there are so many variables, the outcome of every art law case is unique and cannot be directly transplanted elsewhere. It is, therefore, not surprising that one of the largest concerns of the judiciary is that the introduction of blanket rules in relation to art would create an overly restrictive approach towards defining art in law. If jurisdictions create hard and fast rules on art, it risks creating regional asymmetries. These can then become detrimental to the law and wider art market, as can be seen in the decline of Dutch art transactions due to an increase in the VAT on art in Holland.[46]

Judgments on art in law cannot be easily transferred between cases because the reasoning for the outcome of each case is often not immediately clear as the judiciary avoids overt commentary on art theory. Moreover, even when it is explicit, it is chained to the specific case of origin, avoiding hypothesising on art in broader terms. Decisions on art in law are subjective but only relevant to the original content in question, they rarely reach a transferrable objective standard. Consequently, 'judicial concepts of art are not, of course, consistent'[47] as is illustrated in the various areas of law which are explored in the following four chapters.

Although the judiciary attempt to avoid handing down judgments based on subjective tastes, any outcome concerning art feeds into the greater ontology of 'what is art'.

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[44] *Re Pinion* [1965] 1 Ch 85, 106
[45] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1,2
[46] Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016) xii
[47] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 50

Whether the courts choose to or not, they continuously engage with the subjectivity of art theory.[48] So much so that it has to led criticisms that the court is willing to be ignorant in its approach to defining art to ensure it reaches a judgment which does not further burden the legal process. Attempts to avoid art theory are based on the desire to avoid falling into the caveats found in the definition of art that are so integral to its contemplation. So much so that Kearns is incredibly critical of the ability of the court to comment on art, stating that his criticisms 'follow extensive research of the judiciary's poor degree of aptitude for comprehension of art, focused on American, French, but mainly English judges.'[49]

As the word art does not have a clear foundation for definition,[50] the legal definition of art varies depending on jurisdiction. Historically, when courts would engage with art theory, many would rely on the American judgment in *Olivotti*,[51] that a work of art must 'imitative of natural objects… and appealing to the emotions through the eye alone'.[52] Within *Olivotti*,[53] carved marble seats and a font were imported into the United States under the classification as sculpture. The Customs Court however declared that they were not sculptures because although beautifully carved, they were not representational of the natural world. Without imitation, they could not be considered to be sculptures. This judgment greatly restricted the definition of art by limiting art to mimesis or Imitation Theory. However, *Olivotti* has since become redundant as art has evolved past imitation and, as shown in the previous chapter, Imitation Theory is an inadequate individual basis upon which to define art. Yet, on few occasions has the court attempted to address this development. By attempting to ''stay out' of decision-making about art',[54] the 'coyness'[55] of the courts has created inconsistent legal principles. The implementation of legal principles in art, for example in English public morality law, 'reveals a lacuna of judicial

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[48] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 845
[49] Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1776
[50] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 66
[51] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[52] ibid 46
[53] ibid
[54] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 9
[55] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 300

knowledge'.[56] The judiciary is trailing behind the developments of art theory and needs to catch up.

To account for the discrepancies in judicial knowledge, the court has a habit of extracting elements of the artwork to reach legal judgments without viewing the image as a whole. The process of assessing only elements of the image leads to effectively 'remaking' the image[57] to appease the requirements necessary for the court's preferential legal decision. When the image of art is remade in the law without due attention given to the importance of art theory, the result is a clear number of questionable judgments and criticisms of law's ability to handle art law cases. Again, it is clear that the subjective cause and objective effect principles are at play. For example, controversial art is subjected to legal measures which are 'inadequately conceived, inconsistent, and unnecessarily draconian'.[58] Because understanding controversial art requires a nuanced understanding of art theory, to avoid this caveat the effect becomes a restrictive law. Laws governing controversial art are often based in strict liability,[59] the reason for the offence is not considered in whether or not the offence is justified. For controversial art, the justification lies in art theory. Kearns has also criticised these measures by referring to the Gibson obscenity trial[60] as an example of the court caricaturing the public. The court's argument, that even gallery visitors cannot understand artistic merit and what is obscene even if it appears in a gallery setting,[61] was used as a justification for the court's limited consideration of art theory in its judgment.

For Kearns, if the law cannot facilitate the subjective nature of understanding art, then it cannot reach an adequate definition and must make a mockery of art in order to reach a legal definition.[62] Consequently, law often avoids entertaining broad questions like 'what

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[56] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 53
[57] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 12
[58] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 655
[59] ibid
[60] *R v Gibson* [1991] 1 All ER 439 (CA)
[61] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 658
[62] ibid

is art' or 'why is something art' and instead focuses on the legal problem at the expense of the art itself. In doing so, law aims to circumvent the issue of art theory.[63] The most obvious way it does this is by reducing the multitude of art theory in art altogether, by delineating art as property.

iii. Art as Property and Legal Formalism

Although the question, "what is art" is the 'quintessential unanswerable question',[64] the law must be capable of reaching a legal definition of art. To avoid this question, the legal approach to art is often formulated in such a way that there is a limited overt consideration of art theory, if at all. To facilitate this approach, law often focuses on the physical and tangible properties of art, restricting the intangible nature of art theory to an inconvenient and often ignored consideration. To reduce art theory in law, art is generally divided into the tangible and intangible.[65] Most law focuses on dealing with the tangible elements of art. Art is generally treated as property which is subject to general contract laws, the Sale of Goods Act[66] and Consumer Rights legislation.[67] English law also applies the rules of *caveat emptor*[68] and generally focuses on art as a commodity, an interesting trend which is expanded upon in the latter chapters of this thesis. Where arguments concerning what makes art special property cannot be harmonised, judicial deliberation on art and art theory is kept to a minimum or avoided altogether. However, by attempting to avoid engagement with art theory, the court denies the fundamental elements of artistic existence while implicitly acknowledging that there is something special about art[69] because law continuously reaches judgments on art which do not always adhere to regular property law. The question in this section is *how?* If the court

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[63] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 810
[64] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 147
[65] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 304
[66] Sale of Goods Act 1979
[67] Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016) 109
[68] ibid 108
[69] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 296

deliberately attempts to avoid considering art theory, how can it reach legal judgments on art?

The primary legal approach to art is to reduce the work to a chattel to also reduce the role art theory plays in art. This is evident throughout several areas of law. In the Gibson obscenity case,[70] the Court of Appeal did not refer to Gibson as an artist in their judgment. This ensured that the defence of artistic merit under the OPA 1959[71] could never have been considered as legally enforceable.[72] Alternatively in *Leaf*,[73] concerning the fulfilment of a commission contract by John Constable, the court ignored external factors which were important to the work as being a work of art by Constable. Instead, the court focused on the literal depiction of the image and essentially 're-read' the object[74] to ease legal proceedings. In the case of Lady Chatterley's Lover,[75] the court took the offending passages from their context before reading them,[76] stripping them of their artistic significance. Alternatively, in the Adam Ant face painting case,[77] the court refused copyright protection on the grounds that a 'painting is an object; a paint without a surface is not a painting'. Critically, the court did not consider the totality of the work[78] and thus did not need to engage with the debate in art theory concerning the significance of the human face as comparable to a canvas. Moreover, perhaps more crucially, it also highlights the bias of the court for a chattel-based understanding of art suggesting a painting is a physical object comprised of paint on canvas.

To avoid the problem of art theory, the secondary approach by the court is relying on the habit of utilising zoning techniques. These can be used to indicate specific features that qualify something as a work of art or to draw distinctions when something *cannot* be art.

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[70] *R v Gibson* [1991] 1 All ER 439 (CA)
[71] Obscene Publications Act 1959
[72] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 31 - 32
[73] *Leaf v International Galleries* [1950] 2 KB 86
[74] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 12
[75] *R v Penguin Books* [1961] Crim LR 176
[76] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 40
[77] *Merchandising Corporation of America Inc v Harpbond* [1971] 2 All ER 657
[78] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 12

Further zoning techniques include the utilisation of legal formalism, the inadmissibility of artworks with a function or utility to be described as art or the significance of display within an art institution.[79] Although there are clearly provisions for the protection and deliberation of art, as is clear from the existence of art focused defences such as that of the Indecent Displays Act,[80] the requirements for classification within these statutory provisions do not require overt engagement with art theory. The idiosyncratic caveat to these defences are that it is the physical context rather than the actual artwork which provides the protection.[81] Alternatively, it is the utilisation of legal formalism, describing artworks based on their physical presentation which protects the work of art, as is clear in the CDPA.[82] These provisions highlight that again the court acknowledges the significance of art but is restrictive in its consideration of the role of art theory in defining art.

Historically, the acknowledgement of an official legal definition of art has been limited. Where present, it was simplified to create a basic zoning threshold to decide whether something was art. As per *Olivotti*,[83] the orthodox precedent for art law cases which was overturned in the infamous and revolutionary *Brancusi*[84] case, definitions of art which are outwardly acknowledged by the judiciary were created with the intention to create a selective definition of art[85] which could be aligned with a singular and basic theory. In the case of *Olivotti*, art could only be that which was mimetic, a representation of the natural world, and in alignment with Imitation Theory.[86] Although mimesis is no longer the sole legal approach to art, this basic approach indicates that there has always been an element of art theory in art law judgments.

The notion of thresholds or categories of acceptable art forms runs throughout the legal definition of art. Art is often reduced to nominal issues, such as whether or not it is a

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[79] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 407
[80] Indecent Displays (Control) Act 1981
[81] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 655
[82] Copyright, Designs and Patents Act 1988
[83] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[84] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[85] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 405
[86] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)

useful object or purely decorative, to further reduce judicial engagement with art theory. For example, in the United States, the courts draw a clear 'distinction between fine arts and useful objects'.[87] This distinction is made to reduce the complications of having an artwork which is subject to both design laws and regulations which apply explicitly to works of art, two similar but altogether different areas of law. This approach reduces the work of art to a non-functional object which exists for beauty and beauty alone. However, through this, law subconsciously supports the aesthetic school of beauty without direct acknowledgement. A further example is the US requirement for sculpture to not be 'capable of any functional use'.[88] These thresholds allow the law to reduce art to simple interpretations of Aesthetic Theory which do not require further investigation by the judiciary. The reductive nature of simplifying art into limited categories of accepted forms is a common criticism of the legal definition of art. For Soucek, like many other scholars, the legal response to the 'what is art?' quandary demands a more expansive definition. Soucek is critical of reducing art to 'disinterested pleasure'[89] because it creates a restrictive and ignorant definition of art. The answer to the question 'what is art?' is no longer, and cannot be, simply answered by stating a physical form of art, whether that be a painting, an engraving or similar physical output. However, unfortunately for wider art theory, legal formalist definitions of art that simplify art into lists of accepted forms are common, popular and prevalent within the legal definition of art.

One of the crucial zoning techniques used in the legal definition of art is legal formalism. Legal formalism reduces the expanse of art to a list of acceptable categories. Pila is one of the most vocal critics of legal formalism,[90] as is Karlen who denounces the inability of the court to refer to a definition of art which is not found in the Oxford English dictionary.[91] Pila denounces legal formalism because it leads to a severely restricted definition of art which focuses on non-aesthetic materialism.[92] Formalist definitions are not concerned with wider art theory or with the justification for a work of art. Legal formalism is

[87] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 407
[88] ibid 409
[89] ibid 411 - 12
[90] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 231
[91] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 55
[92] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 233

concerned only with form. Walton's formalist organisation of art into categories of accepted art forms[93] is denounced by Pila as not fit for the purposes of legal definition because it further develops a formalist definition which fails to understand how art is perceived and digested.[94] The severe limitations of legal formalism are best understood in practice. For example, in the Oxford English Dictionary, art is defined as:

> 'art, *n.*[1]
>
> 8a. The expression or application of creative skill and imagination, typically in a visual form such as painting, drawing, or sculpture, producing works to be appreciated primarily for their beauty or emotional power. Also: such works themselves considered collectively
>
> b. The theory and practice of the visual arts as a subject of study or examination; (also) a class or lesson in art.'[95]
>
> 'Phrases 3b. *work of art*: something produced or created by skill or craft. In later use *spec.*: a product of the creative arts, *esp.* one with strong aesthetic or imaginative appeal; a fine picture, sculpture, poem, musical composition, etc. Also in extended use.'[96]

This definition of art is severely restricted and fails to acknowledge art's complexity. It reduces art to physical outputs and lists, dampening the expansive nature of art. Crucially, to some extent, the law acknowledges that this is not an adequate definition. Although still an approach which continues to inform statutory provisions, beginning with the Engraving Act[97] and still applicable today under section 4 of the Copyright, Designs and Patents Act[98], it is no longer the sole approach to defining art in law. Karlen's criticism of the use of the formalist Oxford definition of art is not concerned with the base line of enquiry created by statutory provisions. Instead, it is aimed critically at the judicial

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[93] Kendall Walton, 'Categories of Art' [1970] 79 Philosophical Review 344
[94] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 244
[95] Oxford English Dictionary Online, 'art, n.1' (Oxford University Press, June 2018) <http://www.oed.com/view/Entry/11125?result=1&rskey=z2M6Hf&> accessed July 10, 2018
[96] Oxford English Dictionary Online, 'work, n.' (Oxford University Press, June 2018) <http://www.oed.com/view/Entry/230216> accessed July 10, 2018
[97] Engraving Copyright Act 1734
[98] Copyright, Designs and Patents Act 1988, s 4

interpretation of art and reluctance of the judiciary to incorporate the influential commentary of outside sources when making judgements on art.[99]

For law, art can be defined solely using legal formalism when there is no necessity for interrogating further because the work in question is obviously art and it is simple and straightforward. However, where the status as art is called into question, the legal system can expand beyond formalism if it is too restrictive or appears problematic. Thus, formalism inevitably creates the foundation of the definition of art but is not the absolute definition. It has become the default position from which the courts can then develop in accordance with the specificities of an individual case. This process is what I have encapsulated as the basis of the Art Conundrum. The ability of the courts to expand beyond legal formalism is crucial because it indicates that even when attempting to avoid engagement with art theory, the court is relying on a theory of art, that the physical properties within the work define the artwork. This is, in turn, further evidence that the court can and will engage with art theory. The reality that the courts are capable of engaging with art theory can be found in a small number of exceptions to the general avoidance of obvious consideration of art theory by the judiciary. Although these examples are far and few between, they serve as crucial indicators of how the court has both engaged with art theory and broken away from simple legal formalism and zoning thresholds.

Leiboff highlights that both the infamous Brancusi trial[100] and that of Serrano's '*Piss Christ*'[101] are clear examples of where the court has explicitly engaged directly with the work of art, even if they did so 'without adopting the language or tone of connoisseurship'.[102] Brancusi is the oft-cited and most prevalent example of the court engaging with art theory. In summary, the US customs case of *Brancusi* engaged with whether the sculpture in question was actually art.[103] To do so, it openly engaged with

[99] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 55
[100] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[101] *Archbishop of Melbourne v Council of Trustees of National Gallery* [1998] 2 VR 391
[102] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 16
[103] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

the opposing art theory debates of both sides.[104] However, this was not without resistance and it is notably a direct reflection on the hesitation and unwilling nature of the court to engage with art theory unless absolutely necessary. Additionally, Farley notes that it is often in the customs courts that judgments which debate art theory are irrefutably clear,[105] which may perhaps be linked to the fact that there are significant sums attached to the state interest in the property that echo the economic significance of art. The historic significance of Brancusi is critical because it made redundant the *Olivotti*[106] approach and is still cited today as a leading case in the legal definition of art. Thus, it also acts as a key indicator of the lack of development of law by highlighting that the last significant decision on art theory within art was made in 1928, over 90 years ago. For example, when read closely, the similar case of *Haunch of Venison*[107] from the early 2000s, is a retelling of the Brancusi case. There is an obvious fear to further develop the engagement with art theory in law and a preference for the continual constraint of art to well-known patterns, trends and established principles, many of which do not service art in law.

Yet, these fears seem unfounded. The legal system is capable of considering art theory as *Brancusi*,[108] along with *Olivotti*,[109] *Haunch of Venison*[110] and many others explored throughout the following chapters will indicate. Cases such as these initially serve as a clear example of how the court can and does engage with art theory where necessary. These cases also show that the *Bleistein* approach[111] is outdated as the judiciary is capable of engaging with art theory even without extensive expertise in art. Moreover, these explicit examples of art theory engagement, which buck the trend of ignorance in the court, suggest that perhaps the court is not so ignorant after all. The similarity between cases which explicitly engage with art theory compared with those that do not highlight

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[104] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 850
[105] ibid 839
[106] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[107] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[108] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[109] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[110] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[111] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

that there are trends in the way that law approaches art. These trends clearly dictate that law is capable of engaging with art theory, even when it claims not to do so. Thus, although seemingly law tries to remain impartial to the importance of art theory in law, it reaches a bipartisan definition by sometimes engaging consciously with art theory and sometimes subconsciously. Artistic debate is always present even when the judiciary attempts to avoid it. Therefore, although the approach towards art attempts to restrict the deliberation of art theory, whether that be through treating art like property or relying on zoning techniques like those found in legal formalism, in order to reach an outcome on art, the engagement with art theory is inevitable.

iv. Acknowledging Theory in Art: The Unspoken Truth

Engagement with extensive art theory in law is subtle. Although law is outwardly hostile to art theory overall, as exemplified by both the *Bleistein* approach[112] and the general treatment of art as property, a legal definition of art cannot be reached without acknowledging it. This is because art is fundamentally linked with art theory. Even when treating art as a chattel or by using basic and restrictive definitions of art, such as those found in formalism, art theory plays a role. Artworks cannot be split from their nature in art theory so the court cannot truly escape the unavoidable interaction between law and art theory. Therefore, even when attempting to avoid art theory, the court must utilise a theory-based definition, albeit a basic and restrictive one. When the court aims to refrain from commenting on art, they do not succeed in avoiding art theory completely. Rather the judiciary simply disguise the fact that art cannot be split from the significance of art theory in its nature, so they subvert it. The focus of the trial is often a nominal theory decision rather than an ontological one. In art law cases, the court will always pick the easiest problem to consider which requires the least engagement with art theory. Often this is whether the work of art physically resembles established categories of art. The court resolves this by using legal formalism, one of the least expansive theories of art. Art within the court is not actually a case of avoiding art theory, it is actually about avoiding the dangers of getting ensnared in an overly complicated debate on art theory wherever possible.

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[112] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

The most prevalent way in which the court avoids acknowledging the art theory in art has been explored above, namely that the court restricts art to a chattel in an attempt to reduce or ignore engaging with these theories. As established, this does not remove the theory-based elements from the work of art, it simply subverts or reframes the artistic issue to one which is commonplace in law, the general handling of chattels. By reducing art to physical outputs, it draws on the most legally digestible of art theories, legal formalism. Legal formalism is so simple that it almost surpasses as not being linked to art theory at all, hence why it has been separated away from the chapter on art theories and stands alone in this chapter discussing the legal approach to defining art. Legal formalism is the base from which the court begins to form a judgment on art and is supported by statutory provisions which embrace formalist definitions. The aim of the court is to reduce engagement with art theory. Thus, formalism is just one of many techniques utilised by the court to avoid acknowledging the importance of art theory in defining art.

Another technique used by the court to attempt to avoid engaging with art theory can be found in the avoidance of court to consider artistic quality or merit. The court prefers to avoid deliberating on what is "good art" or "bad art"[113] and simply focuses on whether an artwork fulfils the specific formalist definition of art. This is arguably a direct outcome of the *Bleistein* decision,[114] because deciding whether art is good or bad would require some understanding of art theory, something which judges purportedly do not have or do not wish to have. It is only where a further legal qualifier is required that the court will consider the merit of a work of art[115] and often shift this judgement to experts within the art world, because it requires overt engagement with art theory. By relying on the artistic decisions of approved institutions and art world actors, the court reduces the necessity to overtly form its own theory-based decisions on art while unwittingly promoting the significance of Institutional Art Theory.

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[113] Kenly E Ames, 'Beyond Rogers v. Koons: A Fair Use Standard for Appropriation' [1993] 93(6) Columbia Law Review 1473, 1519

[114] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903); Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 820

[115] ibid 824 – 836

Alternatively, the court may to choose to reduce art to a mere chattel because removing the artistic message eases the judicial process. The desire to avoid art theory is so strong that even where the work is recognised as art, the court will avoid engaging with elements of the work which could drastically alter the interpretation. In the Gibson obscenity trial,[116] Gibson's' message about disregard for life, ornamentation and postmodernism was critical to the interpretation of his work '*Human Earrings*', yet the court chose to place an obscenity charge based in strict liability against the artist[117] and try the work under an offence which did not acknowledge the significant nature of the work as art.[118] Without considering meaning and intention, specific art defences are no longer available and the court does not have to make an overtly art theory based decision by weighing up the significance of the art in question. This approach in legal literalism is heavily criticised as inadequate to deal with the specialities that arise in cases which deal with art.[119] When art is seemingly stripped of its aesthetic qualities, the court avoids openly engaging with art theory and does not acknowledge the significance of art theory in its judgments. This has led to consistent criticism of the inadequacy of law to adjudicate on art.

The avoidance of acknowledging the art theory elements of art in judicial reasoning has further compounded the segregation of law in the art world. It is often beneficial to settle prior to reaching the courts, with Ames attributing this to the legal uncertainty created by the court in art law cases.[120] It is often not clear the extent to which the court will acknowledge the art theory based elements of the work which makes going to trial a high risk venture. Art is fundamentally a property founded in art theory and the treatment of it as seemingly not so has led to skewed judgments. Even lawyers have called for greater clarification on *why* the judiciary or jury have reached a particular outcome. For example, Kearns argues that the Lady Chatterley case's[121] outcome is 'frustrating' because

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[116] *R v Gibson* [1991] 1 All ER 439 (CA)
[117] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 657
[118] ibid
[119] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 37
[120] Kenly E Ames, 'Beyond Rogers v. Koons: A Fair Use Standard for Appropriation' [1993] 93(6) Columbia Law Review 1473, 1484
[121] *R v Penguin Books* [1961] Crim LR 176

although no obscenity charge was found, the jury did not clarify if the work was factually obscene or redeemed by its artistic status.[122] The deliberate avoidance of elaborating on such a crucial decision allows the court to remain outwardly ignorant to the significance of recognising the artistic merit or art theory in the work.

Many of these frustrating outcomes are the result of these different techniques utilised by the court to avoid acknowledging their involvement in the consideration of art theory. Whether it be through the courts engagement in 'displacement', under which the crux of an issue involving art is reframed to focus on a non-aesthetic issue,[123] or the court's ability to hyper focus on the significance of the evidence presented to the court, or in some cases, ignore explaining the reasoning for the outcome at all,[124] the court avoids overtly acknowledging the importance of art theory in art. However, these techniques do not remove the theory from art, rather they facilitate a legal approach to art which does not *need* to acknowledge its involvement in the theory debate, even though it cannot avoid this fact.

When judges protest that they do not engage with art theory, this is not true. Rather, they do not actively acknowledge their engagement. In fact, when the court attempts to avoid making decisions on art which rely on art theory, such as in the *Gibson*[125] obscenity trial, the case of Lady Chatterley's Lover[126] or even *Bleistein*,[127] the court is making decisions using art theory because art is fundamentally linked to art theory. Moreover, the case of Lady Chatterley's Lover[128] was a clear defeat for legal literalism as it emphasised that there is more to art than its literal interpretation and there is something more to it which must be acknowledged by law.[129] Soucek argues that judges makes aesthetic decisions constantly, from decisions made in public-funding and land use through to the more

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[122] Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1176
[123] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 836
[124] ibid 839
[125] *R v Gibson* [1991] 1 All ER 439 (CA)
[126] *R v Penguin Books* [1961] Crim LR 176
[127] *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903)
[128] *R v Penguin Books* [1961] Crim LR 176
[129] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 40

artistically inclined endeavours such as copyright and obscenity.[130] These decisions, many of which are referred to as 'first-order, "retail decisions" are consistently made to determine 'whether particular objects counts as works of art or as aesthetically valuable'.[131] By making retail decisions on art, the court is able to utilise formalism and economic valuations in defining art. This keeps all judgments at surface level and subverts the issue of art theory. Yet, this does not mean that the court is not engaging with these theories. Leiboff is strongly vocal about the engagement of the judiciary with art theory through their choice to reflect on certain aspects of a work of art or to acknowledge that the work has artistic qualities, with the tendency to be to reflect on the physical or formalist elements of the work.[132] Moreover, Farley notes that even where judges attempt to avoid engaging with art theory, it often occurs disguised as something else or is obscured from view.[133] For all three of these contemporary writers, law, the courts and other government bodies fundamentally rely on art theory, even though they may be unaware or intentionally ignorant of this engagement.[134]

Leiboff refers to the process of the courts reframing the view of art as the 'textual 'recreation' of the object or image'.[135] It allows the court to assess works of art without truly considering the implications of the work as art. The court subverts the nature of the work of art and its implications in art theory, while facilitating a reductive engagement with the work in question. The artwork is recreated within the context of the court and through this recreation is seemingly stripped of its base in art theory. This 'taming' process allows the approach to art to be driven by commerce, keeping law in the comfort of what it already knows.[136] The image is reframed to address the legal issue at hand, dictated by the desire to only consider the artwork relative to the legal context. Soucek notes the importance of the legal context because it underpins why the artwork is in the courtroom and constrains any art theory judgements relative to the specific legal

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[130] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 382
[131] ibid 384
[132] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 9 – 10
[133] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808
[134] ibid 845
[135] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 10
[136] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 297

issues.[137] The contextual recreation of art allows judges to rely on either the *Bleistein* approach[138] or legal formalism as a base for defining art because it tames the wild theory based elements of art and removes its prominence. Thus, it is consequently apparent that only when art cannot be displaced from its theory, such as in the Brancusi case,[139] or only where it is 'able to shift from being an ordinary chattel to one which is obviously art',[140] judges must actively acknowledge that they are participating in the judgement of art and by default, art theory.

For Farley, considering art theory is critical to developing a suitable law which is appropriate for reaching a legal definition of art.[141] Farley argues that expert testimony and a more open explanation of how courts have reached specific outcomes would greatly improve the current understanding of the legal definition of art.[142] Some progress has been made on the first aspect as expert evidence has in some cases been held as important. However, the latter aspect of Farley's suggestion is highly unlikely to come to fruition. There are multitude of reasons why this is unlikely. If the court is were to be more open about how it reaches each outcome on art, it would have to openly engage with art theory. This is something it actively avoids doing. Moreover, more expansive judgments lead to more substantial criticism of the inability of law to adjudicate on art because it gives tangible evidence through which to criticise decisions on art. By remaining aloof on how the court has reached its verdict, art judgments remain shrouded in a cloud of mystery which is helpful for the court. Additionally, it is undeniably clear that law is sufficient in reaching decisions on art even with the clear attempts to avoid art theory. As law has found a way to adequately define art with a limited overt consideration of art theory, it is not pressed to further develop its reasoning or even acknowledge the significance of art theory in law.

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[137] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 395
[138] *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903)
[139] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[140] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 7
[141] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 854- 857
[142] ibid 853

In agreement with Leiboff, a judgment which actively comments on the art theory in an artwork would be a 'breakthrough for law' but judges are reluctant to create such a precedent and will always try to remain on 'the law's side of the canvas'.[143] To put it simply, there will be no theoretically just outcomes for art if we cannot appreciate the ontology of art in deliberation.[144] The outcomes on art will never be theoretically just because art theory is at the core of all artistic considerations, yet the court actively attempts to avoid these elements, as showcased in *Bleistein*.[145] However, law doesn't need to reach theoretically just outcomes, it just needs to reach a sufficient judgment on art. The court must be capable of reaching an outcome which is workable for legal process. The court is capable of this, as the following chapters which assess the different areas of law will show.

The reality that law need only reach sufficient judgments on art, rather than theoretically just judgments which actively engage with art theory, is not adequate for all scholars. Kearns is one of the most vocal critics of the avoidance of open engagement with art theory in the courts, suggesting that the remedy to is to create carefully planned art tribunals.[146] Moreover, there are also many areas of law which involve art in which cases are still yet to emerge that may require more explicit engagement with art theory. For example which claims could be brought against conservators for damaging or changing a work have not arisen within the court yet but Lennard states it is only a matter of time before these claims are brought.[147] Whether the court will be able to deal with these new claims is yet to be seen, but the solution is unlikely to be Kearns' art tribunals. Simply put, there is no need for further development of art in law because the current approach to art works at a capacity which is adequate for what is required. Law can continue to avoid openly engaging with art theory and subvert its significance because it reaches outcomes which are fit for purpose. Thus, the pressing questions concerning art in law should not be about how to reach a singular definition of art or how the current definition could be

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[143] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 23
[144] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 33
[145] *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903)
[146] ibid 60
[147] Francis Lennard, The Impact of Artists' Moral Rights Legislation on Conservation Practice in the United Kingdom and Beyond' (ICOM Committee for Conservation: 14th Triennial Meeting, The Hague, Netherlands, Sep 2005) 2

reformed. Rather the focus for probing the relationship between art and law needs to be reassessed to address what is often taken for granted or assumed – how does law deliberate on art and consistently reach decisions on art when it allegedly ignores art theory and the fundamentals of art?

Law desires a stable definition of art because then it can be trusted.[148] However, art is an inherently fluid concept and thus the legal system struggles to grasp the depth of its multiplicity. Defining art within the court, the supposedly 'dangerous undertaking' as indicated by Justice Holmes,[149] cannot be altogether avoided because art requires some level of engagement with art theory, whether that be overt or subconscious. Moreover, these decisions are enacted both within and outside the court by the judiciary and various government officials.[150] Therefore, it is not simply the art world who create and imply definitions of art. Ultimately art *needs* an applicable definition in law which can be utilised by the judiciary because the value of art means that it cannot be treated the same as other forms of property.[151] Thus, if both experts and amateurs are to draw definitions of art for legal purposes, the position of law must be clarified. This is the fundamental crux of my research. The current approach to art is encapsulated within my theory of the Art Conundrum. I am not so much concerned with defining art holistically as I am with drawing attention to the process of how the court is able to reach a workable definition of art. The line of inquiry is concerned with understanding the approach of the court in reaching a definition and what elements, factors or thresholds must be met to reach an outcome as art in law? I argue that the court utilises a procedural theory, which I have named 'The Art Conundrum', to solve the problem of art in law. The Art Conundrum Theory guides the court in reaching legal judgments on art while remaining apparently ignorant to their inherent engagements with art theory. As art theory is fundamentally at the root of all deliberations on art, the Art Conundrum focuses on the legal context to facilitate the court in finding the appropriate art theory to define art. The court does not need to explain which theory of art they have aligned with because simply by using the Art Conundrum, it satisfies the necessary engagement with art theory.

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[148] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 298
[149] *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903) at 251 - 252
[150] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 466
[151] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 810

v. The Art Conundrum Theory

The creation of the Art Conundrum theory is a direct result of the consistent discordance between art and law. For the legal system, art is truly a conundrum. As established, there is a false belief that art cannot be, or should not be, defined in law relative to the various theories of art. These theories of art are the enemy of legal certainty. Yet, the reality is that art is consistently defined with both explicit and subconscious references to art theory. Law regularly finds a way to solve the problem of art in order to reach binding legal judgments on a regular basis. However, there is little acknowledgement of the procedures which are undertaken by the court to ensure that art can be defined in law. The Art Conundrum has been developed to highlight the processes undertaken by the judiciary in defining art. The Art Conundrum highlights that the legal definition of art is intrinsically linked to art theory. As much as the legal system detests that it engages with art theory and relies on the *Bleistein*[152] approach to cement it's reasoning, through the Art Conundrum I have encapsulated the legal approach to art into one manageable concept which shows that law considers art theory even where its argued that it hasn't.

Taking inspiration from Karlen's argument that English courts fail to consider outside sources on the definition of art beyond those found within the Oxford English Dictionary,[153] I begin with the definition of a conundrum. This facilitates a discussion of explaining exactly why art is a conundrum for law and why the term 'Art Conundrum' is an adequate summary of how law approaches art.

> **'conundrum, *n.***
>
> **4b.** Any puzzling question or problem; an enigmatical statement.'[154]

So why exactly is art a conundrum? Art is a conundrum because the appearance of art in law is exactly that, a puzzling problem. Art is enigmatic by default, it is mysterious,

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[152] *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903) at 251 - 252
[153] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 55
[154] Oxford English Dictionary Online, 'conundrum, n.' (Oxford University Press, June 2018) <http://www.oed.com/view/Entry/40646?redirectedFrom=conundrum&> accessed July 10, 2018

difficult to categorise and aloof; 'art is unstable'.[155] Art can be art without obviously being art, as exemplified by the infamous case of the cleaner who threw away part of Gustav Metzger's '*Recreation of First Public Demonstration of Auto-Destructive Art*' because they mistook it for rubbish.[156] Art does not always present as an easily identifiable and formalist object, to the detriment of legal ease. Thus, when law must define art, it often struggles to create clear and concise lines of precedent. Whenever the question of art arises in law, it is one which puzzles the court. It is avoided by the judiciary and is subjected to intense scrutiny by the public.[157] To reach a legal definition of art, the first step is to acknowledge that art is an inherent problem for the legal system because it is not a certain concept. Art is notoriously difficult to comprehend. As a result, there is a misconception that the precedent, statutory provisions and judicial commentary do not outwardly present as a sufficiently coherent approach to art.

The conceptualisation of the Art Conundrum builds reactively to the inadequate failings of art theorists to create a concise and singular definition of art which could be transplanted from art theory into law. Art theory scholars often choose a theory which is best aligned to their interests, with their understanding guided by their own perspective. As discussed, art is highly subjective which, when applied to law, leads to further contest as to which perspective is most suitable. As is evident in the previous chapter on the various theories of art, theories of art are often full of contradiction and self-gratification. Some theories of art would verify the artistic status of an artwork based on elements that others would not consider. For the purposes of art theory, this is acceptable. It is possible and acceptable to have competing schools of thought under which a viewer can align themselves, even if they directly clash. Yet, in law, we cannot afford to rely on such ambiguity or preference. There is no room for such irrationality in law. To rely on something so volatile is not a sustainable or rational approach. Law needs to have a concise understanding on the matters upon which it deliberates. It cannot irrationally rely on only one specific art theory for the legal definition of art because it risks

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[155] David McClean in Rebecca Waller-Davies, 'Law Less Ordinary | The World of Art' (Features, Lawyer2B 2014) <https://l2b.thelawyer.com/issues/l2b-autumn-2014/law-less-ordinary-the-world-of-art-law/> accessed 11 December 2017

[156] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 7

[157] *Re Pinion* [1965] 1 Ch 85, 106

invalidating legitimate works of art which deserve the correct legal protections or sanctions. Thus, within the Art Conundrum Theory, rather than relying on one specific art theory to define art, I suggest that law reaches an appropriate definition of art by looking at what is required by the legal issue at hand. This allows the judiciary to draw from whichever art theory it requires to reach a judgment. The ability to rely on several different theories of art ensures that the legal system can always reach a decision because the legal definition of art can always be justified. Thus, the Art Conundrum operates as a multifaceted tool which acknowledges that art is a puzzling question. A puzzling question which requires an extensive toolkit to solve.

When a case involving art arises, the legal system navigates the problem by delving into a definition of art only insofar as is necessary to solve the legal query. Where possible, it will fall short of directly commenting on the artwork.[158] This has led to a tumultuous relationship between art and law. Art remains a problem for the legal system. Leiboff is extremely critical of this dynamic, stating that 'law's response to the artistic is one of extreme distrust'.[159] This distrust is arguably due to the inability of the law to correctly and succinctly theorise on the definition of art, with lawyers 'seeing'[160] what is the best legal approach to the art case in question rather than truly theorising on the position of the art itself. This reframing of the art problem, away from what is art to what is the legal position of the art, is not without academic support. There is no shortage of scholars who would argue that art in the law is not the same as art in the gallery. Leiboff, Pila[161] and Merryman[162] are but to name a few. This is because lawyers, observers and critics 'see' what they want and define art accordingly. Yet, for legal professionals, it is the subconscious application of the Art Conundrum which enables them 'see' art sufficiently

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[158] Marett Leiboff, 'Lawyers look at the Elgin Marbles, but stars keep them firmly in sights' (The Conversation, 10 Oct 2014) <http://theconversation.com/lawyers-look-at-the-elgin-marbles-but-stars-keep-them-firmly-in-sight-32798> accessed 31 May 2018

[159] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 294

[160] Marett Leiboff, 'Lawyers look at the Elgin Marbles, but stars keep them firmly in sights' (The Conversation, 10 Oct 2014) <http://theconversation.com/lawyers-look-at-the-elgin-marbles-but-stars-keep-them-firmly-in-sight-32798> accessed 31 May 2018

[161] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229

[162] John H Merryman, 'Art and the Law Part I: A Course in Art and the Law' [1975] 34 Art Journal 332; John H Merryman & Albert E Elsen, *Law, Ethics and the Visual Arts* (2nd ed Kluwer Law International 1987)

enough to reach a judgment. The Conundrum acknowledges the difficulties faced in defining art and enables the user to see art relative to the legal context, reframing the art and constraining it within law. Kaprow's observation on the increase of non-art objects appearing in 'art-identifying frames',[163] namely galleries, museums and theatres, efficiently summarises the ability of lawyers, observers and critics to 'see' what they want, in order to define art as required by law:

> 'Regardless of the merits of each case, the same truism was headlined every time we saw a stack of industrial products in a gallery, every time daily life was enacted on a stage: that anything can be estheticized, given the right art packages to put it into'[164]

Although Kaprow's commentary concerns a movement away from 'traditional art' towards the incorporation of real-life actions and movements, it provides a useful comparative tool for understanding the application of the Art Conundrum. Kaprow's observation suggests that art operates in secular packages, art is only art when it can be presented as such. The limits of presentation are not created by the art itself but rather by the viewer and circumstance. For law, the legal professional is the viewer and the relevant circumstance is the legal context in which the art is brought forward. By placing art into the package of legal context, the artwork need only be defined enough to appease the legal issue at hand. An expansive definition of art or commentary on how the judgment is reached is not necessary. This reframing approach views art as a legal problem which must be solved in accordance with the limits of the legal system.[165] It is something that law, the courts and the judiciary consistently engage in, but it is never directly addressed or commented on. Thus, I have encapsulated the approach of the law into one singular concept, the Art Conundrum, to show that there is a legal procedure and process to defining art which already exists but, until now, rests in the subconscious of the legal professional. As there are limited examples of existing legal definitions of art in any area of law, the courts have resorted to relying on a case by case interpretation of

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[163] Alan Kaprow, 'Art Which Can't Be Art' (Reading Between, 1986) <www.readingbetween.org/artwhichcantbeart.pdf> Accessed 21st November 2016

[164] ibid

[165] Marett Leiboff, 'Lawyers look at the Elgin Marbles, but stars keep them firmly in sights' (The Conversation, 10 Oct 2014) <http://theconversation.com/lawyers-look-at-the-elgin-marbles-but-stars-keep-them-firmly-in-sight-32798> accessed 31 May 2018

art.[166] It is through the Art Conundrum that it is possible define art in a sustainable way and ensure that art is defined relative to the legal context rather than to a strict definition.

The Art Conundrum Theory is not about assigning law to align with a purely singular theory of art. Rather, it is primarily concerned with defining art within the parameters of the legal context within which it arises. It contests the perceived legitimacy in attempting to define art through one theory or definition and states that this is not a practical reality. The Art Conundrum promotes a definition of art which is malleable and, for the law, ultimately purposive because it allows the court to find the suitable definition of art as is necessary to solve the legal issue. Within the Art Conundrum, it becomes clear that there is an unavoidable contestation between the different theoretical justifications for art and art as an enigmatic problem which must be solved. In accepting this contestation, I acknowledge that the definition of art will never be straightforward but that is the nature of art. Art is puzzling. Therefore, to reach a suitable definition of art, a multi-faceted application of several theories is inevitably required because it acknowledges the fundamental basis of art as a difficult problem that requires a flexible approach to be solved. The Art Conundrum theory is an acceptance and enactment of this multiplicity.

The Art Conundrum Theory recognises that there are several possible definitions of art and the determination of which to apply depends on the legal circumstances in question. It builds on a recognised notion that an adequate definition for art in the present day requires a multiple strand approach, as acknowledged by Davies's three-strand 'hybrid definition' theory of art.[167] Davies's approach attempts to limit the shortcomings of any individual theory and employs a cluster of theories in order to provide a compelling analysis of whether or not an object is art when its nature as art is called into question. However, it is only applicable in aesthetics. The Art Conundrum Theory is a similarly rooted approach but expands the utility of a cluster approach to art into the realm of law. It recognises there are several different legal instances in which art may arise and the determination of the meaning of art depends upon those circumstances and how it is

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[166] In Brief, 'Copyright in Artistic Works' (2 July 2018) <https://www.inbrief.co.uk/intellectual-property/copyright-artistic-works/> accessed 2 July 2018

[167] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 The Journal of Aesthetics & Art Criticism 375

viewed by the court. It depends on why the judiciary is attempting to solve the problem and their influences when doing so. Thus, the novelty of the Art Conundrum lies in both the *circumstance* and the *viewer*. As art cannot be easily defined and there is no adequately singular theory of art for law, the Art Conundrum accepts the limitations of all and suggests the application of the appropriate art theory is dependent on the legal context in which it must be viewed. Therefore, art continues to be a conundrum to which the answer is an ambiguous definition which relies heavily on the specific interpretation of art within the specific legal circumstance – how the art is 'seen' defines it.[168]

Servi critically comments on the nature of art, revealing that the way in which art is seen impacts both our interpretation and the outcome – 'art reminds us that there is not one singular way of doing and seeing things, that problems can have more than one solution, and questions more than one answer'.[169] The Art Conundrum directly engages with this approach to art. Reflecting on the preceding chapter's survey of art and comparing each individual theory's merits and limitations against the Art Conundrum, the Art Conundrum Theory is undoubtedly the most appropriate approach for art and law. It accepts the ambiguity of 'art', in subject, content and circumstance. From this short survey of five different theories of art, I identified several key features on defining art. These ranged from the powers and roles of actors within the 'Art World', to the impact of time and context on art, to the cultural impact and significance of defining art for the purposes of protection, cultural enrichment and intellectual stimulation. Ultimately there is no natural basis for prioritising them in terms of importance. Their importance is ranked by the viewer who aligns with one of these theories and argues their ranking based on how they 'see' the art.

By contrast, this final theory — my Art Conundrum Theory — enables a heterogeneous approach to defining art in law. Art is a conundrum which the viewer, the legal professional, must convincingly solve. The legal professional must assess the art within the legal circumstances in which the art has arisen to reach a decision as to whether the

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[168] Marett Leiboff, 'Lawyers look at the Elgin Marbles, but stars keep them firmly in sights' (The Conversation, 10 Oct 2014) <http://theconversation.com/lawyers-look-at-the-elgin-marbles-but-stars-keep-them-firmly-in-sight-32798> accessed 31 May 2018

[169] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016) 107

subject in question should be defined as art for the legal purpose at hand. A lawyer will always attempt to see what is best for their client, but the judiciary should continue to remain objective and fall short of dictating their own taste. This principle is guided by the oft-cited case of *Hensher*[170] which stated that when adjudicating on whether works of artistic craftsmanship were recognised within copyright protections, it was stated that 'Judges have to be experts in the use of the English language but they are not experts in art or aesthetics'.[171] The judiciary will inevitably draw upon their own understanding and comprehension of art to reach this decision, but they must decide which presented argument is the most convincing for defining art. The ability of the legal professional to cross reference between different theoretical definitions of art in order to find a commonality also underscores the shared history of art present in all artworks. Thus, I have coined the Art Conundrum Theory in response to the necessary application of multiple artistic theories to be used in conjunction by the viewer.[172] This approach is encapsulated in the Art Conundrum Theory by emphasising that a combined appreciation of all hypotheses for defining art should best ensure that definitional mistakes are avoided and there is always a legal solution to the problem of art.

Perhaps, as Kearns identified 'there is no longer such a thing as art,'[173] rather, all the artist does is to create something which is marketable as art. Running with this claim, it is further evidence that the Art Conundrum theory, even at the most extreme interpretation of art is the most appropriate definition. When art no longer exists in the abstract, law does not need to define art in abstract. Thus, law simply needs to solve the problem of art in the specific legal context in which it arises. As irrationality and instability[174] are not favourable in legal cases, law avoids prophesising on art and always falls short of providing a definitive definition.[175] However, I argue that the definition of art is always

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[170] *Hensher v Restawile* [1976] AC 64 (HL) 78
[171] ibid
[172] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375, 377
[173] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 84
[174] David McClean in Walter-Davies B, 'Law Less Ordinary | The World of Art' (Features, Lawyer2B 2014) <https://l2b.thelawyer.com/issues/l2b-autumn-2014/law-less-ordinary-the-world-of-art-law/> accessed 11 December 2017
[175] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 23

based in the Art Conundrum because the Art Conundrum does not advocate for a singular theory or definition of art, rather it facilitates law to reach a sufficient and appropriate definition for the problem at hand. Thus, there is a limited necessity for law to explain how it reaches the legal definition of art because it is not essential to the legal process, as law does not need to define art in abstract terms.

vi. Applying the Art Conundrum

The Art Conundrum is a universally applicable theoretical concept which can be applied by any viewer to define art within a specific legal context. It embraces the emergence of new theoretical approaches as it accepts that art is an ever-evolving concept, influenced by trends and innovation. The Art Conundrum aligns with Karlen's criticism that older definitions of art cannot 'absorb the new content'[176] and is therefore resistant to the dangers of being frozen in a particular time or instance. By freezing art in time and not appreciating the stark differences between the tangible and intangible, art is shown a disservice and any legal definition would never be a true indication of art.[177] The Art Conundrum has divorced from a purely *Bleistein* approach[178] to recognise that the judiciary and law continuously engage with art theory. The Art Conundrum defines art based on two immovable principles, the legal context and the necessity to reach a judgment on art. The art is 'seen' by the legal professional for the purposes of solving art based on these principles. In short, the Art Conundrum is a summarisation and explicit reiteration of the way in which the legal profession already engages with art theory, both directly and indirectly dependant on the specific legal context.

When assessing the influence of legal context upon the definition of art, we must begin with acknowledging the importance of context much more generally. It is irrefutably clear that many different contextual influences are indirectly or unconsciously applied by a viewer whenever they determine something to be art. For example, for many the power of the institution and the display of an artwork within an institution plays just as much a part in the validation of art as the artist's declaration of the work. It is easy to conclude

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[176] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 51
[177] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 314 - 315
[178] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

that how art is defined in law is often dependent on the context in which the matter appears. Although the contextual significance of art arises in an infinite number of circumstances, from the artist's studio, to a child's picture on the family fridge, to the artistic institution, it is only within the courtroom that the Art Conundrum is concerned. The expansive questions that were explored in art theory, from Danto's question — 'where are the boundaries of art? What distinguishes art from anything else, if anything can be art?'[179] to considering where Perry draws the boundaries of art,[180] are largely reduced when considered only within the context of the law. For example, the question as to whether a blank canvas, a child's drawing or a glass of water is a work of art depends upon the context in which it arises. Within the law, the question is further refined by the legal context such as whether it is a case considering copyright, obscenity or taxation. The difficulty in defining art is therefore eased by the Art Conundrum because it builds upon the notion that interpretations of art are directly influenced by their context:

> 'Unless we are wedded to two gross errors - a conception of arts as merely physical and objective, and the explanation of art by reference to a specific aesthetic emotion - we must recognize that in its plainest manifestations art depends for its value on some interpretation of life, whether poetic, religious or philosophical'[181]

In the above statement, Read identifies the impact of our own preconceptions on art and how art is perceived. The emphasis on the value of art being intrinsically linked with how one interprets life can be connected to how art is defined as a relation to contextual understanding. Within the legal system, this contextual understanding is dependent on the type of case and the type of legal problem. If it is a copyright case, the contextual requirement varies greatly from a case which concerns obscenity or a case which concerns levies applied by customs charges. The court must therefore acknowledge the contextual implications of these differing examples and does so by utilising the Art Conundrum. Moreover, the use of art experts in legal trials who may give conflicting decisions on an artwork is a clear indication of the impact of contextual influence and how viewers are led by their own prejudices. The Art Conundrum facilitates the application of a variety of art theories to ensure the legal definition of art remains flexible

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[179] Arthur C Danto, *What Art Is* (Yale University Press 2013) 26
[180] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 59 – 73
[181] Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 165

and adaptable enough to reach a definition of art in each specific legal circumstance. It restricts Read's loose 'interpretation of life'[182] concept and refines the approach to a singular objective – to find a sufficient outcome to the legal problem at hand.

The Art Conundrum finds applicability within the context of the law and is already utilised, mostly subconsciously, by the judiciary to solve the legal problem of art. Karlen again addresses concerns towards the impact of legal context on artistic definition:

> 'A legal definition of an art-related term must have its limitations because of the very nature of the law itself. In the first place, an art-related term such as 'work of art' may mean different things when interpreted with respect to the various statutes. This is because legal terms are always defined within the context of the statute in which they appear.'[183]

The critical limitation which facilitates the application and workability of the Art Conundrum is the law itself. The impact of the law means that art is interpreted within a smaller context, one which is only concerned with art theory insofar as is required. Art-related terms do not apply the way that they do in art theory. Thus, the Art Conundrum is a legally focused theory of art which deals specifically with delineating definitions of art within a specific legal context. The Art Conundrum is continuously and consistently applied by the judiciary. The utilisation of the Art Conundrum is most prominent when a judgment on art is reached by engaging directly with art theory. However, this is not the norm. Where the discussion of theory is avoided, the Art Conundrum is still subconsciously applied to reach the appropriate outcome. To understand the application of the Art Conundrum, it is important to highlight Leiboff's criticism that 'most law in the [art law] area is based on an express purported avoidance by the courts of creative intention, aesthetics, cultural value or quality.'[184] As a result, the contextual implications of the law upon art are much more limited in scope because law does not openly discuss the critical theory present in art. Upon this basis, the vast majority of law which deals with art utilises the Art Conundrum to highlight that art is an enigma that does not need

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[182] ibid
[183] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 55
[184] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 8

to be overtly explored. Law must solve the problem but does so by utilising multiple definitions and approaches to art while *always remaining within the confines of a specific legal context* to avoid the dangers of discussing terms in relation to art theory alone.

vii. Conclusion

The conclusion to this chapter opens the critical assessment of law in practice, addressed in the following chapters. If the various theories of art alone are not sufficient to define art in law, we must again ask "*what is art?*". The Art Conundrum Theory dictates that, within the context of the law, a subject is art when the legal context determines an artistic definition is required. It acknowledges there are several applicable definitions of art within the field of art theory which can be used in conjunction with each other in an attempt to solve the legal problem of art but only within the specific legal context. It is the role of law and the judiciary to apply the appropriate theory-based definition of art to reach a definite outcome in each case. The Art Conundrum is undoubtedly the theory applied consistently by the judiciary, statutory legislation and the legal system. However, this application is often not directly acknowledged, rather it has become an inadvertent effect of how the law currently defines art. Thus, the Art Conundrum has existed and will continue to exist as long as law continues to skirt around the complex dialogue between two discordant topics, art and law. The disparity between art theory and the legal approach to art is undeniable. Consequently, this research demanded an understanding of the definition of art in law which has been established through the Art Conundrum.

The most Avant Garde theory of art, the Artist Led Theory, commands that, in its simplest form, there is no longer art only artists. However, the Art Conundrum aims to solve the question of art only relative to legal context. The difference between the use of context and such an abstract theory is staggering. Thus, I argue that the law does not adopt a puritan art theory approach to art, nor does it utilise a specific definition of art. I argue that the law does not need to keep up with, or even consider in depth, these abstract theories of art. Law can simply utilise the Art Conundrum to continually stop short of commenting on any art theories beyond those deemed necessary by the court to reach a suitable definition of art. Thus, I argue, art within the legal sphere operates only within the Art Conundrum and the parameters of the process that it creates.

The following legal chapters of address this reality that law constrains art theory and only deals with art within the Art Conundrum. I consider the current approaches to art in various areas of laws and draw the similar conclusion that there is a procedural process to defining art within these different fields. The Art Conundrum frames this process as solving the conundrum of art facilitates the ability of law to reach a legal definition of art. As context is critical to the application of the Art Conundrum, the following chapters divide examples of art arising in law into various legal contexts, namely copyright, taxation, obscenity and the field of moral rights. Only following these studies can the hypothesis of the Art Conundrum and the way in which art is defined in law be supported with clear evidence. Moreover, this study of art in law will reveal the impact and influence of the judiciary, lawyers and the art world upon art in law. As shown within this chapter, the role of the judiciary is a critical area of literature, with several scholars highlighting the role of the judge, the tendency for avoiding debates in art theory and the significance of judging art within the context of the court. The resistance of the court to acknowledge their fundamental reliance on art theory further compounds the significance of the Art Conundrum.

The following chapters will explore the approach to art in various areas of law and highlight just how significant art theory, context and interpretation are in the definition of art. With the Art Conundrum in mind, it will be evidently clear that the consideration of art theory is inevitable in the field of art law. Although art can theoretically interact with law in almost any field, there are several critically useful categories which have been assessed by several academics before myself. For example, Kearns established a clear number of art law categories in *The Legal Concept of Art*.[185] This dictatorial guide provided a basis for many studies of art law, one such being the recently published *Art Law: A Concise Guide for Artists, Curators and Art Educators*.[186] In this guide, Jones incorporated these historically traditional categories of art law, such as copyright and obscenity, while also assessing the modernity of contemporary art and attitudes towards art in the 21st century. Thus, taking lead from three of the most prominent art law

[185] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998)
[186] Michael E Jones, *Art Law: A Concise Guide for Artists, Curators and Art Educators* (Rowman & Littlefield 2016)

scholars, Kearns, Jones and Merryman,[187] I too will address a selection of these areas of law in which art is prevalent. Importantly for this research, the areas chosen, namely copyright, taxation, obscenity and artist's rights, pose critical questions of the legal definition of art and law's adequacy in keeping up with the evolution of art and its ever-changing theoretical definition. Consequently, it is both logical and right to begin with the most well researched, expansive and ultimately obvious area of law – the field of copyright.

[187] John H Merryman, 'Art and the Law Part I: A Course in Art and the Law' [1975] 34 Art Journal 332

IV

Copyright Law & Art

Copyright Law and the Predisposition to Legal Formalism

> 'Property has been described as consisting of a "bundle of rights". For the visual artist, one of the most important parts of that "bundle" is undoubtedly copyright. Copyright protection allows a creator to profit economically from his or her investment of time, skill, and energy by giving limited monopoly in his or her work.'[1]
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> Leonard D DuBoff, 1984

> 'The foundational concepts and principles underlying copyright law (such as the *author*, *work of authorship*, *originality*, *idea/expression* dichotomy, etc.) have been largely defined by the consistent efforts of the legislators and the courts to steer away from the subjectivity and inaccuracy inherent in aesthetics judgements.'[2]
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> Marko Karo, 2005

Any study of art in the law, logically begins with the concept of copyright. Of the very few areas of art law, copyright is one of the most academically researched areas. The wealth of literature and judicial investigation available pinpoints copyright as not only a fundamental property right but also an artistic one. Historically, copyright is the most artistically inclined area of law. The fundamental elements of copyright law; originality, creativity and artistic craftsmanship, align directly with critical aspects of art. Thus, it might be logical to assume that, within copyright law, there will be a coherent and perceptive definition of art. The legislative hand of the Copyright, Designs and Patent Act 1988, combined with the copious amounts of judicial and academic commentary, indicates copyright as the strongest field of artistic definition. However, as will be

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[1] Leonard D DuBoff, *Art Law in a Nutshell* (West Publishing Company 1984) 189, as cited in Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm. & Ent. L. J. 303, 304

[2] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 93

demonstrated in this chapter, the relationship between art and law within the field of copyright is contentious at best. Macmillan draws on the uncertainty between these two concepts, emphasising that the 'highly specific and prescriptive'[3] definition of copyright does little to define art and rather creates a confused understanding of art. The prescriptivism of copyright, in reality, hinders artistic process and creation. This results in an ill-fitting definition of art, reinforcing the limited and formalist approach towards art.

The study of copyright law is crucial to understand the legal definition of art. It will be revealed that the legal definition of art has a predisposition for utilising legal formalism to define art. This is emphasised in the lack of additional art theories considered in statutory definitions of art. Moreover, this study emphasises the extent to which art is limited by law to reduce the overt engagement with an expansive theory of art that is too unnecessarily complex for law. As will be shown, this is sufficient for the legal definition of art because the Art Conundrum requires only enough engagement with art theory to ensure that legal judgments can be reached. By beginning with the largest area of art law, copyright, the fundamental approach to art in law will be highlighted to illustrate the significance of legal formalism as the first step in Art Conundrum and the legal definition of art. It will also begin to reveal why definitions of art in law are limited at best but that this is sufficient enough for the courts to reach legal judgments on art.

i. The Copyright, Designs and Patents Act 1988 (CDPA)

Few areas of law that consider art have statutory support or guidance targeted directly at the concept of art. However, the field of copyright is unlike many other areas and holds the most prominent definition of art in statutory form. The starting point for defining art under copyright is found in the Copyright, Designs and Patents Act 1988 (CDPA).[4] Barron's summary on copyright law and art serves as a useful guide for introducing the concept of art within copyright legislation. Barron states that beginning with the

[3] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 50

[4] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 180

Engraving Act 1734, the 'economic value of artistic artworks' has been legally recognised.[5] Although dealing specifically with engravings and subsequent prints, it began the period of copyright development between 1734 and 1888, with several acts becoming consolidated under the short title The Copyright Acts 1734 to 1888.[6] However, these acts did little for the definition of art, and failed to define art as a concept within legal discourse.[7] It was only with the turn of the 20th century and the emergence of The Copyright Act 1911 that the category of artistic works was introduced as a prescriptive formalist list, stopping short of defining art as a concept itself.[8] This later developed into the Copyright Act 1956, alongside the adjacent case law which 'remains highly relevant'[9] as a source of precedent for modern cases. The 1956 act provided the final skeleton structure for the current approach to copyright. This gradually emerged in the form of the CDPA, which is the primary source of copyright legislation within the English legal system.[10]

Essentially, through the CDPA, the primary approach to art is preserved in statutory form. The consolidated provisions in the CDPA are now 'regarded as representative of approaches prevalent in common law jurisdictions'.[11] Subject to ongoing amendments, the CDPA defines authorship,[12] copyrightable works,[13] the length of duration for copyright[14] and what acts are restricted by copyright.[15] These provisions create a framework from which claims can be brought when copyrighted works are infringed.

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[5] Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017, 1

[6] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 373

[7] ibid 373

[8] ibid 373

[9] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 62

[10] ibid

[11] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 151

[12] Copyright, Designs and Patents Act 1988, 'Authorship and ownership of copyright', s 9 - 11

[13] ibid 'Descriptions of work and related provisions', ss 3 – 8

[14] ibid 'Duration of copyright', ss 12 – 15

[15] ibid 'The acts restricted by copyright', ss 16 - 27

Consequently, the CDPA acts as a functional guiding tool for understanding the most basic legal definition of art found in copyright law. The definition of art, categorised as 'artistic works', is explicitly listed within section 4 of the CDPA:

> '4(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 purposes of sculpture.'[16]

For the purposes of copyright, art must fall within this category of 'artistic works' to be considered art. The reduction of art to physical outputs is common of the legal approach to art and ties directly into the ease with which legal formalism can be adopted as the primary method for defining art. Booton also notes that 'there is no attempt within the legislative definition to conceptualise "artistic works". Rather, what is provided is a list of things which for the purposes of copyright law, are considered "artistic".'[17] By initially defining art through legal formalism, artistic quality does not have to be considered[18] and art is defined purely on physical characteristics or form. Provided an object can be categorised in one of these listed forms, then it can be described as art. The statutory definition does not qualify the categories of artistic works that it uses. It is decisively broad for the purposes of law, with Wickenden arguing that if the categories provided were more detailed, then there would be a risk that the categories would become too

[16] ibid, s 4
[17] David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' [2003] Intellectual Property Quarterly 38, 43
[18] Copyright Designs and Patents Act, s 4(1)(a)

narrow and too specific.[19] An object only needs to look like art and fall within one of the listed categories to qualify as art under the CDPA. The limited attempt to quantify what is a painting or even what is sculpture shows that, again, law wishes to avoid the issue of engaging openly with, or theorising on, art.

In the previous chapter, legal formalism has already been established as too inefficient to be the sole definition of art because there are instances where art requires more than formalism for definition. Therefore, it is critical to ask why copyright law would emphasis such an inadequate approach. Ultimately, The CDPA emphasises the conclusion that where possible, law should limit how much it engages with art theory. The quality of art or the reason why something is art is not critical for definition under copyright law, it is purely the physical form which makes it art. Copyright disregards complicated definitions of art based in art theory, such as mimesis or Institutional Art Theory and instead focuses on the simplified approach made possible through legal formalism. For copyright, art is a physical commodity. This is reflected in the idea/expression dichotomy – the notion that ideas cannot be copyrighted, and it is only the expression of the idea which can be subject to copyright.[20] Thus, legal formalism is preferable as it prioritises tangibility and can be linked to the treatment of art as property. According to Barron, art must be able to be given a definition or definitive characteristic to be copyrighted.[21] Formalism does just this by simply recognising the physicality of art. For copyright 'a painting is not an idea: it is an object'.[22] This notion of the object is reinforced by the 'Adam Ant' case, which denied copyright protection to Adam Ant who painted faces rather than canvases, adjudicating that a painting 'is an object; a paint without a surface

[19] Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017, 5

[20] Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 137; Ditlev Tamm, 'Art and Copy - A Legal Historian's Reflections on Copyright' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 159

[21] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 380

[22] *Merchandising Corporation v Harpbond* [1971] 2 All ER 657 at 46

is not a painting'.[23] Through legal formalism, copyright avoids the nuances associated with grading quality, style or any other technical element of art and only engages enough with this simple theory to reach a judgment. The basic legal approach is, simply put, it is art if it presents as art. For the CDPA, art does not *need* to be more than that. This is a very reductive approach to the legal definition of art, but it is the most uncomplicated and straightforward. In its most primitive form, for the purposes of the CFPA, if it looks like art, it should be art.

The CDPA is a fixed statutory interpretation of art but delivers a confused definition. It severely restricts the definition of art while giving the judiciary an optional flexibility to expand outside of legal formalism. However, where possible, this option is not often explored. Thus, it appears a limited definition of art is reached through this formalist approach. The application of legal formalism is meant to simplify the issue of what is art, allowing a wide net to be cast within specified categories. However, when art does not conform to these categories then it cannot be considered art within copyright. It is clear from this that although the definition of art in the CDPA may be one of the leading legal definitions,[24] it does not accurately define all works of art, nor does it provide a truly workable definition for a wider survey than art in copyright. The CDPA serves as the most prominent example of the classical legal definition of art in which art is art because it looks like previously accepted art. There is no necessity for judicial interpretation because the statute requires a fixed answer, it attempts to reduce the greyscale in copyright. For copyright law, if it is in the list and it fits the category, then it is art.

Although Wickenden states that the broad nature of these categories allows for judicial invention in defining art as they only state the physical form,[25] Pila is a vocal critic of this approach. For Pila, the formalist CDPA definition of art remains uncertain and unclear.[26]

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[23] ibid

[24] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 188

[25] Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017, 2

[26] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 231

Macmillan further criticises this CDPA approach, noting that 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.'[27] Relying solely on legal formalism is a very restrictive approach to the definition of art. When art arises in a legal context and the art does not neatly fall into one of these categories, the courts are pushed to draw the boundaries of art because the CDPA is ill-equipped to do so.[28] Stokes, like Wickenden, suggests that the judiciary are capable of defining art as 'in light of recent cases, the categories of protected work in section 4 of the CDPA appear to have a reasonable degree of flexibility in practice. One might argue this reflects the pragmatic approach of the U.K. courts to copyright matters.'[29] He notes that through vague categories, there is 'a reasonable degree of flexibility in practice'.[30] Yet, Barron's view is polarized, stating that the courts do not use this flexibility. Rather, Barron claims that 'judgements have proceeded the aesthetically neutral features of entities by ordinary language use to the classifications within the category, with no reference to whether these entities can claim the status of "art".'[31] These opposing conclusions highlight the issue with defining art, the applicability of a definition is only as good as it is considered by the person utilising it. This paradoxical reality emphasises not only the inevitable shortcomings of relying on a singular theory of art but also strengthens the notion that art is not easily defined in static terms. As law is inclined to avoid openly engaging with art theory, it would seem that the CDPA prioritises the *Bleistein* approach[32] as it often does not require the court to expand beyond the basics of formalism but this does not always suffice.

But what about defining art when formalism is not sufficient? What about art which looks like other art? If it falls within the CDPA approved list but looks identical to another

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[27] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 53

[28] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 188

[29] ibid 189

[30] Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 146

[31] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 373 – 374

[32] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

artwork, is it copyrightable? Is this new art, or is it even art at all? This string of questions is a fundamental issue at the crux of copyright protection. To protect one work, another must be considered in breach of copyright and warrant neither protection nor appreciation. Rather, the offending party should be sanctioned for their breach. Yet the formalism of the CDPA does not draw a clear distinction between two identical works. Law must rely on some alternative theory when formalism isn't sufficient. It must be considered how and where does copyright draw the distinction between the original and the copy. By doing so law is clearly engaging with art theory, something it claims not to do.

ii. The Originality Requirement

Most scholars write about the interpretation of originality when hypothesising on copyright, with many focusing on the deceptive nature of originality in copyright. DuBoff notes that 'the common thread [in art law] is a requirement that objects to be claimed as art have some minimal amount of original authorship attached to them.'[33] Originality in copyright is deceptive because the common notion of originality does not align with the legal interpretation of the term, as noted by Hoare.[34] The romantic conception of originality promotes an imaginative, creative and independent thought or idea. One might also assume that the notion of originality would also require some level of art theory to reach its threshold.[35] However, Barron notes that 'a work is original in law if it can be shown that its author has expended some more than minimal conscious effort in its production: it is quite clear that imaginative effort is not required.'[36] Thus, under copyright law, originality does not require a creative effort nor does it require explicit engagement with art theory. Legal originality balances on a minimal threshold as the required standard is set as low as possible in order to promote a wide inclusion of

[33] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 303
[34] Ian Hoare, '"Originality" in Copyright Doctrine' (Intellectual Property Law LW556 2000 – 2001)
[35] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 53
[36] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 379

copyrightable works[37] and to further perpetuate the image that law does not engage with art theory. In turn this allows the judiciary to again avoid engaging in art theory because originality is not linked to creativity but to effort.

This minimal threshold for originality is largely based on precedent set in case law. *Walter v Lane*,[38] one of the definitive cases within copyright law, identified the importance of the author, the contribution of their work and indirectly introduced a legal concept of originality. This precedent was later set within the Copyright Act 1911. In *Walter*, the case pivoted on the notion of whether reporters from *The Times* could be considered as authors. If they were then their work would be protected as copyrightable, due to the efforts they had expended fulfilling the originality requirement by producing the work themselves. *Walter* highlighted that a copyrightable work requires an author to have provided some minimal skill or effort in creating a work. This approach has become routine and can be found throughout all copyright cases. Relaying these principles to art, Booton notes that 'in *LB (Plastics) Ltd v Swish Products Ltd*,[39] it was held by the court that drawings derived from earlier drawings could nevertheless claim to be separate original artistic works attracting copyright since their production was a skilled business involving hours of labour, although the end result was relatively simple.'[40] Further to this, *Ladbroke*[41] also identified that any threshold of originality for the purposes of a creative work requires skill, labour and judgement.[42] From these judgements it is understood that a work of art requires both skill and labour to be considered legally copyrightable.

However, in criticism of *LB (Plastics) Ltd*,[43] the Privy Council in *Interlego*[44] emphasised the failure of the court to highlight what type of skill, labour or talent was necessary. This is crucial because it highlights that again there is limited legal guidance on how to

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[37] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 181
[38] *Walter v Lane* [1900] AC 539
[39] *LB (Plastics) Ltd v Swish Products Ltd* [1979] FSR 145 (HL)
[40] David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' [2003] Intellectual Property Quarterly 38, 51
[41] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465
[42] *ibid*
[43] *LB (Plastics) Ltd v Swish Products Ltd* [1979] FSR 145 (HL)
[44] *Interlego AG v Tyco Industries Inc* [1989] AC 217

adjudicate on art. This is another instance of the judiciary creating a precedent that allows the court to avoid being specific in their judgment to avoid the dangers of enshrining specific art theories and ensure that later courts are not bound to prescriptive rules in art. Alternatively, in relation to the concept of the author, Stokes points towards the 'often-cited case'[45] of *University of London Press Limited v University Tutorial Press Limited*.[46] Although concerning literary works, *University of London Press.* drew the conclusion that any work which is to be deemed original must not be copied from another work, it should originate from the author.[47] This sentiment is also echoed in *Burke v Spicer's Dress Designs*[48] which, in essence, decided that only if a dress designed by the designer had also been made by the designer herself and not her assistants, the dress would have been copyrightable for later reproduction.[49] These various cases emphasise the low but personal effort required to fulfil the requirement of legal originality and align with recent musings on the significance of the artist's intention as per the Artist-Led Theory. Law is clearly utilising more than just legal formalism here, while perhaps creating a deliberately low threshold[50] to ensure that this engagement is not overt.

It is important to also pay some attention to the failure of any test for originality to consider creativity, something which is largely linked to the common notion of originality. Kearns heavily elaborates on this point, noting that English copyright law fails to consider creativity within originality which leads to a limited appreciation for the nuances of art.[51] Moreover, Karo notes that there is no consideration of artistic merit.[52] Although seemingly positive, as it allows art to be considered without determinations on taste, it is also a concern because influential or important works may not be given

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[45] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 184
[46] *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601
[47] ibid
[48] *Burke v Spicer's Dress Designs* [1936] Ch. 400
[49] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 52
[50] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 181
[51] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 62 & Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 188
[52] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 94

sufficient recognition. Without considering creativity or artistic quality,[53] the definition of originality aligns with the rigid statutory approach within the CDPA[54] and preserves the sentiment that copyright is wider than the protection of artworks.[55] Critically, law ensures 'the artistic is just one object of copyright protection which exists to protect products of original labour.'[56] By ignoring the notion of creativity within originality, the concept of originality is not prejudiced in favour of the artist[57] as not all copyrighted works are made by artists, nor should the process of creation be inherently creative – originality is a minimal threshold.

The originality threshold only requires skill, labour and judgement[58] which originates from the author.[59] Provided the author can show that these ideas have originated from them and have required some minimal level of skill, labour and judgement on their behalf, then for the purposes of law, the work is original and therefore copyrightable. If the work also falls within the category of art as delineated by the CDPA, then it can be copyrighted as a work of art.[60] This is a critical requirement as it states that, for the purposes of copyright law, a work of art must fulfil the originality requirement and be listed within the formalist definition of art. However, if this requirement cannot be fulfilled, then it denotes that the law will not sanctify a legitimately considered work of art as a *copyrightable* work of art. It is a concerning development because it risks the ever-present concern that a legitimate work of art will fail to be recognised in copyright law due to technicality rather than accepted reality. This is a vital observation. By dividing art between those that are copyrightable and those that are not, art is further segregated into additional categories of legitimacy. This is a clear engagement with the significance of art theory that law tries to avoid. By disenfranchising a stream of art, law must be able to draw a significant distinction between the two. However, it chooses to remain ignorant

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[53] ibid 94
[54] Copyright, Designs and Patents Act s4(1)(a)
[55] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 62 - 63
[56] ibid
[57] ibid 65
[58] *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465
[59] *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601
[60] Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 119

of exactly how this is done because this is a difference that can only be justified by utilising art theory. However, it once again highlights that law cannot completely ignore that art theory is present in legal judgments, albeit covertly.

In summary, the English legal system relies largely on the CDPA and the originality requirement to establish a work as copyrightable. A work is not copyrightable if it fails the originality test. If a work of art fails to pass this test, it would seemingly fail to be considered an original work of art for the purposes of copyright law. By drawing distinctions between works that should be copyrighted and those that shouldn't, law is subconsciously engaging with the differences in art theory between the two artworks. The originality threshold remains low to ensure that law can adjudicate on art without delving too deeply into art theory. This is critical for the application of the Art Conundrum because it allows the court to engage with art theories only insofar as is necessary. This conclusion can be put to the test in the example of appropriation art where law must draw distinctions between two works because they often present as physically similar and fulfil the originality requirement.

iii. The Art of Appropriation and the Fair Use Defence

The extent to which law will attempt to avoid engaging with art theories is evident in the legal treatment of appropriation art. How does the legal system differentiate between two works of art which appear substantially similar if it claims not to be able to understand art? This is the crux of the problem. Where appropriation art develops or borrows the work of another in its creation it cannot be so easily divorced from the original work. Appropriation is highly illustrative of issues which arise due to the minimal requirement of originality, the subconscious engagement with art theory by law and the necessity for any legal definition of art to be capable of providing remedies to nouveau concepts. It reveals that beyond simple theories like legal formalism, law will skate around delving into how theory shapes decisions between similar works. As noted by Kearns, there is no requirement for a high standard of originality in copyright, rather the standard is low and does not require the work to be 'novel, inventive or unique'.[61] Thus,

[61] ibid 133

the question in the case of appropriation artworks is 'what level of originality is needed when the work is a derivative of something which is already protected in copyright law?'.

Giry succinctly notes that 'copyright law favours original works over derivative works'.[62] Generally the value of a copy does not equate to the value of the original[63] and copies are not seen as authentic.[64] However, with the appropriated work, it borrows a percentage of the original work and attempts to transform this work into something new so it must pass its own originality test. Referring again to Kearns' criticism of copyright, Kearns identified that for a work to be considered original, it required 'no more than trivial effort and skill'[65] but 'mere mechanical copying' will not suffice[66] as per the judgment in *The Reject Shop plc v Manners*.[67] Thus, a derivative work would require a higher standard.[68] By deciding the higher standard, law must engage with art theory. A good example of the process applied to delineate this higher standard of originality comes from reflecting on the various copyright claims brought against Jeff Koons for his appropriation artworks.

The three cases which are most indicative of the relationship between appropriation art and copyright law are *Rogers v Koons*,[69] *United Features Syndicate Inc v Koons*[70] and *Blanch v Koons*[71] respectively. Each case provides an example of an action brought against Koons for breach of copyright following the creation and display of his art, with many works originating from his 1988 Banality series of sculptures. Beginning with *Rogers*[72] in 1992 and ending with *Blanch*[73] in 2006, Koons transformed his own legal image from

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[62] Stephanie Giry, 'An Odd Bird' (Legal Affairs, Sept/Oct 2002) <http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp> accessed 11 September 2017

[63] William A Carleton (III), 'Copyright Royalties for Visual Artists: A Display-Based Alternative to the *Droit de Suite*' [1991] 76 Cornell Law Review 510, 515

[64] ibid 522

[65] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 184

[66] ibid 185

[67] *The Reject Shop Plc v Manners* [1995] FSR 870

[68] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 306

[69] *Rogers v Koons* 960 F2d 301 (2d Cir. 1992)

[70] *United Features Syndicate Inc v Koons* 817 F Supp 270 (SDNY 1993)

[71] *Blanch v Koons* 467 F3d 244 (2d Cir 2006)

[72] *Rogers v Koons* 960 F2d 301 (2d Cir. 1992)

[73] *Blanch v Koons* 467 F3d 244 (2d Cir 2006)

unjust copycat to innovative appropriator. Although there are many merits to consider in each case, Farley claims that *Rogers*[74] 'best demonstrates the tensions in applying copyright law to contemporary art'[75] and thus it will be used as the key case from which the additional cases pivot. It is important to note that each case brought against Koons was brought within an American jurisdiction. Although this might limit the utility of this analysis, particularly as the American approach to fair use differs greatly from the English approach to fair dealing, the Koons example is critical as it involves a famous visual artist which brought attention to the legal issue of appropriation art on a global scale. Consequently, irrespective of jurisdiction, most legal criticism of appropriation art considers the various Koons cases.

There are a wealth of art law claims that have been brought against Koons. In the 1992 case of *Rogers v Koons*,[76] Koons was indicted for copyright infringement due to his use of Art Rogers' photograph '*Puppies'* as inspiration for the sculpture '*String of Puppies*'. Later in 1993, in *United Features Syndicate*,[77] Koons was again found to have infringed the copyright of Garfield's 'Odie' character, the rights of which were held by United Features Syndicate, due to Koons' use of the cartoon dog in the sculpture '*Wild Boy and Puppy*'. In 2006, Andrea Blanch brought an unsuccessful claim for copyright infringement against Koons.[78] Blanch claimed breach of copyright against Koons' partial use of her photograph that was originally featured in a Gucci campaign that appeared in issue 248 of Allure magazine in August 2000. Most recently, in 2017, Koons was found to once again have infringed copyright, on this occasion with regards to his use of a photograph by Jean-François Bauret for Koons' sculpture '*Naked*'.[79] Additionally, at the time of writing, there

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[74] *Rogers v Koons* 960 F2d 301 (2d Cir 1992)
[75] Christine H Farley, 'No Comment: Will Cariou v. Prince Alter Copyright Judges' Taste in Art?' (2015) 5 Intellectual Property Theory 19, American University, WCL Research Paper No. 2014-53 <https://ssrn.com/abstract=2529170> accessed 12 Dec 2018, 24
[76] *Rogers v Koons* 960 F2d 301 (2d Cir 1992)
[77] *United Features Syndicate Inc v Koons* 817 F Supp 270 (SDNY 1993)
[78] *Blanch v. Koons* 467 F3d 244 (2d Cir 2006)
[79] Amah-Rose Abrams, 'Jeff Koons and Centre Pompidou Lose Copyright Infringement Case' (Artnet News, 10 March 2017) <https://news.artnet.com/art-world/jeff-koons-pompidou-lose-copyright-infringement-case-887324> accessed 10th March 2018; Jessica Mieselman, 'How Jeff Koons, 8 Puppies, and a Lawsuit Changed Artists' Right to Copy' (Artsy, 14 August 2017) <https://www.artsy.net/article/artsy-editorial-jeff-koons-8-puppies-lawsuit-changed-artists-copy> accessed 15th March 2018

is a potentially outstanding claim against Koons for his work '*Fait d'Hiver*' as being an infringement of an advert created by Franck Davidovici for the French clothing brand Naf Naf. As succinctly summarised in one article: 'Appropriation: Where there's money, there's a lawsuit'.[80] For Koons, a successful artist who consistently creates and sells some of the most expensive works of art, the lawsuits have been persistent.

As noted by Farley, *Rogers*[81] is a useful microcosm for the relationship between law and the appropriation artist.[82] In *Rogers*, the artist Art Rogers brought a claim against Koons for a breach of copyright for his photograph '*Puppies*'. Koons had taken the black and white photograph and instructed Italian fabricators to fashion a colourful statue based on the image, constructed from painted wood, with Koons having complete control over the art direction. This work was later displayed in the 1988 '*Banality*' series. Rogers claimed that Koons had unfairly copied his image, while Koons accepted that the image had been used as inspiration but argued that the two works were spiritually different. For Koons, the new sculpture represented a 'fair social criticism' on societies obsession with the commodity and material goods.[83] Koons argued that the sculpture was a parody and did not fall within the breach of copyright as his use was fair. The court sided with Rogers, stating that Koons' use of the photo was a breach because it did not satisfy the four requirements of the fair use test.

The fair use test separates a work from being either a legitimate original work or an infringement upon a copyrighted work. As per Title 17, Chapter 1, subsection 107 of the U.S. Code, the fair use doctrine is stated as:

> 'Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting,

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[80] ArtLyst, 'Jeff Koons And Pompidou Center Lose Plagiarism Lawsuit in France' (ArtLyst, 10 March 2017) <http://www.artlyst.com/news/jeff-koons-pompidou-center-loses-plagiarism-lawsuit-france/> accessed 15th March 2018

[81] *Rogers v Koons* 960 F2d 301 (2d Cir. 1992)

[82] Christine H Farley, 'No Comment: Will Cariou v. Prince Alter Copyright Judges' Taste in Art?' (2015) 5 Intellectual Property Theory 19, American University, WCL Research Paper No. 2014-53 <https://ssrn.com/abstract=2529170> accessed 12 Dec 2018, 24

[83] *Rogers v Koons* 960 F2d 301 (2d Cir 1992) at 309 – 310

> teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.'[84]

The fair use defence is a four-stage test used to see if the use was legitimately fair. Rather than focus solely on art theory, the test applies commercial and economic values to reach a judgment on an infringement. However, the existence and use of this test ultimately emphasises the critical importance that the law has placed on finding the balance between the interests of the original and the nouveau, with Farley again extending this to suggest that any judgment in copyright cannot avoid issues based in art theory.[85] The fair use defence is one area in which the consideration of art theory is unavoidable within the legal system.[86] However, for Koons, and for many appropriation artists, the fair use defence is a risky safety net because law tries to ignore its own engagement with art theory in reaching decisions. The necessity to interpret the art theory-based elements of the works, such as the meaning, purpose or justification of the artwork, only partially forms this test and these elements are restricted to ensure that the commercial elements are given more weight. Although Koons and many of the experts within the Koons trials relied heavily on the spirituality of the work, the court did not find that these elements were significant enough to outweigh the commercial and economic aspects. Koons tried to argue that the use was a parody on society at large, but instead the court found that any derivative work must parody the copyrighted work itself.[87] Thus, this lack of correlation between the two did not justify the use and the court did not draw a

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[84] 17 United States Code, Chapter 1, §107 (2018)
[85] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 834
[86] ibid 833
[87] *Rogers v Koons* 960 F2d 301 (2d Cir. 1992)

distinction between the two works, even though an argument based in art theory would have supported Koons' claims.[88]

The fair use defence largely boils art down to technicalities and four requirements. For some, such as Boggs, this process of boiling down means the meaning of art is lost and misunderstood.[89] Moreover, Farley argues that because Koons' work was not understood, the judgment reached in *Rogers* was wrong[90] on the basis that the fair use test requires an understanding of the purpose and the character of the use and the nature of the work which are two inherently theory-based elements. However, as is shown in *Rogers* and many of the other Koons cases, the copyright process is not a deliberation on art theory and will avoid overtly commenting on theory. Instead, the reduction of art theory and the promotion of non-aesthetic values is a common approach used by law to define art, as seen in the prioritisation of formalism. As noted in *Blanch*, the test focuses on the physical expression of the work and the court's interpretation of this rather than the artist's intent or significance of the artwork itself:

> 'Copyright law thus must address the inevitable tension between the property rights it establishes in creative works, which must be protected up to a point, and the ability of authors, artists and the rest of us to express them or ourselves by reference to the works of others, which must be protected up to a point. The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.'[91]

This tension is ever-present in art as Jones notes that 'nearly all artists take some inspiration from the works of other artists. Yet there is a risk that this appropriation of an early work will infringe upon copyright.'[92] Consequently, the fair use test seems to be a failed balancing act. In an attempt to avoid openly engaging with art theory, it makes a complicated mess of art and gives preferential treatment to the original at the detriment of the new derivative. Macmillan is very critical of the effectiveness of the four-stage test,

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[88] Christine H Farley, 'No Comment: Will Cariou v. Prince Alter Copyright Judges' Taste in Art?' (2015) 5 Intellectual Property Theory 19, American University, WCL Research Paper No. 2014-53 <https://ssrn.com/abstract=2529170> accessed 12 Dec 2018, 24
[89] James S G Boggs, 'Who Owns This?' [1992] 68 Chicago-Kent Law Review 889, 898
[90] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 853
[91] *Blanch v Koons* 467 F3d 244 (2d Cir 2006) at 251 - 252
[92] Michael E Jones, *Art Law: A Concise Guide for Artists, Curators and Art Educators* (Rowman & Littlefield 2016) 119

arguing that it will protect a very limited number of cases of appropriation art, with many falling foul of the rules[93] and Shore states that the fair use defence 'offers artists only a vague and unstable defence in court, one that is open to widely differing interpretation'.[94] The four-stage test only goes to show that the copyright definition of art prioritises the economic and commercial issues which surround the presence of art in law because law does not want to openly engage with theories more complex than is necessary. Appropriation art fragments the rules of copyright beyond legal formalism and the minimal originality threshold into a dynamic which requires law to engage with art theory to some extent. However, as seen in the Koons example,[95] the discussion of theory is limited and the focus is often redirected to the commercial impact of the artwork.

When comparing the US approach of fair use against the English law principle of fair dealing, the desire of law to evade engaging explicitly with art theories is prevalent. Hart J in *IPC v New Group Newspapers*[96] stated that 'fair dealing was an elusive concept, incapable of exact definition because it was a matter of fact, degree and impression'[97] while Shore has criticised the defence as offering 'only a vague and unstable defence in court, one that is open to widely differing interpretation.'[98] Though how law should interpret fair dealing is not elaborated upon because that would encourage active engagement with art theory. This is evident from the limited guidance provided in the statutory notation of the defence of fair dealing. Sections 29, 29A & 30 of the CDPA outline many instances in which something is considered fair dealing, and therefore not an infringement of copyright. These instances are often complicated, nuanced and long sections of legislation. For the purpose of providing an example, a short extract from each of these sections is as follows:

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[93] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 64

[94] Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books 2017) 56

[95] *Blanch v Koons* 467 F3d 244 (2d Cir 2006) at 251 - 252

[96] *IPC Media Ltd v News Group Newspapers Ltd* [2005] EWHC 317

[97] ibid at 533 - 534

[98] Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books 2017) 56

> '29(1) Fair dealing with a work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.'[99]
>
> 29A(1) The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—
> (a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and
> (b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).[100]
>
> 30(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public'[101]

The English law approach to defences in copyright are comparably much stricter than that of the United States. This approach has been historically viewed as unworkable, with Wienand commenting that, until the recent amendments to copyright in 2014, copyright was viewed as 'compris[ing] a series of arbitrary and unenforceable rules.[102] Although Wienand states that 'the intention [of these new changes] is to bring UK copyright law up to date',[103] the result of this is yet to be seen due to the how recent the change is.[104] Thus, the current scope of copyright and the defence of fair use, or fair dealing in England, continues to be difficult to quantify. Alternatively, Jasani makes a critical comparison between the European and American approaches to fair use, returning some damning verdicts on the realities of both systems:

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[99] The Copyright, Designs and Patents Act 1988, s 29
[100] ibid s 29a(1)
[101] ibid s 30(1)
[102] Peter Wienand, 'UK Copyright Infringement Exceptions – How the Changes Will Affect You' (Farrer & Co, July 2014) <https://www.farrer.co.uk/Global/Briefings/UK%20Copyright%20infringement%20exceptions%20–%20how%20the%20changes%20will%20affect%20you.pdf> accessed 14th March 2018, 1
[103] ibid
[104] ibid

> 'By contrast, in Europe, the defences against a claim for copyright infringement are much narrower, where only prescribed types of uses can enjoy protections from claims of infringement. Some argue that the U.S.'s broad fair use exception creates room for abuse where influential artists profit by and get away with "stealing" from smaller artists, while others argue that Europe's narrow and prescriptive approach stifles creativity.'[105]

Jasani's comments suggest that neither system's application of fair use is ideal. In the process of deciding whether a work of art has infringed on another, and by attempting to protect reproductive rights, the legal system always runs a risk of inflicting a detrimental impact upon art and creativity. Moreover, with many artists abiding by Cattelan's notion that all originality is an 'evolution of what is produced… originality is about your capacity to add',[106] it is concerning that Jasani has indicated the stifling effect caused by copyright. Ultimately, the issue of appropriation is not an issue which will be easily solved anytime soon and, as identified in *Blanch*, often requires a case-by-case basis.[107] The individuality of each case and limited application of precedent on later cases is a recurring theme throughout the legal definition of art that is facilitated and appeased through the Art Conundrum. Weil tries to place a positive spin on the issue of fair use, stating that appropriation art is 'the "Robin Hood" provision of copyright. Within limits, it permits the artist - not infrequently envisioned as a sort of rogue - to poach on the content-rich so long as excessive harm is not done and so long as something with a value beyond that of the original is thereby made available to everybody else.'[108] Perhaps this fits with Cattelan's theory that art evolves from what has come before but the reference to "Robin Hood" equates fair use and the problem of appropriation with the redistribution of value which further compounds the legal treatment of art as a valuable property. This default

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[105] Azmina Jasani, 'Appropriation Art Takes Another Hit in European Courts' (Art at Law, 9th May 2017) <https://www.artatlaw.com/archives/2017-jan-dec-archives/appropriation-art-takes-another-hit-european-courts> accessed 23rd January 2018

[106] Sarah Thornton, *33 Artists in 3 Acts* (Granta Books 2015) 152

[107] *Blanch v Koons* 467 F3d 244 (2d Cir. 2006) at 264; In Brief, 'Copyright in Artistic Works' (2 July 2018) <https://www.inbrief.co.uk/intellectual-property/copyright-artistic-works/> accessed 2 July 2018

[108] Stephen E Weil, 'Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood' [2001] 62 Ohio St L J 835

position in law sees the importance of art theory consistently made inferior to these commercial interests.

The technicalities of law in copyright are complex, with DuBoff suggesting 'the courts are constantly walking a tightrope'[109] when defining art in law. DuBoff simplifies the American approach to copyright into four succinct questions in order to highlight ways in which law attempts to solve the problem of art without directly emphasising the significance of art theory in its process. Instead, law decides an artwork's worth by reframing the art theory debate to focus on the pragmatic issues surrounding the artwork. DuBoff's questions are as follows:

> 'The legal definition of art for copyright analysis therefore requires that the work in question have at least a modicum of originality. As discussed above, the courts have interpreted the originality requirement as having a very low threshold, asking the following questions when testing originality:
>
> 1. Is the work a common design? (*Atari*[110])
> 2. Is the design commonly used in the trade? If so, has the design been rearranged in a manner that exhibits a minimal amount of originality? (*Towle*[111])
> 3. Was the work copied? (*Lynch*) If so, is there a minimal amount of intellectual labour involved? (*Haan*[112])
> 4. Would an ordinary observer viewing the two objects conclude that the two items are substantially similar? (*California Raisin*[113]) If so, is the substantially similar feature one that is so generalized as to be deemed an unoriginal expression and, therefore, non-copyrightable (*Gund*[114])'[115]

DuBoff's approach succinctly identifies the crux of several crucial United States copyright cases, many of which provide greater insight into the general workings of copyright.

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[109] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm. & Ent L J 303, 305
[110] *Atari Games Corp v Oman* 693 F Supp 1204 (DDC 1988)
[111] *Towle Mfg Co v Godinger Silver Art Co Ltd* 612 F Supp 986 (CDNY 1985)
[112] *Haan Crafts Corp v Craft Masters Inc* 683 F Supp 1234 (ND Ind 1988)
[113] *Cory Van Rijn v California Raisin Advisory Bd* 697 F Supp 1136 (ED Cal 1987)
[114] *Gund Inc v Smile Intl Inc* 691 F Supp 642 (EDNY 1988)
[115] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 311

Overall, it emphasises that the legal approach to art is often a process of wider technical considerations which may contradict with seemingly 'common sense' assumptions. Each of the cases noted by DuBoff considers a focused aspect of how copyright interacts with property and how it can be used to distinguish copyrightable works from those which aren't, even if the works in question may already be considered generally as works of art. By utilising this pragmatic approach, the content of the artwork does not need to be explored because the judiciary is able to remain on the peripheries of art theory consideration. Although Kearns notes that the English legal system is 'more generous'[116] in its requirements than many other systems and the applicability of these questions is limited when applied to the English legal system, it is still a useful tool to understand the reluctance of law to engage with art theory and the preference for keeping language neutral and based in legal principles. DuBoff's test suggests that it is likely that the English approach to art within copyright will also prioritise pragmatic elements above art theory.

Appropriation art is difficult to define in copyright law. Whether a work is an original work or an illegitimate appropriation hinges on a test which is not easily qualified or applied. On the one hand, copyright protects the notion of originality and preventing art from becoming a copying process. Law does not require an overtly theory-based judgment to do this and it creates a straightforward guideline for the legal approach towards direct copies. Yet, on the other hand, it risks failing to protect significant appropriation works which require law to engage openly with theory to reach its judgment. Thus, the problem of appropriation art emphasises the failings of a legal approach which relies on defining art only to the minimum threshold of formalism and effort-based originality. A decision based in art theory is too risky for law and thus judges revert to *Bleistein*[117] principles to justify the minimum engagement with theory. Weil succinctly summarises that 'fair use is quintessentially a "don't ask" practice'[118] in which artist's borrow from others and only face legal consequences if a claim is brought. If it is a "don't ask" practice, then the legal issue of appropriation is only a concern after the fact. In turn, the legal system does not need to provide an abstract definition of art or

[116] Simon Stokes, 'Categorising Art in Copyright Law' [2001] Entertainment Law Review 179, 181
[117] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[118] Stephen E Weil, 'Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood' [2001] 62 Ohio St L J 835

appropriation because it is a reactive law. This further allows law to avoid hypothesising on art theory because appropriation is case specific. Thus, the issue of appropriation art does not become any clearer, rather the treatment of appropriation art by law further fragments art. This follows the general theme of how art is defined within the law of copyright.

Weil critiques that 'with its extreme reliance on particular facts and circumstances [fair use] may never be a neat or tidy affair.' I am inclined to agree with Weil. Within this discussion of fair use, it has become clear that the fair use provision is a complicated and nuanced area of law. Rather than give definitive answers, it appears to ask even more questions, which law does not truly wish to engage with due to their aesthetic nature. When theory-based decisions are made in deciding between two works of art, they are constrained by the case in which they are made which limits the ability to use these fair use principles in later cases. As exemplified by appropriation art, artists can create an artwork that is recognised as a legitimate work of art under legal formalism, but it may still fall foul of copyright law. The fair use doctrine provides limited guidance on this dynamic. It then begs the question, why are some works of art more copyrightable than others and how does copyright gauge the worth of a work of art?

iv. Gauging 'Worth' in Copyright

Copyright law identifies that some artworks are worth protecting and thus others, by proxy, are not. This is problematic for art because legitimately recognised works of art may not be afforded copyright protection or may breach that of another, as is clear in the case of appropriation art. How law reaches a decision on which artworks to protect over others further shows the subtle engagement with art theory in legal decisions. However, as the judiciary also distance themselves from overtly considering art theory, it leaves the artist in an unclear legal position. How can an artist be original but also be influenced by other artists when the threshold for originality is low and similar works are increasingly copyrighted which reduces the pool of creativity? Perry notes this concern of the artist, stating that 'it is very difficult to be original unless you can find your own micro-niche, and then it's difficult to step out of your niche because the territory on either side is

already inhabited by another artist with his own micro-niche'.[119] Perry's concerns as an artist are paramount because, when applying this to law, if copyright protection is awarded to the territory either side of them, then there is limited legal room for creativity or diversity. With this in mind, I turn to Kearns' extensive work on art law for one of the most critically damning statements on the application of copyright law:

> 'Contrary to the trend of non-exhaustive definitional approaches to art by artists and art philosophers, copyright law, in its function of protecting original art, has to decide what "art" is that is worthy of legal protection in this sphere'[120]

Under Kearns' premise, copyright law makes decisions clearly based in art theory when deciding which works are worth protecting. The idea of deciding worth is a theory-based decision, one must understand the qualities that make it worth protecting. Yet, with such a low threshold for certification under the CDPA and originality requirement, this engagement with art theory is severely stunted. This highlights that the legal definition of art is often not operating at its optimum output because it aims to simplify the problem of art to art's detriment. Karo draws similarity to the process of art criticism, as copyright law 'plac[es] different forms of visual art in unequal positions',[121] preferring the physical, traditional and non-appropriated. Therefore, often legitimate works of art which fall outside of these criteria are not protected or awarded legal protection under copyright principles because they require more engagement with art theory than the court is willing to give. By contrast, works which may not be worthy of protection may still receive protection due what Kearns calls 'the lack of formal admission of a criterion of quality or worthwhileness in operation'.[122] Without directly considering quality and actively engaging with art theory, just as some works which should be protected aren't, many which may not be worth protecting but fulfil the required copyright law thresholds will receive copyright protection. The definition of art becomes trivialised in this manner and does not accurately represent the wider understanding of art, value and worth.

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[119] Sarah Thornton, Interview with Grayson Perry in Sarah Thornton *33 Artists in 3 Acts* (Granta Books, 2015) 308
[120] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 84
[121] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 94 – 95
[122] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 85

Karlen reflects back to Duchamp's ready-mades to emphasise this trivialisation. Although Duchamp's readymades are presented as works of art, their physical form is not 'original'[123] and thus they would not be granted copyright protection. Karlen emphasises that the legal recognition of readymades as artworks is instead found in other areas of law, in particular the statutory powers given to galleries to accept works of art into their collections.[124] As readymades are accepted by galleries, they are recognised by law as artworks by default. This legal power afforded to galleries strips the requirement of the court to engage with art theory because the definition of art has already been made. Thus, arguably, it shows that the court readily accepts Institutional Art Theory by proxy but does not explicitly state as such. However, under copyright, without considering their merit,[125] Duchamp's ready-mades and other works of art may be miscategorised and fail to be protected.

Weighing the worth of art in copyright also touches upon a concurrent theme throughout art, commodification. Although the commodity effect on art in law is further elaborated in Chapter VII, it is worth considering briefly here. If copyright only protects art which is 'worth' protecting for the purposes of an economic monopoly, it suggests that only art which is worth commodifying will be protected. Kearns indirectly addresses this concept of commodification by referring to 'a subtle relationship in copyright law between value of a product and its copyrightability'. [126] This relationship is exemplified by the Mickey Mouse curve in copyright. The Mickey Mouse curve charts how the Disney corporation have protected their property rights in Mickey Mouse by lobbying the US government to extend copyright whenever the period is about to end for Mickey.[127] An action such as this emphasises the commodity effect in copyright and the continual application of this area of law in a way which does not promote art theory but instead favours economic interests. Whether the Mickey Mouse effect is really driving copyright law is tenuous, but

[123] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51
[124] ibid
[125] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 94
[126] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998)
[127] Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books 2017) 58

it does emphasise the impact of the commodity on art in law and how this can warp the application and perception of legal definitions of art. Ultimately, a seemingly commodity driven copyright is not going to promote art theory in its decisions and will be supportive only of those works of art that are commercially worth copying.

Wickenden claims that the economic value of art has long been recognised by law, most notably by the Engraving Act of 1734[128] which largely formed the basis for the introduction of copyright. Copyright is now often quoted as the most obvious example of how art is treated according to property law logic.[129] Consequently, it is not surprising that Kearns draws attention to the 'subtle relationship' between economic value and art in copyright law. Within this relationship, copyright protects that which is worth copying[130] and that which has an exploitable economic value. Moreover, through treating art as property, law facilitates the international art trade by creating laws which allow for the sale of art and its connected rights and interests.[131] It is thus no surprise that Boggs, a vocal critic of legal interference in art, has argued that '[Copyright and intellectual property] has more to do with the right of exploitation and the protection of productivity' than the promotion of the arts or artist's rights.[132] These laws are criticised because they subtly perpetuate the relationship between art and commodification and continue to allow economic influences to exploit their enforcement. Thus, it is not surprising that criticisms of the impact of economics on art return a verdict that economic consideration in art is to the detriment of art theory.[133] When art is commodified, it becomes an object and reduces the necessity for art theory in judgments, reducing art in the law to a pure chattel once again.

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[128] Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017, 1

[129] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 381

[130] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 64

[131] Paul M Bator, 'An Essay on the International Trade in Art' [1982] Stanford Law Review 275

[132] James S G Boggs, 'Who Owns This?' [1992] 68 Chicago-Kent Law Review 889, 907

[133] Norman Williams Jr. & John M Taylor, 'American Land Law Planning Law' (Clark Boardman Callaghan, 2003); Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 417

The focus of copyright law is 'to protect reproductive rights'[134] ahead of artistic rights or art theory. Although Fishman argues recent revisions of copyright have provided better solutions for the visual artist,[135] this is not the focus of copyright law. The goal of copyright is not placed on protecting art which is recognised as important in theory, it instead rests on protecting predominantly economic and commercial aims that are vested in works of art. Artworks which have a commercial, economic or proprietary interest in them are worth protecting. The main concern for copyright is the protection of reproductive rights and to provide a property-based monopoly to a specific person or persons.[136] In order to do this, the definition of art will always be compromised to fit the legal interest. Copyright is not concerned with defining art, it is concerned with protecting the right to prevent illegitimate copying of a protected work and any definition of art reached is a decision made to fulfil this priority.

v. How Copyright Set Legal Formalism as the Default Legal Art Theory

The primary approach to art in copyright is based in legal formalism. Legal formalism is prevalent in multiple areas of law but is largely linked to copyright due to its historical development of grouping art into categories.[137] In every subsection considered in this chapter, formalism has been the default manner in which copyright has defined art before applying additional considerations such as originality or fair use. This link is so strong that Barron argues that the way 'in which copyright law defines the work… exposes the affinities between the discourses of copyright law and aesthetic theory.'[138] However, legal formalism is also a common trend which appears in every area of art law and is referenced to some extent in almost every art law case or judgment because, for law, it is impossible to separate a work of art from its physical form. The inability to separate a work of art from its physical form draws back to the idea/expression dichotomy, a

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[134] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 494
[135] ibid
[136] Leonard D DuBoff, *Art Law in a Nutshell* (West Publishing Company 1984) 1894
[137] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 373
[138] ibid 369

predominant principle of copyright,[139] which requires that a work of art be physically expressed to receive copyright protection. By focusing on the form of the art, it reduces the expanse of what can be considered art and provides a clear guideline for law to follow. These guidelines can be highly specific[140] and prescriptive,[141] further restricting the definition of art, protecting forms such as painting while failing to provide protection for those more contemporary works which blur the line between expression and idea,[142] such as minimalist and conceptual art.[143] By restraining art within legal formalism, the judiciary is able to appear to evade engagement with art theory because as shown in the previous chapter, legal formalism is the simplest of art theories which does not require debate and adheres to the principles of *Bleistein*.[144]

Pila's commentary on legal formalism with respect to copyright is one of the most succinct, illustrating both the pros and cons of legal formalism in the definition of art. For Pila, legal formalism states that 'art is an aesthetic object that exists and is perceived in virtue of its form… it is these non-aesthetic features which constitute the work.'[145] Legal formalism differs from artistic formalism because it does not consider the style or features of the work[146] and largely focuses on its physical form. Pila draws attention to these 'non-aesthetic features' to emphasise that law lacks a consideration of the loaded aestheticism and relevant art theories in favour of elements which require far less

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[139] Ditlev Tamm, 'Art and Copy - A Legal Historian's Reflections on Copyright' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 159

[140] Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 121

[141] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 50

[142] Cristin Fenzel, 'Still Life with "Spark" and "Sweat": The Copyright of Contemporary Art in the United States and the United Kingdom' [2007] 24 Arizona Journal of International & Comparative Law 541, 549

[143] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 95

[144] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

[145] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 231

[146] Frank Sibley, 'Aesthetic Concepts' [1959] 68 Phil Rev 421, 424

deliberation. For Pila, 'in order to perceive a work *qua* work one must perceive it in relation to a category of work',[147] explicitly trumpeting the usefulness of legal formalism. The generic work provides a base from which conditions are set to create categories of identification with these conditions being 'intrinsic to the work'.[148] Examples of these conditions include the necessity for paintings to be 'images fixed in paint on a surface'[149] as in *Harpbond*[150] and sculptures as being 'three-dimensional objects carved or shaped by hand'[151] as in *Metix*.[152] These conditions delineate under which category a work of art will fall and give a legal definition for each type of work. Therefore, even if the court is reluctant to acknowledge it, these legal decisions are subtly based in art theory.

The largest benefit to utilising legal formalism in the definition of art is that it reduces a large amount of judicial engagement with art theories. This makes legal formalism incredibly attractive for a legal system which resists openly engaging with art theory. When asking *why* something is a work of art, legal formalism states it is art simply because it takes the physical form of a work of art. Thus, legal formalism reduces the necessity to consider why we value the work or why some forms are recognised above others as there is no need for these considerations. Legal formalism ignores complex art theory to create a more objective standard of art, with the desire to provide clarity and avoid the 'perennial debate'[153] of defining art broadly. This allows seemingly conflicting forms of art, such as the painting and the cartoon to co-exist[154] and does not require the judiciary to state which is the superior form of art. The court must only consider 'whether

[147] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 230
[148] ibid 231
[149] ibid 233 - 234
[150] *Merchandising Corporation of America Inc v Harpbond* [1971] 2 All ER 657
[151] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 233 - 234
[152] *Metix (UK) Ltd v G H Maughan (Plastics) Ltd* [1997] FSR 718
[153] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 337
[154] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 185 – 192, 190

or not the work has the quality or nature of an artistic work, not whether it has artistic quality of merit'[155] which allows the court to remain as neutral an adjudicator as possible.

However, legal formalism is problematic because it is largely an exclusionary approach to art. If relying on legal formalism alone, the English law approach delineates that any form of art outside those listed within the statutory categories cannot be considered art.[156] The definitions of art in the CDPA are extensional definitions which create a prescriptive list of what can be considered to be art.[157] This approach is often linked back to the historic judgment in *Olivotti*[158] that art was only that which was 'imitative of natural objects . . . and appealing to the emotions through the eye alone.'[159] *Olivotti* created a clear legal standard for defining art based on prescriptive elements, declaring all art which did not resemble the natural world as not art at all. Eventually the Brancusi trial[160] helped to suspend this approach by widening what could be art to be more than Imitation Theory, but it did little to prevent the dominant trend of formalism remaining as a legal staple. Consequently, Barron refers to the use of exclusionary definitions, such as those found in section 4 of the CDPA,[161] as artistic 'blindness'.[162] The judiciary are unable to see the breadth of art or understand art beyond its physical form. Moreover, Boggs notes that ''the visual arts have not fared as well in societies born of the English aesthetic, where literature is the supreme form of expression',[163] a declaration which Macmillan supports[164] as literature has one form while the visual arts have many. This helps to explain why legal formalism will inevitably 'favour some artistic genres, and

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155 Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 55

156 Cristin Fenzel, 'Still Life with "Spark" and "Sweat": The Copyright of Contemporary Art in the United States and the United Kingdom' [2007] 24 Arizona Journal of International & Comparative Law 541, 547

157 Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 821

158 *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)

159 ibid at 46

160 *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

161 Copyright, Designs and Patents Act 1988

162 Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 375

163 James S G Boggs, 'Who Owns This?' [1992] 68 Chicago-Kent Law Review 889, 905

164 Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 73

some artistic gestures within those genres, over others'[165] as art is much more diverse and harder to categorise than literature.

As established, there is little commentary on how or why formalist categories are chosen which makes it difficult to justify adding new categories of art. [166] Thus, it is not surprising that areas of law which rely on legal formalism, such as copyright, often struggle to adapt to new forms of art. Schovsbo argues that ''the law of copyright is often said to be in a state of 'crisis'[167] due to this inability to adapt to new trends and developments. Moreover, Macmillan emphasises that English courts struggle with the artistic[168] and that the relationship between copyright law and creativity is uncertain. [169] These critiques of copyright law can be extended to criticism of legal formalism because both authors are referring to copyright law's reliance on legal formalism and the exclusionary list approach which is unable to keep up with the ever-changing expanse of art. Simply attempting to expand the number of exclusionary categories would not be an appropriate remedy as noted by Stokes, where it is highlighted that 'as one leading copyright Judge has put it, the law has been 'bedevilled' by attempts to extend the scope of these definitions.'[170] The difficulty to expand artistic categories can also be seen in the area of moral and economic rights as new statutes are 'extremely cautious and restrictive'[171] when defining art, particularly in new areas of law. There is a clear limit on the flexibility or adaptability of legal formalism because of the limitations in expansion and

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[165] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 397

[166] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 52 – 53

[167] Jens Schovsbo, 'How to Get it Copy-Right' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 25

[168] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 54

[169] ibid 49

[170] Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 121

[171] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 304

development. With post-modern art practices pushing the norms of established laws[172] and often falling outside of aesthetic categorisation also,[173] it is critical that the legal approach to art is one which is capable of adaptation and modernisation.

Where legal formalism is not sufficient, there are clear instances in which the court considers elements of art which are beyond the formal properties of the work. As illustrated in *Metix Ltd*,[174] which drew the distinction between sculpture and moulds for industrial purposes, relying solely formalism may mean law cannot always differentiate between art and non-art. Only with further consideration of art theory, can we appreciate the suggestion that part of the experience of an artwork is the appreciation of the interaction between the aesthetic elements and the formalist qualities.[175] Consequently, law must be capable of accommodating additional art theories in its judgments. This can include, for example, the intention of the artist and the societal appreciation of the work.[176] Moreover, the consideration of originality and what is meant by the word 'artistic' in 'artistic works' are just two additional elements for defining art which have been considered within this chapter.

To illustrate, a succinct example can be found in Booton's discussion of how a half-eaten sandwich by David Hockney would not be considered a sculpture.[177] Booton's argument is based on the notion that although the form of Hockney's sandwich, a three-dimensional object made by a recognised sculptor, would arguably be a sculpture under the formalist copyright definition of art, it should not be because Hockney does not intend for it to be perceived as such and its form is purely functional.[178] This example draws on the notion of the author, intention, how the object is made and its function. All of these elements can

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[172] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 374
[173] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 185 – 192
[174] *Metix (UK) Ltd v. G H Maughan (Plastics) Ltd* [1997] FSR 718
[175] Noel Carroll, 'Aesthetic Experience Revisited' [2002] 42 The British Journal of Aesthetics 145, 167; Sherri Irvin, 'Scratching an Itch' [2008] 66(1) The Journal of Aesthetics and Art Criticism 25, 27
[176] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 239
[177] David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' [2003] Intellectual Property Quarterly 38, 62
[178] ibid

be legitimate considerations in a more expansive definition of art, such as under the Artist-Led Theory and whether Hockney intended for the work to be art. Relying on legal formalism alone may risk the sandwich becoming a work of art even though it would not be perceived as art by a vast majority of the public. This limitation of legal formalism can also be seen in the strong criticism of copyright protection that is afforded to demonstrational drawings for rivers, screws and bolts.[179] Moreover, Stokes suggests that an artist's intent is crucial to understanding a work of art as there is a difference between a planned work of art and a random series of marks with no order or selection process.[180] Legal formalism alone cannot account for these nuances and to rely entirely on formalism for as the sole definition of art is clearly a naïve and inadequate approach.

The predisposition for legal formalism is due to its simplicity. It relies on the common belief that a work of art is a physical embodiment of an artist's idea. The major commonality between the tastes of the artworld and the legal certainty of the law is an acknowledgement of 'the methods, materials and means deployed in the production of each art'. [181] Both law and art reflect on these properties as an initial interpretation of the work, whether that be their significance for art theory or, for law, purely through legal formalism. However, some works do not conform to these standards and would be wrongly categorised as art, while some objects fit the description but are not works of art.[182] Legal formalism can be utilised to easily identify artworks which do conform to the traditional interpretation of art, allowing for a swift and efficient approach to defining most recognisable works of art. It is only for those works in which legal formalism cannot reach a strong judgment that the court must then expand and deliberate further. Although formalism may be a superficially valid approach to art, sometimes that is all that is required of law. If works of art are categorised as works of art by law, there is no need for litigation or a case to be brought forward. It is only when this doesn't occur, and a decision cannot be made sufficiently on a work of art that we see legal proceedings

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[179] *British Northrop Ltd v Texteam Blackburn Ltd* [1974] RPC 57

[180] Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 122

[181] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 372

[182] Stina Teilmann, 'Art and Law: An Introduction' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 18

commence. Thus legal formalism, although flawed, is fit for the initial legal definition of art and only when it fails and cannot reach an effective judgment which appeases all, does law really need to elaborate further.

vi. Conclusion

The implications of the legal definition of art in copyright are complicated with Goldsmith stating that even to consider copyright as a singular entity is not really possible, as there are too many nuanced grey areas.[183] From the outset, copyright simply includes art as one of a plethora of protected categories of property within the CDPA. The CDPA also does not consider the ramifications of describing an object as art because it does not need to draw this distinction. Provided the objects falls within the formalistic criteria of art set within the CDPA and is sufficiently original, then it is art for the purposes of copyright, irrespective of whether it is aesthetically a good or bad work of art. Copyright also promotes the protection of reproductive rights and economics above art theory which has led to vast issues with appropriation art, art which is not deemed 'worthy' of protection or in the case of readymades, art which does not meet the originality requirement. It is, therefore, not surprising that copyright is 'often said to be in a state of crisis.'[184]

Where possible, as is evident, copyright law will avoid the interpretation of art and will focus on the commoditisation of a formalist interpretation. By using legal formalism and the originality threshold and restricting art to an approved 'number of outputs and not considering the quality or significance in a work of art, it is art which suffers.'[185] Like the necessity for there to be an array of theories in art criticism, copyright applies a variety of theories but to different extents, settling largely on the prioritisation of legal formalism. This reinforces my belief that law utilises the Art Conundrum to restrain art

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[183] Robert Shore, Interview with Kenneth Goldsmith in Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books 2017) 164

[184] Jens Schovsbo, 'How to Get it Copy-Right' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 25

[185] Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 72

to the legal context in which it arises and deploy the relevant art-based theory where necessary. The predominant reliance on legal formalism in copyright shows that legal formalism alone is not sufficient for defining art in law as it is not truly sufficient for ensuring that all works of art are protected in copyright itself. Instead it compounds the belief that I raised within the Art Conundrum, that the law often defines art relative to the legal context in which it arises and utilises the relevant art theories based on the aims of the judiciary to reach a sufficient legal judgment.

For Kearns, 'English copyright law adopts the rough test that what is worth copying is worth protecting, whereas the criteria for copyright protection are said to avoid any assessments of value.'[186] This observation highlights that copyright cannot be truly devoid of art theory because it makes value assessments on works of art. Those which are worth copying shall be protected, which means they must have some inherent worth, a value which is dictated by the market and institutional interpretation of art. These are art theories at play. By prioritising value, copyright becomes a commodification process which protects art because the value is significant, a value fundamentally based in art theory. Consequently, these themes are prevalent in how law facilitates the legal definition of art and are explored throughout this thesis. As copyright is boiled down to fundamental protection of property rights to ensure that ultimately authors can 'profit economically',[187] it indirectly engages with the role of art theory while also attempting to steer clear of this decision. This is seemingly not an optimal approach to art, but it is sufficient for the purposes of law.

For the purposes of copyright law there is no need to define art beyond the implications of reproductive rights and a shallow interpretation of originality. The focus of copyright law is not to define art but to protect a wide criterion of property, of which art is one of many. Copyright law highlights that any possible definition of art in law relies principally on legal formalism as a base for definition, but it requires additional considerations to truly grasp the magnitude of difference between general property and art. The Art

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[186] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 64

[187] Leonard D DuBoff, *Art Law in a Nutshell* (West Publishing Company 1984) 189; Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 304

Conundrum facilitates this process because it encompasses all theories of art and makes them available for use in law. Through this, art in law is supported by art theory as well as by the legal context and goal. Defining art within law is not about legitimising *all* art, rather only legally recognising art for the purposes of the legal context in which the art arises. Within copyright the focus is on legal formalism and the originality requirement. As copyright is based in economic principles, it is logical to now progress onto a study of how taxation, another economically charged field of law, defines and adjudicates on art.

V

Taxation Law & Art

Taxation and its Inconsistent Judgements on Art

> 'The only cases in which courts have not sought to avoid the question of what makes art "art" are those decided by the customs courts. Even here, however, the courts address this question as if they are the first to do so, ignoring all of the scholarly discourse on this point.'[1]
>
> Christine H Farley, 2005

> 'If external regulations start to hit the artworld, one must pray that they will be as global as the art market itself. Otherwise, regional asymmetries will lead to regulatory arbitrage. There is precedent here: The Netherlands raised its VAT on art, for example, Dutch galleries struggled greatly, while Hong Kong's zero VAT makes it an art-market nexus; and strong tax incentives encourage far more American than European collectors to donate great works to public museums.'[2]
>
> Bruno Boesch & Massimo Sterpi, 2016

Art and tax are two concepts which are connected through economic pressures. Due to the complexities of the art market, the impact of commodification and the monumental value of art, art cannot exist without being subject to the effects of taxation. The implications of tax upon art are astronomical, impacting upon all critical areas of the art world from creation of art to the sale and preservation of art. As a result, art and tax law clash intensely over the monetary and art theory valuations of art. When an object is declared as art, it has substantial implications for tax law. Through assessing the confrontational interactions between art and law, critical analysis will show that the legal definition of art in tax law purposely remains inconsistent, allowing the court to use the Art Conundrum to define art without openly engaging with art theory.

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[1] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 839

[2] Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016), xii

As taxation is such an indeterminately broad category, I have dissected the field into key areas of tax law. These examples will showcase the implications of tax as milestone approaches and key observations towards art in law. Consequently, this chapter shall progress between through several of these examples to reduce the breadth of this field to a concise survey. This journey through how tax and art interact is one which focuses on a select number of key cases which reveal the fundamental issues that have arisen between art and tax law. This will reveal further intricacies of how art is defined and constituted within legal discourse, with a heavy focus on addressing the primary source material directly. A useful starting point is to reflect on the tax requirements placed on art by Her Majesty's Revenue & Customs (HMRC). Although there is a large amount of doctrinal law which relates to taxation, the amount which is applicable to art can be reduced to a few key examples. To begin, I start with the most obvious and simple concept to digest, the applicability of Value Added Tax (VAT) to emphasise that in tax, art is again initially treated as property.

i. Value Added Tax

The standard rate of VAT in the United Kingdom is 20%, which is applicable to the majority of goods and services.[3] The default approach to art is a rate of 20% VAT to be applied in all art dealings, from private sales to auctions. This generalised approach to VAT and art highlights the ongoing trend to treat art like property by default. Where possible, by treating art like property, it reduces the significance of art theory in law and allows law to avoid engaging with intricate theories of art. However, when dealing with art, often several rates of VAT are applicable depending on the circumstances. As a result of these circumstantial differences, there are various government notices applicable only to the art world, such as VAT Notice 718/2: the auctioneers' scheme.[4] These provisions give guidance to the art professional on how to process VAT within art transactions in order to ensure that the rate of VAT is applied correctly.

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[3] HM Revenue & Customs, 'VAT Rates' (06 Jan 2018) < https://www.gov.uk/vat-rates> accessed 06 Jan 2018

[4] HM Revenue & Customs, 'VAT Notice 718/2: the auctioneers' scheme' (04 April 2017) <https://www.gov.uk/government/publications/vat-notice-7182-the-vat-auctioneers-scheme> accessed 05 October 2017

The sale of art can be subject to many different rates of VAT beyond the default 20% rate. For example, in particular circumstances the sale of art can be exempt from VAT *entirely*, such as in accordance with VAT Notice 701/12,[5] which governs 'Antiques, works of art or similar (as assets of historic houses) sold by private treaty to public collections'[6] and 'Antiques, works of art or similar (as assets of historic houses) used to settle a tax or estate duty debt with HM Revenue and Customs.'[7] Art can also be subjected to a third rate of VAT, known as a margin scheme, with a rate of 16.67% applied to the 'difference between what you paid for an item and what you sold it for, rather than the full selling price'.[8] With works of art being one of the key categories of eligibility, it appeals to auctioneers and dealers specifically as it requires a purchase and a further sale for eligibility, adding yet another dimension to the taxation of art. There is also, at times, an applicable 5% reduced rate which often triggers with respect to imports.[9] Conclusively, it can be deduced from these exceptions that art sometimes *will* be treated differently from normal chattels for the purposes of taxation. This is critical because, even in its most general form, taxation begins to segregate art as a special or different and reinforces the notion that there are elements of art worth giving special assistance. However, as law continues to avoid engaging with art theory, it does little to directly emphasis what exactly makes art different or suggest *why* art is special. Law continues to perpetuate a notion that art can be special, suggesting there is some engagement with theory to support these claims, but does not elaborate to reduce the necessity for law to engage directly with these theories. This again places tax law in line with the *Bleistein* approach[10] and the desire to avoid law becoming an arbiter of taste.

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[5] HM Revenue & Customs, 'VAT Notice 701/12: disposal of antiques, works of art from historic houses' (08 December 2011) < https://www.gov.uk/government/publications/vat-notice-70112-disposal-of-antiques-works-of-art-from-historic-houses> accessed 08 October 2017

[6] HM Revenue & Customs, 'Guidance: VAT Rates on Different Goods and Services' (12 May 2017) <https://www.gov.uk/guidance/rates-of-vat-on-different-goods-and-services#introduction> accessed 08 October 2017

[7] ibid

[8] HM Revenue & Customs, 'VAT margin schemes' (27 November 2017) <https://www.gov.uk/vat-margin-schemes> accessed 27 November 2017

[9] Value Added Tax Act 1994, s 21

[10] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

When importing art, dependent on the circumstances, any of the three rates of VAT may be applicable.[11] Generally, art will receive a 0% rate or reduced rate of 5%,[12] as noted in the tariff charts. In creating these legal exceptions, law is indirectly acknowledging the significance of art which can only be linked back to its importance in art theory. So much so that there are circumstances in which art can pass into the United Kingdom without custom duties levied upon it. The value of art exceeds pure commodification so those who deal in art are able to capitalise on these exceptional rates. This appreciation for art is crucial because it contradicts the seemingly dictatorial and formalist language of the Trade Tariff. It hints at an appreciation of art theory without directly confirming it. Such an observation can be stretched to suggest that the dictatorial language of the Trade Tariff is for the simplification of the customs process and not meant to be used as an indicative definition of art. These reductions in VAT are clear special allowances for art and highlight that the legal definition of art is not based on a singular theory of legal formalism alone.

Nevertheless, the general implication of VAT on artworks, in principle, is that art is treated in the same way as any other good or service. It is unclear precisely why in the few exceptional circumstances, such as pursuant to VAT Notice 701/12,[13] that art is treated differently from the norm. Consequently, the generality of assessing VAT gives little insight into understanding the legal distinction between art and other goods or how law draws this distinction. Simply critiquing VAT alone is not sufficient to understand the legal dynamic of art within tax. Thus, VAT forms the base position of tax law by echoing the ongoing parallels between art, commodification and the *Bleistein* approach.[14] However, this base position has been challenged and somewhere which returns a much more decisive and illuminating decision on art is in the customs court. The customs court

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[11] HM Revenue & Customs, 'Commodity information for 9701100000' (05 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/commodities/9701100000#overview> accessed 06 October 2017

[12] ibid

[13] HM Revenue & Customs, 'VAT Notice 701/12: disposal of antiques, works of art from historic houses' (08 December 2011) < https://www.gov.uk/government/publications/vat-notice-70112-disposal-of-antiques-works-of-art-from-historic-houses> accessed 08 October 2017

[14] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

has been a key battleground between art and law, providing clear precedent on the legal definition of art which is still prominent today.[15]

ii. Import Duties and Customs

When art is imported into most jurisdictions, there are applicable customs duties that must be paid by the importer. Within the United Kingdom, imports of art are subject to import duties. Through both case law and the supporting statutory instruments, the assessment of import duties and the customs court reveals crucial signals with respect to how art is defined. The initial signal is found within the language used by HMRC when referring to art which reinforces the treatment of art as a commodity. When importing art, the Trade Tariff states that 'the commodity code for importing [art] is 9701100000'.[16] Art is explicitly referred to as a commodity in its initial description. This is critical as it highlights that tax law deems art as a basic product which can be sold and traded, rather than glorifying it, as is often the case in art theory. This also aligns tax law's treatment of art as a commodity with the approach under copyright law. The notion of commoditisation has elicited vast debate in art theory on the significance and meaning of art because it suggests that art can be reduced to sales and popular tastes instead of having a greater cultural significance. It adheres to the circular theory of art being made for sale and approval. This is one of the great criticisms of Institutional Art Theory approach. When the creation of art is led by these forces, its fundamental basis is drawn from economics, reinforcing the notion of art as commodity. If art is created under the pressures of the market or seeks immediate approval from the Institution, then it is hard to divorce it from commoditisation because its foundation is rooted in a desire to be appealing to the market. With regards to the Trade Tariff definitions, the terminology used does little to engage these divorce proceedings. Rather it directly enforces art as commodified good and law's alignment with these elements highlights again that art in law cannot truly escape art theory, even if the relationship is subtle.

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[15] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 839

[16] HM Revenue & Customs, 'Commodity information for 9701100000' (05 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/commodities/9701100000#overview> accessed 06 October 2017

This notion of commoditisation is also furthered by the definition of art to be found in the Trade Tariff under heading 97.[17] With accordance to the Tariff, art is defined generally under headings 9701 - 9703 as follows:

01. Paintings, drawings and pastels, executed entirely by hand, other than drawings of heading 4906 and other than hand-painted or hand-decorated manufactured articles; collages and similar decorative plaques[18]

02. Original engravings, prints and lithographs[19]

03. Original sculptures and statuary, in any material[20]

These definitions of art paint a critical picture of how art is defined within the circumstances of tax law. Within these classifications, the concept of art is again reduced to legal formalism. Reducing art to 'paintings, drawings and pastels' reinforces Pila's criticisms of a law which prioritises procedural ease over artistic quality and integrity.[21] By attempting to simplify the art theories at play, once again, law aims to ease the burden on the judiciary. By reducing the necessary engagement with art theory and facilitating an approach that makes art classifiable without expansive discussion, the judiciary does not need to overtly engage with art theory. The result is the ever-present sentiment in art law, that art becomes little more than these physical outputs because *it does not need to be more than that* for law's purposes. Through the Trade Tariff definition art is reduced to a simple object which can ultimately be commodified and manipulated by the legal context in which it appears.

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[17] HM Revenue & Customs, 'Section XXI: Works of art, collectors' pieces and antiques – 97: Works of art, collectors' pieces and antiques' (07 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/chapters/97> accessed 07 October 2017

[18] HM Revenue & Customs, 'Heading 9701' (07 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/headings/9701> accessed 07 October 2017

[19] HM Revenue & Customs, 'Heading 9702' (07 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/headings/9702> accessed 07 October 2017

[20] HM Revenue & Customs, 'Heading 9703' (07 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/headings/9703> accessed 07 October 2017

[21] Pila J, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229

By reducing the wider art theory through legal formalism, artworks are divorced from their cultural significance. This is a crucial decision because it empowers the legal system to make decisive judgements about art without addressing the complexities that further art theories entail. Again, this is the prominently recurrent theme whenever art appears within law's discourse. Through its use of language, the Trade Tariff has attempted to alienate the breadth of art theory present in art for the purposes of taxation. In doing so, it has accommodated for the reality that customs officers deal with objects and not with theories. From this it can be deduced that the legal definition of art is generally reductive, reducing artworks to mere chattels for ease of legal and practical proceedings. Perhaps this is an unavoidable consequence of considering art and tax. The nature of taxation is rooted in the ability to levy a duty against an object or service. For this to be possible, an object or service must be subject to commodification. However, the significance of art theory in art emphasises the inherent value of art beyond these reductive powers. Art cannot merely exist as a commodity. Therefore, as is ever apparent, even though the legal system attempts to avoid engaging with art theory, there are indisputable instances in which this does occur. As noted in the previous section exceptions are indeed made for art in tax law.

iii. The Brancusi Trial

One of the most definitive cases on the legal definition of art is the famous trial of Constantin Brancusi's '*Bird in Space*'.[22] Brancusi's '*Bird*'[23] is a perfect microcosm for how the legal definition of art produces much confusion, contestation and drama. Consequently, analysing the case of Brancusi's '*Bird in Space*' will highlight the fundamental issues of art in tax law. The appropriateness of studying the Brancusi trial as a source of commentary on the English legal system is made possible for two reasons. The first being that both modern customs tariffs in both the United States and England are similar in content when defining art and are clearly influenced by the outcome of the

[22] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[23] The Met Museum, 'Constantin Brancusi | Bird in Space' (MET Collections, 2017) < http://www.metmuseum.org/art/collection/search/486757> accessed on 4th August 2017

Brancusi trial. The second is that the modern English case of *Haunch of Venison*[24] directly refers to the Brancusi trial as the guiding case in its judgment. This second point shall be assessed under the next subheading. Under this subheading, I will first address the similarity between the US and UK customs tariffs before moving on to the Brancusi case.

Under the current Harmonized Tariff Schedule of the United States, the definition of art is not dissimilar from that of the HMRC Trade Tariff, which was addressed in the previous subheading. If an object is considered to fall within specific formalist categories, it may pass into the US duty free. The current US Tariff defines art under several headings and mirrors the UK Trade Tariff under headings 9701 - 9703:

> '9701 – Paintings, drawings and pastels, executed entirely by hand, other than drawings of heading 4906 and other than hand-painted or hand-decorated manufactured articles; collages and similar decorative plaques; all the foregoing framed or not framed:'[25]
>
> '9701.10.00 - Paintings, drawings and pastels'[26]
>
> '9702.00.00 - Original engravings, prints and lithographs, framed or not framed'[27]
>
> '9703.00.00 - Original sculptures and statuary, in any material'[28]

Additionally, the current US Tariff Schedule introduces several further headings which are applicable in the classification of art, those that are worth noting are:

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[24] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820

[25] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Heading 9701' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9701> accessed 08 October 2017

[26] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Heading 9701.10.00' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9701.10.00> accessed 08 October 2017

[27] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Subheading 9702.00.00' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9702.00.00> accessed 08 October 2017

[28] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Subheading 9703.00.00' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9703.00.00> accessed 08 October 2017

> '9810.00.30 – Drawings and plans, reproductions thereof, engravings, etchings, lithographs, woodcuts, globes, sound recordings, recorded video tapes and photographic and other prints, all the foregoing whether bound or unbound, and exposed photographic films (including motion-picture films) whether or not developed'[29]
>
> '9812.00.20 – Articles imported for exhibition by any institution or society established for the encouragement of agriculture, arts, education or science, or for such exhibition by any State or for a municipal corporation'[30]
>
> '9813.00.70 – Works of the free fine arts, engravings, photographic pictures and philosophical and scientific apparatus brought into the United States by professional artists, lecturers or scientists arriving from abroad for use by them for exhibition and in illustration, promotion and encouragement of art, science or industry in the United States'[31]

These categories are much more widely drafted today than at the time of the Brancusi trial. Although still based restrictively in legal formalism, these broader modern categories indicate legal acknowledgement of the diversity of art form and the subtle adoption of additional theories beyond legal formalism due to the impact of the Brancusi trial. The consideration of the pragmatic issues of who is importing the artwork and the intended destination and reason for importing the work as legitimate qualifiers for deciding whether an object is art emphasises the inclusion of both Institutional Art Theory and the Artist Led Theory. Although the tariff does not divulge that these are additional art theories at work by focusing on pragmatic issues surrounding the work of art, similar to the questioning approach highlighted in copyright by DuBoff,[32] it is an undeniable inclusion of art theory in defining art. The inclusion of these additional

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[29] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Subheading 9810.00.30' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9810.00.30%20> accessed 08 October 2017

[30] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Subheading 9812.00.20' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9812.00.20%20> accessed 08 October 2017

[31] United States International Trade Commission, 'The Harmonized Tariff Schedule of the United States – Subheading 9813.00.70' (2017 HTSA Revision 1 Edition) <https://hts.usitc.gov/?query=9813.00.70%20> accessed 08 October 2017

[32] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 305

considerations should be welcomed as it is a crucially inclusive approach to art and one which was not possible at the time of the Brancusi trial.

To begin assessing the significance of *Brancusi*,[33] the facts of the Brancusi trial are as follows. The case concerned a piece of sculpture by the well-known sculptor Constantin Brancusi. The sculpture titled '*Bird in Space*,' also known as '*Bird in Flight*', was crafted from polished bronze in a curved and symmetrical elongation to mimic the concept of a bird in flight. The sculpture was escorted by Marcel Duchamp, a well-known artist, into America and was to be exhibited in the Brummer Gallery in New York.[34] It was entered into United States customs as a work of art, which would grant duty free entry for the sculpture. However, customs officials did not grant '*Bird in Space*' free entry and instead levied a 40% duty against the price in accordance with the duty levied on goods manufactured from metal.[35] Duchamp contested the decision upon the basis that '*Bird in Space*' was a legitimate sculpture and work of art and should therefore enter duty free. The court had to decide which tariff definition '*Bird*' could be prescribed. After evidence from expert witnesses within and outside of the Art World, a verdict was reached. In the case of Brancusi's '*Bird*', it could be classified as sculpture created by a professional artist and eventually it received duty free entry.[36]

Brancusi's '*Bird*' would have little trouble entering into the United States now under classification as art. However, at the time of the Brancusi trial in the late 1920s, the scope of the legal definition of art was much narrower. It was only after the monumental ruling in the Brancusi trial that the legal definition of art began to widen enough to accept a broader definition of art. *Brancusi*[37] paved the way for the legal definition of art to incorporate new schools of art while also considering the purpose and reason for the work's import alongside the artwork's form and the intent of the artist. In Brancusi's case, the customs officers did not consider the fact that the art was imported for exhibition, nor

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[33] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[34] Stephanie Giry, 'An Odd Bird' (Legal Affairs, Sept/Oct 2002) <http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp> accessed 11 September 2017
[35] United States Tariff Act of 1922, para 399
[36] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[37] ibid

whether it was being brought into the country by a recognized art professional for the encouragement of arts. Rather, Brancusi's '*Bird*' was tested against a classical definition of art which did not and could not accommodate for its avant-garde presentation.

Initially, the case seems rather straightforward. An artist who created a sculpture attempted to transit it into the United States to be displayed as an artwork, only to find that customs required the payment of a duty. However, when read deeper, the case gives rise to the constant battle between law and art theory. At the time of entry, in 1926, the United states trade tariff did accommodate for some works of art. Under paragraph 1704, the definition of a work of art accommodated for a broad medium of art. At the time, paragraph 1704 defined a work of art as:

> 'Original paintings in oil, mineral, water, or other colors, pastels, original drawings and sketches in pen, ink, pencil, or water colors, artists' proof etchings unbound, and engravings and woodcuts unbound, original sculptures or statuary, including not more than two replicas or reproductions of the same; but the terms "sculpture" and "statuary" as used in this paragraph shall be understood to include professional productions of sculptors only, whether in round or in relief, in bronze, marble, stone, terra cotta, ivory, wood, or metal, or whether cut, carved, or otherwise wrought by hand from the solid block or mass of marble, stone, or alabaster, or from metal, or cast in bronze or other metal or substance, or from wax or plaster, made as the professional productions of sculptors only; and the words "painting" and "sculpture" and "statuary " as used in this paragraph shall not be understood to include any articles of utility, nor such as are made wholly or in part by stencilling or any other mechanical process; and the words "etchings," "engravings," and "woodcuts" as used in this paragraph shall be understood to include only such as are printed by hand from plates or blocks etched or engraved with hand tools and not such as are printed from platen or blocks etched or engraved by photochemical or other mechanical processes.'[38]

Seemingly under this definition, again based in legal formalism, it is arguable that '*Bird*' could have been defined as art. Brancusi was a professional sculptor and there is limited specification as to what constitutes a sculpture. The sculpture must be 'original'[39] and sculpted from one of the listed materials, of which 'bronze'[40] is included. Brancusi's '*Bird*'

[38] United States Tariff Act of 1922, para 1704
[39] ibid
[40] ibid

fulfils both of these requirements. Therefore, under the Tariff Act alone, Brancusi's *Bird* was arguably art. However, the Court did not rely on this definition alone. Instead it also considered the 1916 Customs Court decision in *Olivotti*[41] which held that for sculpture to qualify as art, it must be '"chisel[ed]" or "carve[d]" "imitations of natural objects," chiefly the human form, [and that it must] represent such objects in their true proportions'.[42] Brancusi's '*Bird*' did not imitate the natural form of a bird in flight, rather it *suggested* that form through interpretation. The semantic discussion which followed focused on whether the sculpture must directly imitate and resemble a bird in flight because it was titled as such. *Olivotti*[43] relied on a very literal interpretation of art, referencing back to the arguments of Imitation Theory and mimesis. This is critical because it already emphasises that the court was willing to consider the significance of another art theory alongside legal formalism, even if it did not admit to doing so. Again, this highlights that the court cannot stay neutral to art theory and that it must consider theory in judgments on art. Whether Brancusi's *Bird* could be considered art rested largely upon one preconception, whether Brancusi's sculpture resembled a bird in flight as the title referenced.

Within a mimetic approach to art, true art is that which imitates the natural world. The consequence of reliance on a mimetic approach to art is that creativity and the imagination are hampered and restricted to a narrow view of what constitutes a work of art. If a strict application of the *Olivotti*[44] rule is followed, it is hard to conclude that Brancusi's '*Bird*' is art. However, even by the Brancusi trial, art theorists had long moved beyond the notion of mimesis as the only way to define art. The expansion of art theory beyond Imitation Theory was also not lost on the side of the claimants in the Brancusi trial. They emphasised through their arguments that Brancusi's '*Bird*' was art even though it did not imitate the form of a bird because it was represented by these new schools of art. The court subsequently demonstrated its awareness of these broader schools of art theory through the following comment:

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[41] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[42] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916); Stephanie Giry, 'An Odd Bird' (Legal Affairs, Sept/Oct 2002) <http://www.legalaffairs.org/issues/September-October-2002/story_giry_sepoct2002.msp> accessed 11 September 2017
[43] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[44] ibid

> 'In the meanwhile there has been developing a so-called new school of art, whose exponents attempt to portray abstract ideas rather than imitate natural objects. Whether we are in sympathy with these newer ideas and the schools which represent them, we think facts of their existence and their influence upon the art worlds as recognized by the courts must be considered'[45]

This commentary was a pivotal moment in the legal definition of art. The Brancusi case directly challenged the judiciary to expand their understanding of art and emphasised the importance of a broader definition that evolved beyond legal formalism. It suggested that the ways in which art had previously been defined in law had come to be insufficient because of the stifling focus on traditional form and classical presentation. Moreover, it highlighted the court's willingness to again consider the significance of the art world and its influence. The application of the rule in *Olivotti*[46] would have meant that '*Bird*' was not art in law even though it clearly was a work of art in the terms by which art constituted itself. Through his unorthodox approach to both presentation and form, Brancusi not only baffled the legal system but forced it to reconsider the basic definition of art upon which it had relied for so long. This led to arguably the most explicitly obvious engagement with art theory in the legal definition of art:

> 'The object now under consideration . . . 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, and as we hold under the evidence that it is the original production of a professional sculptor and is in fact a piece of sculpture and a work of art according to the authorities above referred to, we sustain the protest and find that it is entitled to free entry.'[47]

Through these comments, the Brancusi court held that the ornamental and beautiful nature of '*Bird*' endowed it with unignorable aesthetic qualities, invoking Aesthetic Theory in its judgment. The emphasis on the ornamental nature, the status of the sculptor, the influence of expert witnesses and the originality of the piece guaranteed its status as art while also enshrining the Institutional and Artist Led theories in law. This is

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[45] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928) 430
[46] *United States v. Olivotti & Co.,* 7 Ct Cust App 46 (1916)
[47] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928) 431

one of the lone examples of the court ever openly engaging with art theory, stating that as it was both pleasing to look at and ornamental in nature then it was a work of art. It is thus not surprising that Farley states the customs court is the place where judgments which engage with art theory are the most evident.[48] The Brancusi case underscored that although physical attributes and assumptions are useful, they are not always sufficient. The legal definition of art must be able to encompass more than this. Elements such as the theoretical, historical and cultural value of art needed to be introduced to the process of legal definition if a sufficiently accurate definition of art was to be reached. These different values enforced that the legal definition of art needs to be more expansive.

With the resolution of the Brancusi trial, the impact of legal context upon definitions of art is undeniable. The legal context in which the art arises impacts the ways in which an artwork is viewed and called into question. As the Brancusi trial occurred in a jurisdiction with such a prominent art market,[49] the Brancusi trial is famed for how it reiterated that law must also appreciate that art is more than imitation. The outcome of the trial directly suggests that it is improper and unjust to define art without acknowledging that art can be portrayed in various mediums and styles, there is no one size fits all approach to art. Thus, when art is defined within the circumstances of law it must appreciate the breadth of art theory to keep up with the ever-changing landscape of art.[50] This is a crucial demand on the law because it requires an appreciation for artistic talent and merit which often directly contradicts with the natural inclination of legal professionals and the *Bleistein*[51] approach. There is already uncertainty in defining art in theory, as explored previously in the 'Defining Art' chapter of this thesis, and it appears that following *Brancusi*[52] law has had to more openly acknowledge that it must learn to deal with these discrepancies. It is conclusively clear that art cannot be defined by physical attributes or as commodity alone, as is attempted in the Trade Tariff. Therefore, the extent to which

[48] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 839
[49] United States Tariff Act of 1922
[50] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928) 430
[51] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[52] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

this expansion of art theory in law must occur must be explored and can be done so through addressing *Haunch of Venison*.[53]

For Soucek, the Brancusi trial is a signifier of the judiciary beginning to question the legal definition of art rather than simply stating what is indeed art.[54] The extent to which Brancusi has had a lasting effect is undeniable. It opened up the ability of law to accept additional art theories in its interpretation of art, but it did not give a conclusive answer on what is legally art. By introducing new considerations into a previously entirely mimetic and formalist theory of art, Brancusi has widened the discussion as to what legally constitutes art. However, although Brancusi was a monumental ruling, little has changed since then. How little progress this discussion has made is no more evident than in the English law case of *Haunch of Venison*,[55] what I refer to as the 'English Brancusi Trial'. The judgment in *Haunch of Venison*[56] refers heavily to the outcome of the Brancusi trial and is, to some extent, a duplicated modern counterpart. It deals with similar facts but reaches a vastly different judgment. It too is a customs case concerning legally recognising a sculpture as art. However, unlike the Brancusi example, it does not end with a judgment in favour of art. Rather it shows just how convoluted and intricate legal process can be and highlights just how little progress has been made from the Brancusi trial to now.

iv. Haunch of Venison and The English Brancusi Trial

The Brancusi trial set the precedent that art can be more than legal formalism and imitation by emphasising that there are new schools of art emerging which must be legally recognised as art. The works of Bill Viola and Dan Flavin fall into this new school, being video and light installations respectively. The work of both these artists was challenged in the English court in *Haunch of Venison*.[57] Addressing *Haunch* is a useful

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[53] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[54] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 389
[55] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[56] ibid
[57] ibid

exercise in understanding both the transferable impact of the American *Brancusi*[58] case into the English legal system and for understanding how *Brancusi*[59] has set the stage for the legal definition of art to be more than imitation. However, *Haunch* is also a critical case because it highlights that interpretations of art can vary depending on the court. Although the English tribunal originally chose to decree both works as art for customs purposes, the ruling was overturned by the EU Commission. Instead, the commission decided that when dismantled, neither work could be considered to be art at all and should be subject to the full rate of VAT and applicable customs duties.

Haunch[60] is a significant milestone in the English law approach to art for two reasons. Firstly, it is clear that the American Brancusi trial has become the clear international template for defining art in tax law. This reduces the amount that individual jurisdictions must hypothesise on their own interpretation of art theory because the decision has already been made in Brancusi. And the second, as the EU commission's reversal of the case was made specific only to *Haunch*, it is evident that law will always aim to return judgments on a case specific basis which restricts the ability of later courts to rely on the precedent set in art law cases. This is particularly true if the ramifications are international and pose a potentially restrictive problem for other jurisdictions, as would be the case for all EU member states. As a result, as *Haunch* was overturned, no transferrable precedent has been set and the question of whether art is legally art when dismantled remains unanswered. Consequently, this again reinforces the hesitant nature of law to adopt a new approach towards incorporating art theory overtly in law and create definitive rules in art.

In *Haunch*, the Haunch of Venison gallery attempted to import installation artworks by recognised artists Bill Viola and Dan Flavin, made from video and light bulbs respectively. The court did not dispute that they were works of art when assembled, nor did they refute the reputations of either artist.[61] The dispute rested on whether the works of art could be considered sculpture for the purposes of import even though they were dismantled. If

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[58] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[59] ibid
[60] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[61] ibid

classified as art, the rate of VAT would be reduced with no applicable customs duties whereas if the works were not found to be art then both the customs duties and the full rate of VAT would have been applied.[62] The appellant claimed that they should be classified as art while for the respondent, as the works were dismantled and not in one piece, the claim was made that the two works 'should be classified according to the classification of their separate parts.'[63] Under this principle, the works would not be art but would instead be classified as '"electrical devices" which covers "image projectors" and "lamps and light fittings"'.[64] The court found in favour of declaring the works as art, relying on two key points in its judgment. The first being the support from 'what might be termed professional people in the art world'[65] for the works to be recognised as sculpture, with the director of the National Portrait Gallery Sandy Nairne stating that 'the question of 'is this the sculpture?' is not to do with what it looks like when it is in customs but what it looks like assembled'.[66] The second point on which the court relied was on a strong correlation drawn to the Brancusi trial:

> 'Eighty years later it does not seem in the least surprising to find that an abstract work could be regarded as sculpture. That case [Brancusi] is not an authority binding on us but it is interesting to note that the Court made the following remarks:

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[62] Withers LLP, 'Stop Press: Haunch of Venison Partners Limited v HM Revenue and Customs' (Withers Worldwide, 2009) <https://www.withersworldwide.com/en-gb/stop-press-haunch-of-venison-partners-limited-v-hm-revenue-and-customs> accessed 24th Jan 2018

[63] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820 at 18

[64] Withers LLP 'Stop Press: Haunch of Venison Partners Limited v HM Revenue and Customs' (Withers Worldwide, 2009) <https://www.withersworldwide.com/en-gb/stop-press-haunch-of-venison-partners-limited-v-hm-revenue-and-customs> accessed 24th Jan 2018

[65] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820 at 21

[66] Matthew Kohley, 'The World's Most Expensive Light Bulbs: How the European Union is Applying VAT to Imported Works of Art' (Lexology, 28 Aug 2012) <https://www.lexology.com/library/detail.aspx?g=6aa77d09-7232-49e4-88ec-2c8d9214cc20> accessed 22nd July 2018

> "... the man who produced the importation is a professional sculptor, as is shown by his reputation and works and the manner in which he is considered by those competent to judge upon that subject"[67]

This clear reliance on the principles of *Brancusi*[68] is crucial, particularly as even the court noted that the *Brancusi*[69] decision was not binding upon the English court. Throughout *Haunch*,[70] there is a constant reliance on the authority of *Brancusi* and its ability to accept a non-traditional work into its canon as art. Much of the case draws back to how *Brancusi* readdressed the legal definition of art to include more abstract works. The decision to accept these works as art appeared to be a monumental step forward in the legal definition of art because it was an explicit acceptance by the Tribunal 'in its decision that sculpture has expanded considerably during the 20th and 21st centuries to encompass novel art forms including video installations and that accordingly, the work of Flavin and Viola should be treated as sculpture.'[71] It shows that there is an interdependence between jurisdictions on reaching judgments in art which seemingly suggests that reaching a legal definition of art in any jurisdiction must have an appreciation for its global impact. Moreover, it highlights that the legal definition of art has the ability to evolve and accept new categories of work. Had this become the binding precedent and not been reversed by the subsequent EU commission ruling, the legal definition of art may be much more openly progressive than it remains.

Within the EU Commission decision however, the Commission argued that whether dismantled or combined, these were not works of art. On Viola's work, the commission stated that 'as none of the individual components or the whole installation, when assembled, can be considered as a sculpture. The components have been slightly modified by the artist, but these modifications do not alter their preliminary function of

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[67] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820 at 30

[68] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

[69] ibid

[70] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820

[71] Withers LLP 'Stop Press: Haunch of Venison Partners Limited v HM Revenue and Customs' (Withers Worldwide, 2009) <https://www.withersworldwide.com/en-gb/stop-press-haunch-of-venison-partners-limited-v-hm-revenue-and-customs> accessed 24th Jan 2018

goods of Section XVI. It is the content recorded on the DVD which, together with the components of the installation, provides for the 'modern art'.[72] While on Flavin, it was decided that 'it is not the installation that constitutes a 'work of art' but the result of the operations (the light effect) carried out by it'.[73] This was a 'surprising decision',[74] not only because it seems to separate the experience of art as being different from its physical presentation, which is arguable a theory of art in its own right, but also because the 'Commission also accepted the view of the HMRC that even though the works cannot be characterized as sculpture on import, the full VAT rate should be calculated based on the value of the shipments as sculpture.'[75] Thus, the court is stating that it is not a work of art but it should be taxed at a rate relative to its value as a sculpture. This is an illogical conclusion. Tischler produces an extensive critique of the Haunch of Venison case and the failures of law to be able to adapt to the presentation of art and it's attached theory, arguing that the problem is that this standard creates no account in the law for what "art" is at all'.[76] It is in instances like this that the court must learn to draw definitive lines on art and avoid being hiding behind the vague defences that have been so prevalent since the days of *Bleistein*.[77]

The Haunch of Venison case is worrying for the artworld. It sets a dangerous precedent that art is only finished when it is combined. However, true to form, law has curbed the influence of this case by restricting the judgment to the case specific basis of *Haunch*.[78] As noted by Lydiate, 'Because [EU Regulation 731/2010] only addresses the specific Viola and Flavin 'components' imported into the EU by Haunch of Venison, it remains moot whether it embraces importation into the EU of component parts of all disassembled

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[72] Commission Regulation (EU) No 731/2010 of 11 August 2010 concerning the classification of certain goods in the Combined Nomenclature
[73] ibid
[74] Kohley M, 'The World's Most Expensive Light Bulbs: How the European Union is Applying VAT to Imported Works of Art' (Lexology, 28 Aug 2012) <https://www.lexology.com/library/detail.aspx?g=6aa77d09-7232-49e4-88ec-2c8d9214cc20> accessed 22nd July 2018
[75] ibid
[76] Rachel J Tischler, 'The Power to Tax Involves the Power to Destroy": How Avant-Garde Art Outstrips the Imagination of Regulators, and Why a Judicial Rubric Can Save It' [2012] 78(1) Brooklyn Law Review 1665, 1686
[77] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[78] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820

artworks'.[79] The judgment from *Haunch* cannot be applied elsewhere in law, nor can it be used as a foundation for later judicial commentary because it has been restricted by the EU commission to be only relevant to the specific artworks of Viola and Flavin. Comparable to the approach in *Bleistein*,[80] the court attempts to avoid engaging with art theory by refusing to make an overall statement on how artworks should be defined and whether assembly is critical for legal recognition as art. Instead, the court restricts its impact and reduces later liability by reigning in any ontological argument to a case specific technicality.

Why the commission reached their judgment is still unclear. Particularly as Markellou[81] draws attention to the regulation's contradiction of previous cases, both *Onnasch*[82] and *Krystyna*,[83] which considered sculpture to be 'all three dimensional artistic productions, irrespective of the techniques and materials used'.[84] The original *Haunch* tribunal argued that the precedent set by allowing these dismantled works to be art would not allow an influx of cases arguing that non-artworks were art because if there was any doubt, the burden of proof would be on the importer to prove their status.[85] For Markellou, 'it is undeniable that art is moving faster than its legal framework'[86] and the failure of the court to keep up with these developments will continue to be detrimental to the evolution of art. Yet, the Commission still chose to reverse the decision and with limited explanation.

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[79] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 135

[80] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

[81] Marina Markellou, 'Rejecting the Works of Dan Flavin and Bill Viola: Revisiting the Modern Boundaries of Copyright Protection for Post-Modern Art' [2012] 2(2) Queen Mary Journal of Intellectual Property 175, 181

[82] Case 155/84 *Reinhard Onnasch v Hauptzollamt Berlin-Packhof* [1985] ECR 01449

[83] Case C-231/89 *Krystyna Gmurzynska-Bscher v Oberfinanzdirektion Koln* [1990] ECR I-04003

[84] Case 155/84 *Reinhard Onnasch v Hauptzollamt Berlin-Packhof* [1985] ECR 01449

[85] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820 at 50

[86] Marina Markellou, 'Rejecting the Works of Dan Flavin and Bill Viola: Revisiting the Modern Boundaries of Copyright Protection for Post-Modern Art' [2012] 2(2) Queen Mary Journal of Intellectual Property 175, 177-8

The lack of transparency from the EU Commission's decision to reverse the outcome of the English court has led to a further fragmented approach to the legal definition of art, with Haunch of Venison's own lawyer relying on Freedom of Information legislation to find out about the EU commission's process.[87] Ultimately, for *Haunch of Venison*[88] it can be deduced that to avoid engaging with art theory in deciding at what point something becomes art, the court will instead focused on the technicality that upon presentation to the customs court, if the work is not immediately recognisable as a work of art then it cannot be declared as such. This again aligns the basic approach to art with legal formalism which has been proven to be reductive and not suitable as the sole theory for defining art. Such a clear contradiction in opinion between the *Brancusi*[89] and *Haunch*[90] cases raises the question as to how customs courts assess art, particularly when they are at loggerheads with expert opinion. The Brancusi work was not immediately recognisable as a work of art but the definition of art expanded to include these new schools of art. Whether this expansion will eventually include the works of Flavin and other minimalist or installation sculptures is yet to be seen. Lydiate questions whether contemporary art market professionals have the courage and conviction that Duchamp and Brancusi and Whitney had in 1928 to take the case to the European Court of Justice.[91] Currently, we are still awaiting another case to test the limits of the court.

Ultimately, *Brancusi* and *Haunch* show that the extent to which the court must theorise about art is unclear. As shown in the Brancusi trial in the previous subsection, the Tariff Act was not sufficient for defining '*Bird in Space'*. As consequence, the trial required additional input from experts within the art world.[92] The experts who testified on behalf of customs stated that '*Bird'* was not art and that it could not be viewed as such. Yet, the

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[87] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 134

[88] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820

[89] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

[90] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820

[91] Henry Lydiate, 'Flavin's Fittings' *ArtQuest* (2011) <https://www.artquest.org.uk/artlaw-article/flavins-fittings/> accessed 30th April 2020

[92] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928) 430 - 432

witnesses called to testify for the claimants argued that the work was beautiful and a true work of art, a threshold set by Brancusi. We see this occur again in the Haunch of Venison case. History repeats itself but returns a polarized verdict. Even where experts convinced the English courts that Viola and Flavin's works were art, the European Commission reversed the decision to declare the dismantled works as art.

When reflecting on *Brancusi*[93] and *Haunch of Venison*,[94] both cases concern the issue of deciding how we define a work of art that does not present as a traditional artwork. But what of the case where an artwork which was considered "good" art and recognised as a legitimate work of art in a traditional style was not declared legally as art for tax purposes? On this notion, it is important to consider the case of Castle Howard,[95] which dealt with an artwork which was treated as non-art. This direct contrast is critical in highlighting that often at the forefront of law is not the desire to define art for art's sake, but rather to reach the optimal legal judgment, irrespective of the ontological impact on art.

v. A Brief Consideration of Capital Gains Tax and Reynolds' 'Portrait of Omai'

The case of Castle Howard concerned a claimant who was attempting to establish that an artwork could be classified as 'plant and machinery' under section 44 of the Chargeable Gains Act 1992. The argument advanced here is the inverse to that in Brancusi suggesting that there are circumstances under which artworks can be defined as non-art for advantageous legal purposes. The case of Castle Howard is interesting because it deals directly with the question whether an artwork can be a wasting asset based on its value and the legal context under which it is considered rather than on its significance as art or even its physical form.

The facts of the case[96] begin years earlier, following the death of Lord Howard of Henderskelfe on 27th November 1984. Following his death, the executors of his estate

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[93] ibid
[94] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[95] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[96] ibid

were devolved the '*Portrait of Omai*' which was painted by Sir Joshua Reynolds in about 1775. During Lord Howard's lifetime and following his death, the painting hung in Castle Howard and, following its partial opening to the public in 1952, was handled by the company under which the house operated. The painting was later sold for a substantial profit on 29 November 2001 for a hammer price of £9.4m. Commission and VAT of £200,000 was deducted following the sale but the question as to whether the sale was also susceptible to chargeable Capital Gains Tax (CGT) arose. The executors argued that the painting should be classified as 'plant and machinery', within the bounds of section 44[97] of the Chargeable Gains Act 1992. They argued that as plant, the painting was deemed a 'wasting asset with a predictable lifespan not exceeding 50 years'[98] and would be exempt from CGT under section 45.[99] The First Tier Tribunal struck down this claim but it was repealed by the Upper Tribunal before HMRC appealed to the Court of Appeal (Civil Division). The Court of Appeal, after much deliberation, determined '*Omai*' could be categorised as 'plant and machinery' under section 44. It would not be subject to CGT as it was, for these purposes, a wasting asset with a predictable lifespan of no more than 50 years.[100]

The case pivoted on whether a valuable painting which was over two hundred years old could be classified as 'plant and machinery'. Throughout *Henderskelfe*,[101] '*Omai*' is reduced to a technical definition under section 44 which does not consider the significance of the painting as art. Nor does it adhere to the rules on legal formalism which are so often relied on by the court when adjudicating on art. The abandoning of such a clear predisposition suggests that law adheres to the Art Conundrum to find the most appropriate legal definition for the purposes of the specific legal issue, rather than for the art itself. In *Henderskelfe*,[102] the definition of art rests on two elements. The first is the explanation of 'plant and machinery' found in *Yarmouth v France*[103] and the second is the

[97] Taxation of Chargeable Gains Act 1992, s 44
[98] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278 at 3
[99] Taxation of Chargeable Gains Act 1992, s 45
[100] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[101] ibid
[102] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[103] *Yarmouth v France* [1887] 19 QBD 647

definition found within section 44(1) of the Chargeable Gains Act. Both definitions are as follows:

Within *Yarmouth v France*, Lindley LJ defined 'plant and machinery' in these terms:

> 'There is no definition of plant in the [Employer's Liability Act 1880]: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business…'[104]

Alternatively, section 44(1) of the Chargeable Gains Act 1992 defines plant and machinery as:

> '44(1) In this Chapter "wasting asset" means an asset with a predictable life not exceeding 50 years but so that —
>
> (a) freehold land shall not be a wasting asset whatever its nature, and whatever the nature of the buildings or works on it;
>
> (b) "life", in relation to any tangible movable property, means useful life, having regard to the purpose for which the tangible assets were acquired or provided by the person making the disposal;
>
> (c) plant and machinery shall in every case be regarded as having a predictable life of less than 50 years, and in estimating that life it shall be assumed that its life will end when it is finally put out of use as being unfit for further use, and that it is going to be used in the normal manner and to the normal extent and is going to be so used throughout its life as so estimated;
>
> (d) a life interest in settled property shall not be a wasting asset until the predictable expectation of life of the life tenant is 50 years or less, and the predictable life of life interests in settled property and of annuities shall be ascertained from actuarial tables approved by the Board.'[105]

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[104] ibid at 658
[105] Taxation of Chargeable Gains Act 1992, s44(1)

Both definitions are concerned with the practicalities of running a business. Neither definition aims to solve or define art. So how did the court decide that '*Portrait of Omai*' is not art for the case of CGT when it is very clearly a painting and is recognised as such by legal formalism. How is it that *Omai* could be defined in such narrow terms so far divorced from consideration of the artistic integrity of '*Omai*'? This is a simply answered question. Within the circumstance of law, art does not need to be defined as art if the legal question does not directly require a definition of art. Simply put, law can avoid art theory entirely if the issue is purely a case of legal semantics. Thus, in the instance of '*Omai*', the concern was never about defining the painting as an artwork but whether the painting could be defined as 'plant and machinery' for the purposes of CGT.

The painting was classified as 'plant and machinery' because 'the company had sufficient interest in the picture for it to qualify as plant'.[106] This reasoning is in line with the decision in *Yarmouth*.[107] It may be hard to accept that an invaluable masterpiece should be deemed to be 'plant and machinery' and therefore a 'wasting asset' with a lifespan of no more than fifty years. Not surprisingly, the indisputable value of '*Omai*' caused great contestation throughout the legal proceedings. Both sides recognised the importance of defining '*Omai*', with one side focusing on market value while the other focused on function. However, the decision in this case rested on the functionality argument, based on the actions of the company which operated the house and had substantial control over the painting. The interest was not in the artistic merit of the painting itself. The fact that '*Omai*' was over two hundred years old or that it is considered to be one of Reynold's greatest works[108] was not of significant importance because the legal issue did not concern whether '*Omai*' was a work of art.

The complete ignorance of the painting as art is critical as it highlights that, in the legal context, it is possible to treat art no differently from a chattel which again reduces the need to consider art theory when reaching judgments on art. In this case, the artwork is merely a company asset. In his final judgment, when rationalising this peculiar result,

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[106] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278 at 30
[107] *Yarmouth v France* [1887] 19 QBD 647
[108] Tate Britain, 'Joshua Reynolds: The Creation of Celebrity' (Tate, 2005) <http://www.tate.org.uk/whats-on/tate-britain/exhibition/joshua-reynolds-creation-celebrity> accessed 16 October 2017

Lord Justice Briggs provided guidance as to why the value of the painting was immaterial stating that 'on the facts of this case, section 44 may have proved inconvenient to HMRC. They must, however, take the rough with the smooth, and this case may be an example of the rough.'[109] This a critical observation and two key criticisms can be made. First, the reiteration of the section 44 definition[110] emphasises the court's fixation on the legal issue at hand rather than on the work itself. It shows that the doctrinal definition of 'plant and machinery' was all that was required, and the artistic significance of the painting could be made redundant to reach the legal outcome. The second criticism is the sentiment of the smooth and the rough as being a defining feature in the relationship between law and art. As I have argued up to this point, defining art, both in theory and in law, is seemingly both a simple and impossible task. Perhaps the inevitable consequence of defining art within the law will be an answer which is both rough and smooth. The Art Conundrum facilitates such an approach because it is not concerned with finding a perfect answer, it aims to find the answer which is appropriate for the legal context at hand. Thus, it does not seem impossible or unreasonable that cases in the same area of law may produce polarizing verdicts.

Looking back on the cases discussed throughout this chapter, it is clear that there are smooth and rough elements within the taxation approach to art. *Brancusi*[111] produced a smooth definition of art while both *Haunch*[112] and *Henderskelfe*[113] have returned rough judgments which complicate and fragment the legal definition of art. However, it is clear that law is capable of facilitating a variety of different approaches in taxation alone and, as will continue to be shown, each area of law has its own rough patches to compliment the smooth. This brief exploration of *Henderskelfe*[114] is introduced as a key comparison tool to see just how complicated the legal definition of art can be. Moreover, it reiterates that, wherever possible, law will avoid engaging with art theory as much as possible to

[109] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278 at 34
[110] Taxation of Chargeable Gains Act 1992, s44
[111] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[112] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[113] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278 at 34
[114] ibid

adhere to the *Bleistein*[115] approach that the judiciary are not trained in art and therefore are not capable of commenting on it, much to the detriment of art.

vi. Drawing Inferences from Inconsistent Judgments

The assessment of taxation reveals a complicated web of approaches to defining art in law. It builds from the predisposition towards legal formalism introduced within the previous chapter to highlight that there are undeniably more theories of art considered in law. However, this observation is limited because law continues to adhere to the *Bleistein*[116] approach and avoids overtly enshrining different theories into precedent. Instead, the court skates around various theories and utilises them dependent on the legal context without acknowledging that this has been done. Law only hints that there are other theories beyond legal formalism at play. Kearns is very critical of the current approach to art and law, stating that applying general legal provisions to art leads to an asymmetric relationship under which art is greatly disadvantaged.[117] Relying predominantly on these definitions leads to a law which is not equipped to deal with art which does not hold every element, where only some are held, or holds identifying elements which are not exclusive to art.[118] It does not value that art can be a multifaceted concept. Such an essentialist legal definition of art risks misunderstanding the dynamic state of art[119] by undervaluing the ability of law to comprehend the complex nature of art theory. Moreover, it also threatens law's stability when art does not fit into these simplified categories. Consequently, Karo argues that the desire for a definition which is aesthetically neutral is only an impression[120] and emphasises that the reality of defining art in law is far different from the perception.

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[115] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[116] ibid
[117] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 27
[118] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)
[119] Kerstin Mey, *Art & Obscenity* (I B Tauris & Co Ltd 2007) 3
[120] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 94

The predisposition of the judiciary, statutes and lawyers to utilise legal formalism is perhaps the most definitive trend for defining art in law. Through utilising legal formalism, the definition of art avoids the consideration of further art theory by reducing art to physical outputs which can be easily listed and applied. Kearns acknowledges that there is not enough definitional criterion in the artistic definition of art to create a legal definition, so it is simpler to rely on legal formalism and refer to recognised forms of art, such as painting and drawing.[121] By relying on these recognised forms, artworks do not need to be dissected because they are simply declared art by physical representation. Restrictive formalist definitions, such as the lists found within the CDPA[122] or those within HMRC Tax codes,[123] are preferable because they create a unified standard for art. This should theoretically reduce the requirement for engagement with art theory in a legal definition of art, meaning that artistic theories of art are made redundant or become secondary considerations in law.

Moreover, through legal formalism and the relevant tax codes, law also promotes the commodification of art. The approach in copyright to delineate art as a list of objects within the CDPA,[124] under which the protection of these is often explained economically[125] is a direct result of the commodification of art. Alternatively, the treatment of art as a taxable commodity in tax law also aligns directly with the commodification of art. The reference to art as a commodity in tax law is explicitly clear in the HMRC tax codes[126] as the language used states that 'the commodity code for importing [art] is 9701100000.'[127] When terminology such as this is used in law, it further emphasises the inevitable commodification of art because art is constantly and

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[121] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 66
[122] Copyright, Designs and Patents Act 1988
[123] HM Revenue & Customs, 'Trade Tariff' (19 July 2020) <https://www.trade-tariff.service.gov.uk/sections> accessed 20 July 2020
[124] Copyright, Designs and Patents Act 1988
[125] William Landes & Daniel B Levine, 'Economic Analysis of Art Law' in Victor A Ginsburg & David Throsby (eds), *Handbook of the Economics of Art and Culture* (North-Holland 2006)
[126] HM Revenue & Customs, 'Trade Tariff' (19 July 2020) <https://www.trade-tariff.service.gov.uk/sections> accessed 20 July 2020
[127] HM Revenue & Customs, 'Commodity information for 9701100000' (05 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/commodities/9701100000#overview> accessed 06 October 2017

consistently referred to as a form of property. As a result, art has become a legally recognised asset to offset tax through various schemes[128] or trust structures,[129] existing as both a luxury consumer good and a capital good for those who can afford it.[130] By treating art as a commodity, law can reframe the object to prioritise the legal concerns rather than focus on engaging with art theory. It can continue to perpetuate the notion that art can be reduced to physical outputs and stripped of its theoretical basis, something which is not actually possible as directed by *Brancusi*.[131]

The aesthetically neutral attempt to define art prejudices different forms of art and promotes those which are established or well accepted, such as painting and sculpture, while failing to provide protection for more contemporary practices[132] such as minimalist art, conceptual art and the emerging category of computer-generated art. The most common forms of art are the most well established, as shown in both the CDPA[133] and the HMRC tax code categories.[134] These lists are based in legal formalism and protect those works because their physical presentation aligns with a recognised artistic form. However, some works of art that recognised as legitimate forms would struggle to be included in some formalist definitions and many would not receive protection in law. To name a few, Watkins suggests that 'body art, ceramics, collage and assemblage, computer generated art (such as three-dimensional 'virtual' art or 'webart'), film-making, graphic art, holographic art, illustration, installations, performance art, photography, print-making and video art'[135] are all legitimate forms of art and many would struggle to be

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[128] Stonehage, *Tax Efficient Planning for Art Collectors* (Professional Advisors to the International Art Market (PAIAM) 26 June 2013) accessed 27 November 2017

[129] ibid, 2; Don Thomson, *The Orange Balloon Dog: Bubbles, Turmoil and Avarice in the Contemporary Art Market* (Quarto Publishing plc, 2018) 25

[130] Ulrike Klein, 'Der Kunstmarkt, Zur Interaktion von aesthetik und Oekonomie' (Peter Lang 1993) 181; Mark A Reutter, 'Artists, Galleries and the Market: Historical Economic and Legal Aspects of Artist-Dealer Relationships' [2001] 8(1) Jeffrey S Moorad Sports Law Journal 99, 119

[131] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

[132] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 95

[133] Copyright, Design and Patents Act 1988

[134] HM Revenue & Customs, 'Trade Tariff' (19 July 2020) <https://www.trade-tariff.service.gov.uk/sections> accessed 20 July 2020

[135] Dawn Watkins, 'The Value of Art or the Art We Value' [2006] 11 Art, Antiquity and Law 251, 255

categorised under these statutory definition of art. This is realised in *Haunch*[136] and the treatment of Flavin and Viola's work. Fenzel draws directly on the enumerative approach in legal formalism as the reason for the inability of British law to protect many of these forms of art.[137] Having a statutory standard based in legal formalism risks other forms outside of those which are popular or recognised as being given art status. Utilising a list makes the definition of art immediately exclusionary[138] and limits the ability of law to adapt. [139] This is a particular concern if law is to keep up with the contemporary or innovative artist who produces work outside of these recognised forms.[140]

Relying on legal formalism alone and not appreciating the more nuanced elements of art theory returns a large risk of miscategorising art. Pila agrees that even with these formalist categories, the 'categories are matters of significant legal uncertainty.'[141] This is largely because Pila states that legal formalism is often not perceived correctly. For Pila, legal formalism should not be relied upon alone, it should utilise judicial reasoning alongside other art theories.[142] Without this additional element, legal formalism lacks the sufficient elements required to guide the judiciary in defining art. As consequence, there seems to be little explanation as to why certain categories are chosen and no deliberation on areas which overlap or conflict.[143] Without an explanation as to how these categories are chosen, and with little statutory support to expand on how these categories are

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136 *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820

137 Cristin Fenzel, 'Still Life with "Spark" and "Sweat": The Copyright of Contemporary Art in the United States and the United Kingdom' [2007] 24 Arizona Journal of International & Comparative Law 541, 548

138 Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 52

139 ibid 53

140 Simon Stokes, 'Some Current Issues Relating to Art and Copyright: An English Law Perspective' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 115 - 116

141 Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 230

142 ibid 237

143 Fiona Macmillan, 'Artistic Practice and the Integrity of Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 52 - 53

defined, legal formalism leans too heavily on the court's interpretation of form.[144] For Walton, this is misguided because the formalist categorisation of art often fails to appreciate aesthetics and the wider importance of art theory[145] and is therefore not a true reflection of art. The assumption in utilising formalism is that it should make defining art easier. However, if the work is not perceived correctly or the approach to art is flawed, then incorrect definitions of art or objects which should not be considered works of art are granted legal art status. As was the case in *Breville*,[146] which are afforded plaster casts used to make components of a sandwich toaster copyright status as 'sculptures' under the 1956 Copyright Act.[147]

Although judges' aim not to comment on art theory, courts undoubtedly do and must[148] define art on a 'regular basis'[149] because relying on legal formalism and the *Bleistein*[150] approach is not sufficient to define art, as shown in the Brancusi trial. However, judgments often do not justify *why* the court has reached its decision on art as this would require overt engagement with art theory. Through assessing the various cases in taxation, it is clear that at times, the court has relied on Imitation Theory, the Artist Led Theory and Institutional Art Theory. However, this has often been an unconscious bias and bar for *Brancusi*,[151] it has been a subtle engagement. The failure of the court to explain the *why* element in art law cases has led to vast criticisms of law and helps to explain the discrepancies that have arisen in this study of taxation. Throughout the case law there is a vast amount of 'inconsistent judicial reasoning'.[152] The wide spectrum of judicial decisions further confuses the assessment of how law defines art, with the prominent trend in defining art being the desire to avoid art theory, leading to criticism that

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144 Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 373
145 Kendall L Walton, "Categories of Art" (1970) 79 Philosophical Review 334, 340
146 *Breville Europe Plc v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77
147 ibid
148 Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1
149 Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 808
150 *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
151 *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
152 Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314, abstract

judgments on art are 'conceptually rather unsatisfactory'.[153] It is therefore not surprising that public opinion on the state of an artwork and the legal outcome often directly contrast with the judgment of the court.[154] However, for law this is not a concern because the focus of the judiciary is to solve the legal problem and not the theoretical or artistic one. Law will continue to define art based on legal considerations which may directly conflict with public opinion because the aim is to solve the legal issue at hand, even where it reaches a seemingly illogical outcome, such as that of *Henderskelfe*,[155] where Reynolds' '*Portrait of Omai*' was declared 'plant and machinery' and not art for legal purposes. This contestation further fractures the dynamic between art and law and continues to facilitate the court's desire to keep these two seemingly incompatible fields as separate as possible.

Although the court tries to appear impartial in defining art, this is not possible or sustainable, as shown through *Brancusi*.[156] Art cannot be devoid of appreciation for art theory. Abell argues ignoring the theory based elements of a work of art is problematic because it robs art of its "philosophical significance"[157] while for Benjamin, the way in which a work of art is produced is critical to its understanding and appreciation.[158] Moreover, the most damning statement on how a limited appreciation for art theory in law is unsustainable can be derived from Read. Read states that one of the gross errors in defining art is 'a conception of arts as merely physical and objective',[159] the key feature of legal formalism. This is a critical observation because it highlights that law fundamentally does not appreciate the importance of art theory in an artwork when it relies on the flawed approach of legal formalism and focuses solely on the physical form. Unsurprisingly, the artworld is incredibly critical of reducing the magnitude of art to formalist qualities. Boggs, for example, argues that reducing art to technicalities results

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[153] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 29

[154] Jens Schovsbo, 'How to Get it Copy-Right' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 32

[155] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278

[156] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

[157] Catharine Abell, 'Art: What it Is and Why it Matters' [2012] 3 Philosophy and Phenomenological Research 671, 671

[158] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction* (Penguin Books 2008) 25

[159] Herbert Read, *The Meaning of Art* (2017 edn, Faber and Gaber Ltd 1931) 165

in missing the meaning of art.[160] Thus, it begs the question as to how law can legislate on a topic which it fundamentally does not appreciate in full. Legal formalism suggests that an adequate definition of art is one in which art is reduced to only one factor, something which Watkins states is not possible.[161]

As noted in the previous chapter, due to its simplicity, law favours the initial reliance on legal formalism to reach a judgment. Only when this cannot solve the problem, will law attempt to develop further. Thus, if legal formalism is an inadequate approach to art, it cannot be relied upon for absolute certainty of definition. Rather, it must be an initial step in a larger process for defining art, which allows for a simple and fast definition where applicable but leaves room for further elaboration where the definition of art is unclear. There are clear restrictions as to how applicable legal formalism can be as the sole definition of art, but it undoubtedly provides a foundation for a definition of art to be built upon. The best way to use legal formalism is by utilising the American standard, in which the categories of art are noted as illustrative of what can be considered art rather than exclusionary, as per the British standard.[162] Pila champions such an approach, focusing on how the courts should support formalist definitions with reasoning that is grounded in theories of art appreciation.[163] Only through this form of approach would is it possible for law to adequately define art. Legal formalism is not the only way in which art is defined but it is the predominant way. It must then be supported by other theories of art, even though the court does not often acknowledge this has occurred when it does. Through the Art Conundrum, this can be achieved.

vii. Conclusion

Tax law again repeats the concept of art as commodity and art as defined by the legal circumstance within which it appears, with these circumstances being narrowed further

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[160] James S G Boggs, 'Who Owns This?' [1992] 68 Chicago-Kent Law Review 889, 898
[161] Dawn Watkins, 'The Value of Art or the Art We Value' [2006] 11 Art, Antiquity and Law 251, 253
[162] Cristin Fenzel, 'Still Life with "Spark" and "Sweat": The Copyright of Contemporary Art in the United States and the United Kingdom' [2007] 24 Arizona Journal of International & Comparative Law 541, 547
[163] Justine Pila, 'Copyright and Its Categories of Original Works' [2010] 30 Oxford Journal of Legal Studies 229, 230

within smaller areas of tax law. This study of taxation has revealed that art is defined when it is necessary to be defined, but where it is possible to avoid definitions of art directly, as with in *Henderskelfe*,[164] then this is what the law shall do. Consequently, the discrepancies in approach throughout this study of taxation reinforce my argument that the application of the Art Conundrum theory is crucial for the definition of art. The legal domain calls for a varied approach in which there is no one way to solve the legal problem which considers art. Even within the area of taxation, a narrowed focus in the landscape of law, the breadth of results is staggering. Thus, it begs to suggest that in fact, art cannot be defined holistically or within one simple definition and rather the legal system is purposively embracing a multiplicity approach to defining art in law.

Assessing how the law defines art with regards to taxation has returned a mixed result. Within taxation, the predisposition for legal formalism has been reinforced. However, it has also drawn attention to the subtle engagement with art theory by the court. These are two contrasting themes. The first adheres to the sentiments of *Brancusi*,[165] that law needs to be more accommodating of art and must appreciate these new schools of thought. While the second theme is that law will continue to avoid engagement with art theory as per the precedent set in *Bleistein*,[166] on the premise that the court should not engage with theory where it is not an absolute necessity. These two themes are further explored in the next chapter on Obscenity because the notion of the obscene demands engagement with art theory in order to justify the difference between an obscene work and a justified work. By transitioning to now consider obscenity, the predisposition for formalism and subtle engagement with art theory as shown by Copyright and Taxation can be tested against the strictest of art focused laws.

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[164] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[165] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[166] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

VI

Obscenity Law & Art

Obscenity, Law and the Influence of the Art Market

> '"Art," by its nature, will call into question any definition that we ascribe to it. As soon as we put up a boundary, an artist will violate it, because that is what artists do. In the end, we as a society are left with a choice: either we protect art as a whole or we protect ourselves from obscenity. But we choose one at the sacrifice of the other. It is impossible to do both.'[1]
>
> Amy M Adler, 1990

> 'It may seem counter-intuitive that artists, of all people, have to fight against the prevailing dogma and conservative attitudes. But the reality is they are operating in a commercial market in which art dealers want to present work they already know they can sell, collectors want to buy art their circle will recognize, and the establishment only wants what it knows and understands.'[2]
>
> Will Gompertz, 2015

The relationship between art and obscenity is difficult to assess for a multitude of reasons. Historically, obscenity law has tended to deal with obscene literature above obscene art. The number of cases in which visual art has invoked criminal proceedings under obscenity law is limited when compared with the wealth of cases involving obscenity and literature. As consequence, the few cases which have arisen have also brought with them significant media attention and public outcry. Obscenity law is a criminal area of law, whereas most areas of law deal with art within the realm of civil law. The criminal element of the charge politicises any art which is brought under breach of obscenity law and draws the art out of the art world into the wider social sphere, impacting its interpretation and not accommodating for the importance of art theory.

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[1] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 137

[2] Will Gompertz, *Think Like an Artist: … and Lead a More Creative, Productive Life* (Penguin 2015) 170

Finally, unlike other areas of law, claims of obscenity and morality can be brought by a much wider demographic. Generally, art law claims are brought by either the owner of the art or the artist themselves, limiting those who can bring a claim forward but also binding the legal interests in proprietary terms. Obscenity law claims can be brought by any party who feels affected by the obscene element of the work of it, which results in the potential for obscenity claims to be much wider, more abundant in number and less restricted from the commodification that occurs through ownership of art. Thus, for these reasons, the impact of obscenity law has the potential to be much wider than that of other areas of law.

As the most prominent example of art in criminal law, it is necessary to assess the impact of obscenity law upon the legal definition of art. The application of obscenity and public morality law give a different insight into the legal perspective of art. Obscenity law is also an area of law which has seen rapid change from strict governance to a relaxed and arguably weakened state. By addressing the dynamic between art and obscenity law, critical engagement reveals that as popular and social attitudes change to align with those of the art world, the impact of law on art wanes and the introduction of art theory into law increases. To begin, it is crucial to understand the role of the institution in interpreting art and how this impacts the legal approach to art. Following this, assessing obscenity law will reveal that there is an undeniable influence from the art world which cannot be ignored as another art theory applied by law through the Art Conundrum.

Within the United Kingdom, obscenity law is not as prevalent as it once was because attitudes have become much more liberal towards art. These prosecutions, when do they occur, are few and far between with Kearns noting that in the 1990s and 2000s, the application of obscenity and public morality laws did not result in any prosecutions and few active investigations.[3] Goldsmith indirectly acknowledges this sentiment, suggesting that now copyright and plagiarism trials are the modern equivalent of obscenity trials.[4] Goldsmith's comment highlights just how significant obscenity trials once were while

[3] Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1776

[4] Kenneth Goldsmith cited in Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books 2017) 38

highlighting that they are no longer the pivotal trials at the forefront of art law. Moreover, Kearns notes that public morality laws lay 'virtually dormant… notably in the sphere of the arts'.[5] With morality law on the out, art has embraced the obscene and run with it, outdating the law itself. This can only have been done by law accepting that it must accommodate art theory and social attitudes in its judgments to remain relevant. Like other areas of law, obscenity law cannot rely on legal formalism and the *Bleistein*[6] approach because it has divulged over time. Obscenity law, therefore, illustrates two critical points about art and law. The first is that art and law are in a constantly fluid relationship dictated by social attitudes and the second is that these attitudes are inevitably influenced by art theory, artists and the institution. The assessment of obscenity law makes it clear that institution plays a strong role in the legal definition of art.

i. The Role of Institutional Interpretation of Art

Wherever possible, the courts will try to adhere to the *Bleistein*[7] approach to art and attempt to reduce engaging with art theory by stating that this is the speciality of the art world and should be left to those within the art market. However, to understand whether a work is obscene, there is a requirement for law to consider the content of the artwork and not simply prioritise the form of the work to define it. Consequently, the extent to which the art market and art institutions influence the legal approach towards art is a critical area of consideration in understanding how law defines art. Legal considerations of art may lean on expert evidence, institutional bias and art criticism to reach a legal judgment on art. These are crucial factors for drawing the line between what art is obscene and what is protected by its art status. And where does this information originate? Within the art world. The art world has a clear impact on how art is interpreted and valued which is critical for the legal system because it emphasises the role of additional art theories in the legal definition of art. Therefore, it is critical to consider the

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[5] Paul Kearns, 'The Ineluctable Decline of Obscene Libel: Exculpation and Abolition' [2007] Criminal Law Review 667, 674

[6] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

[7] ibid

motives, influences and deliberations of the art world to further evidence that these art world focused thresholds are another element considered within the Art Conundrum.

As identified in Chapter II, The art world is comprised of the six categories of art insiders (artist, dealer, curator, critic, collector or auction-house expert[8]) and acts as a constant background force within the world of art.[9] The actions of any of these actors can have a range of effects on how different works of art are interpreted, valued and displayed. The verdicts given by the art world influence how everyone interprets art,[10] including the judiciary and those bringing legal action. The influence of the art world is so strong that civil actions may be brought in response to the influence of some of these art world insiders. Such was the case when Duveen, the infamous dealer, stated that a later version of Leonardo Da Vinci's '*La Belle Ferroniere*' painting was actually a copy, much to the dismay of the owner. Duveen's statement led to a notorious defamation case which 'has been called 'the world's most celebrated case of art litigation.''[11] A definition of art simply cannot ignore the influence of the art world and the reality that all works of art become entwined with institutional interpretation. Thus, any viable legal definition of art must consider and be aware of the influence of the art world, the market and the effect that this has on the interpretation of art itself.

Art world actors are referred to by Bennet as 'the passionate few',[12] a term used to suggest that only a limited section of people within an elite group can properly interpret and understand art. This removes the autonomy to understand art from the wider public and reduces disparity in interpretation.[13] For Steven J, art should not be reduced to the 'lowest common denominator'[14] and there is a clear merit in the opinion and influence of

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[8] Sarah Thornton, *Seven Days in the Art World* (Granta Books, 2009) xi
[9] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 6
[10] Dawn Watkins, 'The Value of Art or the Art We Value' [2006] 11 Art, Antiquity and Law 251, 273
[11] Samuel N Behrman, *Duveen: The Story of the Most Spectacular Art Dealer of All Time* (Daunt Books, 2014) 113
[12] Arnold Bennett, *Literary Taste - How to Form It* (7th edn, Hodder & Stoughton 1914) 18
[13] Dawn Watkins, 'The Value of Art or the Art We Value' [2006] 11 Art, Antiquity and Law 251, 272
[14] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 420

experts.[15] So much so that that Adler, in her exploration of Post-Modern art and obscenity, debates that perhaps to avoid the caveats of obscenity law we could rely heavily on Institutional Art Theory to define art, with artworks earning art status and legal protection 'if its hanging in the Museum of Modern Art (or in any art context)'.[16] Although this recommendation is ultimately rejected as unworkable by Adler, it shows that there is an irrefutable influence held by the art market which must be recognised and respected. This influence is most obvious in the adoption of laws which allow the art market to function and facilitate trade through contracts and the sale of goods with Leiboff noting that these are often advantageous to the art market, representing a clear expression of law acknowledging, at the very least, value in the trade of art.[17]

Artists themselves are also key interpreters of art and a critical influence in law as shown through the Artist Led Theory validating their status as creators and their adherence to Institutional Art Theory by playing to the gallery. In both circumstances they influence the definition of art, either by upholding the recognized standards of Institutional Art Theory or expanding beyond and challenging the accepted norm. When artists play to the institution, art is restricted to only that which is critically accepted. This leads to a stunted approach to art.[18] If the definitional role of the artist is too expansive and law was to rely on a completely Artist Led Theory then creating a legal definition of art is no longer realistic as anything can be art as long as it is declared as such by the artist, as exemplified by Rauschenberg's '*This is a portrait… if I say so,*'[19] a telegram presented by Rauschenberg as a portrait. If this were to be accepted, art would be inherently incompatible with law[20] because, for example, it would allow non-art to decreed by the artist. Therefore, the influence of the artist can play a pivotal role in law if it is unmatched. Consequently, law must and does find some ability to interpret the artists' intentions and explanation of art when the judicial use of legal formalism is not sufficient to reach a judgment.

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[15] *Pope v Illinois* 481 US 497 (1987) at 512
[16] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1376
[17] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 307
[18] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1377
[19] ibid 1376
[20] ibid 1359

The interpretation of the artist's intent and the role of the art world has occurred in several areas of law. From copyright and Koons[21] to taxation and Flavin[22] to obscenity and the Gibson[23] trial that is explored in this chapter, each of these cases involved the artist challenging the already perceived notion of art in a different field of law. Each judgment has moulded the approach by subsequent artists to consider what is legally recognised as art which, in turn, leads artists to change their art reactively[24] to fall within the legal categories and avoid legal sanctions. Alternatively, where law fails to appreciate these artist's explanations of their work or fails to justify why it has a reached a particular outcome in law on an artwork, some artists rely on these ambiguously reached outcomes[25] to avoid legal prosecution. For example, if ever an appropriation artist is called to trial, they can rely on a similar basis to Koons to avoid prosecution for appropriation art and grant their work independent copyright.

Shore notes that in a conversation with a friend, his friend informed him that should an artist ever fall foul of copyright law in appropriation art, ''one of the best defences an artist could make in court if they got in trouble for appropriating someone else's work… would be to give the judge a lesson in the history of art. Just give the man or woman in the wig a list of the canonical works of art that have "borrowed" from some other work in some form or way, and logically there's no way you could be found guilty.'[26] This is an important illustration of the potential impact that art world actors have, and the ability of the law to interpret the significance of Institutional Art Theory and the Artist Led approach. Artists in their own defences are capable of empowering their influence and forming a definition of art which is applicable for their own legal case. As the court prioritises judgments on a case by case basis, the artist can create their own definition and only need to assert their influence enough to ensure the court agrees with their

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[21] *Rogers v Koons* 960 F2d 301 (2d Cir 1992); *United Features Syndicate Inc v Koons*, 817 F Supp 270 (SDNY 1993); *Blanch v Koons* 467 F3d 244 (2d Cir 2006)
[22] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[23] *R v Gibson* [1991] 1 All ER 439 (CA)
[24] Amy M Adler, 'Why is Art on Trial' [1993] 22 Journal of Arts Management, Law and Society 322, 331
[25] Kenly E Ames, 'Beyond Rogers v. Koons: A Fair Use Standard for Appropriation' [1993] 93(6) Columbia Law Review 1473, 1506
[26] Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books 2017) 72

interpretation. If and when a court relies on the artist's defence of their work, Jasiewicz argues that the court is engaging in the debate on 'appropriate interpretative agents for contemporary art',[27] effectively stating that for the purposes of law, artist testimony can be, and is, an appropriate tool for legally defining art. This highlights, again, that although legal formalism may be the predisposed way to define art, law is both capable of, and does, use other art theories to reach judgments on art.

With regards to obscenity, artists must self-censor or ultimately be aware that certain works of art will cause public outrage which may result in prosecution.[28] Consequently, institutions continue to be aware of the potential public fallout to obscene works which leads to internal censorship. Lydiate argues it is really the curators and exhibition organisers who sets the initial bounds of indecency, obscenity and art[29] through self-censorship and promotion of their favoured works. By deciding what shall be shown, curators draw a line between morality and immorality, utilising obscenity legislation such as the Obscene Publications Act[30] and Indecent Displays Act[31] to allow their chosen works of art to be exhibited and protected as art.[32] Through these actions, Institutional Art Theory has an indirect impact on law. Moreover, Brooker also emphasises the market effect on censorship and obscenity, concluding that undesirable obscene art is not marketable so artists who push these boundaries often do not gain notoriety, will not profit and the distribution of their art is limited.[33] As the market censors art, it defines the obscene before law has had the opportunity, often resulting in the artworks which challenge obscenity being those which have already gained significant art world approval.

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[27] Monika I Jasiewicz, 'A Dangerous Undertaking: The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases' [2014] 26 Yale Journal of Law and the Humanities 143, 166

[28] David Henley, 'Art of Disturbation: Provocation and Censorship in Art Education' [1997] 50(4) Art Education, Literature, Media and Meaning 39, 40

[29] Henry Lydiate, 'Censorship: Mapplethorpe' [1996] 201 Art Monthly 54, 54

[30] Obscene Publications Act 1959

[31] Indecent Display (Control) Act 1981

[32] Joseph Brooker, 'The Art of Offence: British Literary Censorship since 1970' in David Bradshaw & Rachel Potter (eds), *Prudes on the Prowl: fiction & Obscenity in England, 1860 to the Present Day* (OUP 2013) 179 - 207

[33] David Bradshaw & Rachel Potter, (eds) *Prudes on the Prowl: fiction & Obscenity in England, 1860 to the Present Day* (OUP) 27

Understanding the role of the institution in defining art is most critically evident in assessing obscenity law because the institution forms a basic understanding of art for the wider public. It sets a standard for defining art. For example, when Scotland Yard raided the Saatchi Gallery to seize photographs Tierney Gearnon had taken of her children in various stages of undress, neither Gearnon or Saatchi was ultimately prosecuted by the Crown Prosecution Service, 'to the annoyance of the police'.[34] Moreover, other explicit Saatchi exhibitions, such as that of '*Sensation*' and '*Apocalypse*' also failed to result in criminal proceedings, even if they did create some degree of public outrage.[35] The role of the institution plays into these cases because it sanctifies and protects the work from challenge. As will be proved throughout this chapter, institutional interpretation of art critically impacts upon the legal process both directly and indirectly. The period from 1865 – 1959 saw the largest number of prosecutions under obscenity law,[36] but in recent times, cases of obscenity prosecutions have been far and few between. Consequently, it can be argued that the impact of obscenity law is not as great today as it once was. As art becomes more provocative and reflects 'the culture of its time',[37] influenced by the art world, the boundaries of what is obscene are tested. For each time they pass unchecked and something is no longer obscene, the boundaries are pushed further back. The first instance in which it is clear that law adopts the Institutional Theory of art is in the statutory definitions which exempt artworks from prosecution under obscenity law.

ii. Statutory Definitions of Obscenity and the Implications for Art

The statutory relationship between art and obscenity is a deceptively complex matter. Obscenity within the United Kingdom is a broad category of offence and as a result, 'in

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[34] Tom Lewis, 'Human Earrings, Human Rights and Public Decency' [2002] 1(2) Entertainment Law Review 50

[35] Brooks Adams, Lisa Jardine, Martin Maloney, Norman Rosenthal, Richard Shone, *Sensation: Young British Artists from the Saatchi Collection* (Thames and Hudson 1997); Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776

[36] Dawn Watkins, 'The Influence of the Art for Art's Sake Movement Upon English Law, 1780 - 1959' [2007] 28(2) The Journal of Legal History 233, 243

[37] Tate, 'Essay: Art and Pornography' [Tate, 2018] <https://www.tate.org.uk/art/art-and-pornography> accessed 25th September 2018

English public morality law, there is little differentiation between art and other objects.'[38] Again, this default position reduces the immediate need for legal engagement with art theory. However, there are two statutory exceptions, the Obscene Publications Act 1959 (OPA) and the Indecent Displays (Control) Act 1981 (IDCA). Within these statutes, rather than rely on legal formalism, as is often the statutory approach to law that impacts art,[39] both statutes refer to art by proxy. The OPA refers generally to art as articles with 'any description of article containing or embodying matter to be read or looked at or both, any sound record, and any film or other record of a picture or pictures'[40] and the IDCA just refers to 'indecent matter'.[41] In obscenity legislation, art continues to be an ambiguous entity that is not strictly defined. Instead, we are left with two statutory positions which create exceptions for art without justification as to what art is and, more importantly, without creating guidance as to *why* it has done so. As noted in the previous chapter on taxation, law continues to avoid this *why* question because it would require overt engagement with art theory, in contravention of *Bleistein*.[42]

The Obscene Publications Act 1959 deals directly with the notion of the obscene and is the elder of the two art relevant obscenity statutes. The initial 1857 obscenity statute[43] aimed to prevent the sale of obscene articles, but was not focused on censorship.[44] Now, the 1959 Act[45] is the authority on obscenity and focuses on protecting the public from moral depravity, a job which often leads to direct and indirect censorship of art. The act relies on a test for obscenity that was developed from Chief Justice Cockburn's comments in *Hicklin*,[46] a case which concerned the distribution of anti-Catholic pamphlets deemed obscene regardless of the author's intent.[47] The pamphlets were obscene because they

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[38] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 27
[39] Copyright, Designs and Patents Act 1988
[40] Obscene Publications Act 1959, s 1(2)
[41] Indecent Displays (Control) Act 1981
[42] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[43] Obscene Publications Act 1857
[44] Dawn Watkins, 'The Influence of the Art for Art's Sake Movement Upon English Law, 1780 - 1959' [2007] 28(2) The Journal of Legal History 233, 240
[45] Obscene Publications Act 1959
[46] *R v Hicklin* [1868] LR 2 QB 360
[47] Dawn Watkins, 'The Influence of the Art for Art's Sake Movement Upon English Law, 1780 - 1959' [2007] 28(2) The Journal of Legal History 233, 255

could have depraved or corrupted[48] the minds of those who read them. Thus, the test for obscenity which comprises section one of the Obscene Publications Act 1959 is often also referred to as the Hicklin test.[49] Section one of the act defines obscenity as follows:

> 1. Test of obscenity.
> (1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[50]

Lewis notes that the statutory offence 'is concerned to protect people from harm – to protect them from becoming depraved and corrupted – from being morally degraded'.[51] Moreover Kearns argues that ''to deprave and corrupt... is not equivalent to mere shock and disgust'.[52] The observations are crucial. Both Lewis and Kearns indicate that the core motivator of the OPA is harm, the offending article must deprave and corrupt the viewer – it qualifies obscenity as that which fulfils this threshold, where it doesn't, the object is not obscene. However, importantly, the offence itself does not consider the intent of the artist. Consequently the *mens rea* of the offence is a controversial element of obscenity law.[53] The consideration of the artist's *mens rea* in several cases has appeared limited or strict.[54] The difficulty this poses is that the reading of art is often linked to the artist's intentions and without this, the object is read out of context. Again, from the outset, law continues to evade any extensive consideration of theory which detrimentally affects the legal definition of art. From section 1 of the OPA, art is subject to persecution without justification or consideration of the special significance of art. This is highly problematic for art because it would mean that any work of art that has potential to deprave or corrupt

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[48] *R v Hicklin* [1868] LR 2 QB 360
[49] ibid
[50] Obscene Publications Act 1959, s 1(1)
[51] Tom Lewis, 'Human Earrings, Human Rights and Public Decency' [2002] 1(2) Entertainment Law Review 50, 52
[52] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 655
[53] Paul Kearns, 'The Ineluctable Decline of Obscene Libel: Exculpation and Abolition' [2007] Criminal Law Review 667, 669
[54] *R v Gibson* [1991] 1 All ER 439 (CA); *R v De Montalk* [1932] 23 Crim App R 182; *R v Penguin Books* [1961] Crim LR 176

is automatically in contempt of the OPA. Fortunately for art and artists alike, the OPA includes a defence of public good under section four of the act which protects works that are justified as being in the interests of the public good. Section four of the OPA defines the defence as follows:

> 4. Defence of public good.
> (1) [Subject to subsection (1A) of this section] a person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.[55]

The defence of public good was not always enshrined within the Obscene Publications Act.[56] The initial writing of the act did not prescribe a defence of artistic or scholarly merit, but these were introduced to improve the act and align with public attitudes and interests.[57] The defence is critical as it validates the perception of art as having an esteemed status[58] which also suggests that law has the capacity to consider art theory as significant to defining law. Although the word art is used without defining the term, it is an important piece of legislation because it recognises the social importance of art by law. This is a critical observation because the existence of an exception which has the ability to protect art suggests law cannot truly be neutral to art theory. By accommodating for articles which are in the interest of the public good, law has to engage with a debate on what the public good could be, and this would include some acknowledgement of the significance in art theory of a potentially obscene work of art. For example, esteemed institutions such as the Tate draw upon the comments made by artists, such as Koons and Dumas, as ways to justify the potentially obscene content of the works.[59] Therefore, again, law is subconsciously engaging with art theory because in order to make a decision that

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[55] Obscene Publications Act 1959, s 4(1)
[56] ibid
[57] Henry Lydiate, 'Censorship: Mapplethorpe' [1996] 201 Art Monthly 54, 54
[58] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 652
[59] Tate, 'Essay: Art and Pornography' (Tate, 2018) <https://www.tate.org.uk/art/art-and-pornography> accessed 25th September 2018

it is for the public good, there must be some weighting given to the reasoning as to why the art is significant.

The most infamous case which called upon the use of section four of the OPA is the obscenity trial of Lady Chatterley's Lover. *R v Penguin Books*[60] is often noted as the case which prevented the ongoing repression of books on grounds of morality.[61] Although an allowance was made for literature, again the court did not establish *why*. It is not clear from the case as to how the jury reached their verdict, nor is it clear as to whether the jury felt the work was not obscene at all or was obscene and 'redeemed by literary merit'.[62] However, the precedent was set and in the years following *Penguin Books*,[63] many claims which were brought against potentially obscene books were unsuccessful.[64] These were significant results as it illustrated that attitudes towards obscenity had in fact liberalised and with every win in an obscenity trial, the threshold for bringing a successful case rises. Moreover, it highlights that law does not regulate art on form alone, but also the content of the work itself can be considered as significant in law. Although these are cases concerning literature rather than art, the impact of these cases extends beyond the realm of books. When an allegedly obscene theme fails to be declared obscene, or is protected by section four, it allows reproduction and replication of the content in visual art with reduced scrutiny. Thus, for the world of visual art, which can often be the pictorial equivalent to literature, these judgments continue to be significant. It again emphasises that law recognises and accommodates for the role of the arts as a protected entity in which it is possible to express ideas and concepts which would normally be outside of the boundaries of public morality, for the purposes of challenging popular opinion to elicit critical responses.

Similar defences exist in the United States, developed from *Miller v. California* in which an obscenity claim was brought against the operator of a mailing campaign advertising

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[60] *R v Penguin Books* [1961] Crim LR 176
[61] John Feather, *A History of British Publishing* (2nd edn, Routledge 2006) 205
[62] Paul Kearns, 'Sensational Art and Legal Restraint' [2000] 150 New Law Journal 1776, 1776
[63] *R v Penguin Books* [1961] Crim LR 176
[64] John Feather, *A History of British Publishing* (2nd edn, Routledge 2006) 205

pornographic books and films.[65] This is a significant finding because even in a system which values freedom of speech above many other areas of law, there are still some restrictions dictated by morality. It is to be noted that the comparison to the *Miller* test is limited in that it has a clear motivation to prevent sexually obscene works being shown, whereas the United Kingdom deals with obscenity more generally. The third prong of the *Miller* test is relevant because it queries whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[66] This is a crucial finding as it is clear that the notion of the artistic is recognised as an obscenity trump card and thus further highlights that law, irrespective or jurisdiction, values art enough to give it express protection. However, the value law overtly places on theory is still limited as the defence appears as an afterthought rather than a forethought.

Thomas argues exactly this, that the defence of art being in the public good is an afterthought in censorship.[67] Instead, he suggests reversing the test so that if something is art then it cannot be obscene.[68] This would prevent obscenity from continuing to be a 'phantom crime' in which the crime 'materialises after the verdict is pronounced.'[69] In turn, artists would be granted the security of knowing whether their work would be obscene before its display. This would also increase the prevalence of Institutional Art Theory in law because protecting art which has legitimate institutional merit would prevent these works from being subjected to unfair policing tactics, such as legal seizure and prosecution irrespective of whether it offends the public or the court.[70] Moreover, it would assist in creating a clearer definition of art as it would avoid the post-criminalization of artworks and would create clearer boundaries for the artist to follow. However, prioritising the protection of art in obscenity law may also set a precedent that the theoretical value of art is inherently more important than public morality by

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[65] *Miller v California* 413 US 15 (1973)
[66] ibid at 24-25
[67] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 339
[68] ibid
[69] ibid 344
[70] *R v Gibson* [1991] 1 All ER 439 (CA); Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 344 - 350

enshrining both the Artist Led and Institutional Art theories into law. This is a discussion that law doesn't want to engage in because it would require an open acknowledgement of art theory in law. Thus, currently the OPA only recognises artistic importance when it is challenged and refuse to clearly define art to avoid the complexities of openly engaging with these theories.

Alternatively, the Indecent Displays (Control) Act[71] (IDCA) further extends the specific protection of art in obscenity but focuses instead on the context in which the object arises. Section 1(1) entails that the public display of indecent subject matter is a criminal offence for which the person making the display or anyone aiding in the process of displaying the work is held as liable.[72] Under section 1(2), public display is considered anything which is visible from any public place. However, what is significant about the IDCA is that museums and galleries are given a specific exemption from the act. Section 4(b) states:

> (4) Nothing in this section applies in relation to any matter—
> (b) included in the display of an art gallery or museum and visible only from within the gallery or museum;[73]

The defence of art in an institution is significant. It is one of the lone examples where law has openly recognised the relevance of a specific field of art theory, in this case Institutional Art Theory. The legislation is directly adapting Dickie's Institutional Art Theory[74] and approving the notion that art can indeed be validated and enshrined by the institution. However, the significance of this defence for the adoption of art theory in law is limited. Section four is only an idiosyncratic interpretation of the Institutional Art Theory because it remains largely in line with the *Bleistein*[75] approach. Art is protected under section four due to the context in which it appears rather than due to its own merit.[76] Thus, unlike in the OPA, the IDCA does not require law to truly engage with art theory because it simplifies the concept of art to geographical location. The IDCA

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[71] Indecent Displays (Control) Act 1981
[72] ibid s 1(1)
[73] ibid s 4(b)
[74] George Dickie, *Aesthetics, An Introduction* (Pegasus 1971) 101
[75] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[76] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 655

recognises all indecent works within a museum as legitimate art by proxy, disregarding the necessity for judicial engagement with expert commentary or approval because the work is already considered to be protected purely by its location. By having a confirmed judgement on the significance of the artwork in question before the work reaches the court, it removes the requirement for the court to consider whether the object is art or whether it has real value. This is in adherence with the traditional approach to art in law under the *Bleistein*[77] judgment, in which it was decided that the judiciary are only trained in matters of law and should not comment on art. Simply put, if it is within the institution, it is accepted as art without legal inquiry.

Such an approach is logically fuelled by Dickie's Institutional Art Theory[78] and again delegates any responsibility towards art away from the court and back into the hands of the art world. These are welcome inclusions for the art-friendly but it reflects poorly on the ability of the law of obscenity, and law in general, to openly and truly engage with art theory. Notably, there have been no persecutions of art under the IDCA. This further suggests that law would rather delegate responsibility to the institution than make overt decisions on the quality of art. The continuous deferral of defining art to the institution fuels the divide between the art world and those outside of it, allowing law to avoid explicit judgments on art while subtly incorporating art theory to plug the gap. Lydiate also notes that this reliance on the institution was welcomed by Parliament as it 'was confident that public opinion would accept galleries and museums being trusted to show what such institutions (and not police, juries or magistrates) considered appropriate'.[79] Although this confidence may be legitimately founded, it fails to arm the judiciary with clear guidance in obscenity law should it need to make its own decisions separate of the art institution. Moreover, it weakens the role of the judiciary in obscenity law because it suggests that the tastes of the museum or curator can override that of law, a novelty which is not true of art in law elsewhere. The court consequently limits the application of these provisions to reduce the amount of overt institutional influence in law.

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[77] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[78] George Dickie, *Aesthetics, An Introduction* (Pegasus 1971) 101
[79] Henry Lydiate, 'Censorship: Mapplethorpe' [1996] 201 Art Monthly 54, 54

The statutory provisions for obscenity law are limited in effect and outsource judgements on art. Both statutory provisions promote art as something which deserves exception and protection but fail to explain how this decision is to be made or what can be considered art for the purposes of obscenity law. In attempting to avoid openly engaging with art theory, the decision is delegated again to experts and those within the art world who have often made the decision before the artwork has even reached the court. The legal system continues to present a skewed image of art as something which should be protected but fails to acknowledge what that art is. Therefore, obscene art seems only to be a predominant concern where public criticism is so great that the promotion of obscene art is damning enough to require the judiciary to step in. When this occurs, law tries to reach a strong decisive outcome to alleviate the public scrutiny, often to the detriment of art.

iii. Common Law Interference

Most successful claims for obscenity in art have been brought under the common-law offences of blasphemy, outraging public decency and corrupting public morals. These three offences are 'the other most relevant English public morality laws [which] make no special accommodation of the artistic character of any allegedly offensive item.'[80] Blasphemous libel forbids 'the vilification of Christ and the fundamental tenets of Christianity', outraging public decency questions whether the subject matter outrages public decency and corrupting public morals is a similar offence but it is important to note that the offence of corrupting public morals has not been applied to any case involving art.[81] These three doctrines form the other areas of morality law that are applied to cases involving art but fail to make any accommodation for the significance of art, unlike their statutory equivalents. The application of these offences allows the court to reach binding judgments on art while remaining ignorant to art theory.

These are crucial doctrines because they rely on strict liability for the offence. Common-law offences can ignore the artistic intent and the significance of art theory because they are not considered in the defence. Kearns argues this ignorance is 'not just depriving art

[80] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 29
[81] ibid 36

of a fair hearing but invalidating as immaterial art's distinct ontology including a specialised cultural purpose and concomitant mental impetus.'[82] Upon this basis, law's approach towards art becomes increasingly inconsistent within obscenity law, with statutory principles subconsciously supporting and often promoting the significance of theory in art while common law principles deem it as irrelevant. With this sporadic treatment occurring within the same area of law, it further emphasises that the legal definition of art, and art generally, is misunderstood by law. The impact, and revival, of doctrines such as these restrict modern progress of the law related to art and keep legal attitudes towards art lying dormant in ambiguity.

The case of *R v Lemon*[83] is notorious for illustrating just how these doctrines can circumvent the modern measures aiming to protect and promote art. In *Lemon*, Gay News and its editor Denis Lemon were prosecuted under the common law offence of blasphemy for a poem and image depicting homosexual relations with Jesus Christ.[84] This was controversial as the charge and prosecution were ignorant of both the context of the poem and the image being exposed to a gay readership. Nor did the court acknowledge Lord Denning's 1949 statement that blasphemy was a 'dead letter' area of law.[85] The outcome of *Lemon* is critical because it shows a disregard for the context of art and literature, disregarding the art theory which would have supported the work. Moreover, it also ignores whether those who are exposed to the subject matter are going to be depraved, corrupted or even offended, requirements that are necessity for liability in statutory claims of obscenity. Critically, 'no judicial attention was paid to the poem as art rather than literal factual statement.'[86] This disregard for the relevance of the poem and image as art is critical. Ignoring the theory within art creates an 'unspecialised legal attitude to artistic media'[87] in which the significance of art is not valued. Due to the unspecialised nature of these offences, art is not appreciated as any different to other

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[82] ibid 45
[83] *R v Lemon* [1979] AC 617; *R v Gay News Ltd* [1979] 1 All ER 898
[84] *R v Lemon* [1979] AC 617
[85] Joseph Brooker, 'The Art of Offence: British Literary Censorship since 1970' in David Bradshaw & Rachel Potter (eds) *Prudes on the Prowl: fiction & Obscenity in England, 1860 to the Present Day* (2013, OUP) 179 – 207, 5
[86] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 43
[87] ibid 27

matter and runs contrary to other areas of law which support art as a separate and protected category. Consequently, these doctrines are utilised by the court to avoid the necessity of considering art theory by relying on strict liability to circumvent any complexities or engagement of art theory that are required through legislation.

However, the intention of these common-law doctrines was not to circumvent the OPA and this has become a procedural habit rather than a purposive act. The concern that art would be detrimentally impacted by the common law was so great that 'in 1964, the Solicitor-General gave an assurance, repeating an earlier assurance, that a conspiracy to corrupt public morals would not be charged as so as to circumvent the statutory defence in section 4 of the Obscene Publications Act 1959.'[88] However, this is not what occurred in the case of *R v Gibson*,[89] explored in the next section, in which Canadian artist Rick Gibson was convicted of outraging public decency even though the work in question was a legitimate work of art and sanctioned by an institution. Had the case been brought under the OPA, it would likely have resulted in a more favourable outcome for art. These common-law offences are generally preferred by the Crown Prosecution Service as opposed to their statutory siblings as, unlike the statutory equivalent, there is no explicit exception made for art.[90] The common law offences allow the court to follow the *Bleistein*[91] approach by reducing engagement with art theory and, in this case, removing it altogether. This is exemplified in *R v Gibson*.[92]

iv. Challenging Obscenity in the Gallery

There are few cases of obscenity in recent times which have seen successful prosecutions. Following *R v Penguin Books Ltd*,[93] the liberalisation of obscenity led to an influx of art which pushed the boundaries of the obscene. This continues today, from Rick Gibson to Zhu Yu, the Chinese artist who claimed to have cooked and eaten an aborted baby in his

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[88] ibid 53
[89] *R v Gibson* [1991] 1 All ER 439 (CA)
[90] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 29
[91] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[92] *R v Gibson* [1991] 1 All ER 439 (CA)
[93] *R v Penguin Books* [1961] Crim LR 176

2000 performance '*Shiren*'[94] to Karen Finley, 'whose performance art has been called "obscenity in its purest form"'.[95] One of the most notorious cases involving art and obscenity within the United Kingdom is the case of Rick Gibson's '*Human Earrings*'. The Gibson case is critically illustrative of the dangers of obscenity overreaching into the realm of art. Moreover, the Gibson case also exemplifies the ongoing issue in which the judiciary fails to characterise the subject matter as art in an attempt to avoid engaging with art theory. This leads to a skewed judgment which does not recognise the significance of the artwork in question.

R v Gibson[96] is an English law case in which the artist Rick Gibson and the owner of the Young Unknowns Gallery in London, Peter Sylveire, were prosecuted under obscenity laws for the display of Gibson's artwork '*Human Earrings*'. The sculpture was comprised of two freeze-dried foetuses which had been attached to earrings and displayed on the decapitated head of a mannequin.[97] Although the sculpture was displayed in a gallery setting, Gibson was not tried under the Indecent Displays (Control) Act 1981.[98] Nor was Gibson tried under the OPA 1959 even though it was a recognised work of art. Instead, the obscenity claim was brought against Gibson under the common law, a strict liability offence. Under the common-law offence of outraging public decency, Gibson and Sylveire were found guilty and fined £500 and £350 respectively.[99] These sentences were upheld on appeal.[100] The outcome of this case is critical. As the defendants were tried under the common-law offence of outraging public decency and not under statutory provisions, they were not afforded the statutory defence of artistic merit.

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[94] John A Walker, 'Art and Obscenity by Kerstin Mey' [2007] 14 The Art Book 52, 52 – 53
[95] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1369
[96] *R v Gibson* [1991] 1 All ER 439 (CA)
[97] ibid
[98] Tom Lewis, 'Human Earrings, Human Rights and Public Decency' [2002] 1(2) Entertainment Law Review 50, 53
[99] Daniel Thomas , 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 347
[100] *R v Gibson* [1991] 1 All ER 439 (CA)

Thomas is extremely critical of this as it 'deprived the artist of a voice within the trial process.'[101] It seemingly suggests that where obscenity is concerned the common law can be used to avoid the application of statutory law and starve art of the defence of artistic merit, the statutory provision which defines art as special within the realm of obscenity law. This facilitates the judiciary to avoid engaging in debate with art theory because the artistic nature of the work is not relevant to the charge. The common-law offence, as previously noted, relies on strict liability and thus it does not matter whether the work is supported by art theory. By stripping Gibson of his voice and removing the Artist Led and Institutional Art theories from the conversation, the court reaches a conviction that is preferable for law to the detriment of art. This again suggests that seemingly logical outcomes and processes in art law do not always align with reality because law prioritises the optimal outcome for law over the need to engage with art theory.

Throughout the appeal, Gibson was not designated as an artist, nor was his work referred to in the judgment as art. For Kearns, this is a significant factor because it ignored the artistic value of the work which facilitated an easier legal judgment to the detriment of the art.[102] Kearns also draws attention to the fact that the Court of Appeal could have chosen to view the work as art and try it against the OPA, in which there is a defence of public good. Instead it chose not to.[103] The failure of the Court of Appeal to acknowledge the artistic nature of Gibson's work is crucial. It directly illustrates that English law, as similarly demonstrated in the field of taxation and the case of *Henderskelfe*,[104] sometimes chooses not to categorise some art works as art for legal purposes dependent on the legal context. This leads to judgments which are not favourable for the artwork and contradict with the statutory notion that art is a special category of property. This further fragments the legal definition of art as statutory provisions provide for special treatment of art while the court treads the line of attempting to avoid art theory. In his conclusive comments, Kearns extends this further to argue that the treatment of art as non-art is an insult to

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[101] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 348

[102] Paul Kearns, 'Not a Question of Art: Regina V Gibson, Regina v Sylveire' [1992] 1(2) International Journal of Cultural Property 383, 384

[103] ibid

[104] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278

those who voluntarily enter art galleries because it suggests that the court does not think the public is capable of interpreting something as art when it does not have legal support.[105] This is a rather extreme view but a valuable one. If the art-friendly viewer can decide on the merits of a work of art, then why can't the judiciary even acknowledge that it is art in the first place?

A contrasting example can be found in the various cases brought against the work of artist Robert Mapplethorpe. Unlike Gibson, Mapplethorpe's work is recognised and treated as art leading to a strikingly different result. Due to its content, Mapplethorpe's work courts controversy and is often subjected to legal and social challenges. In *City of Cincinnati v. Cincinnati Contemporary Arts Center*,[106] an American case in which Mapplethorpe's '*X, Y, Z*' series was tried for obscenity, the work was deemed as protected from prosecution because of the artistic merits of the work. Seven works were deemed to be potentially obscene and tried against the offence, 'including photographs depicting a man's forearm inserted into another man's anus, a penis with a finger inserted into its head and a bull whip inserted into an anus.'[107] Several art world actors were brought in as experts to emphasise the artistic merit of the work. Danto argues Mapplethorpe 'achieves images that are beautiful and exciting at once: pornography and art in the same striking photographs'[108] while Easthope praises the work of Mapplethorpe and others to emphasise that it is 'in the name of Art and Literature [that] high culture has traditionally been able to legitimate reaching into the realms of [the censored] in more everyday discourses.'[109] It is due to expert testimonies similar to these that saved the Contemporary Arts Center from prosecution. This integration of institutional justification into the courtroom deliberations led to the acquittal of the case.[110] Through *City of*

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[105] Paul Kearns, 'Not a Question of Art: Regina V Gibson, Regina v Sylveire' [1992] 1(2) International Journal of Cultural Property 383, 386
[106] *City of Cincinnati v Cincinnati Contemporary Arts Center* 566 NE2d 214 (1990)
[107] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 343
[108] Arthur C Danto, *The Abuse of Beauty: Aesthetics and the Concept of Art* (Open Court 2003) 82
[109] Antony Easthope, *Literary into Culture Studies* (Routledge 1991) 97
[110] *City of Cincinnati v Cincinnati Contemporary Arts Center* 566 NE2d 214 (1990)

Cincinnati,[111] it is apparent that law again can support the engagement with Institutional Art Theory, even if it does not acknowledge it as such.

The use of expert testimony is again a critical example of the court avoiding direct engagement with art theory on its own merit and instead relying on the judgments of those who are trained in art, as per *Bleistein.*[112] Although the judiciary is acknowledging that art theory is significant in law, the arguments and justification for this significance is not made by the judiciary. This is critical because it is indicative of law again subtly recognising the importance of art theory while continually avoiding overtly sanctifying this engagement within judicial precedent. Cases continue to be resolved through engagement with art theory by proxy and on a case specific basis. Ultimately, the Mapplethorpe example shows that where treated like a work of art, law does indeed subconsciously note the value of art theory and can support it where necessary.

However, there is no guarantee that law will always acknowledge art theory when judging a work of art. Consequently, there are several examples where Mapplethorpe's work hasn't been tested by law and has been pre-emptively self-censored by the institution to avoid the risk of a legal trial. In the summer of 1989, Mapplethorpe's work was due to be exhibited at the Corcoran Gallery of Art but this was cancelled at the last minute, largely due to the obscene and erotic themes in his work.[113] Alternatively, within the United Kingdom, the Hayward Gallery pulled two Mapplethorpe works from an exhibition after consulting with Charing Cross Police Station.[114] These acts of self-censorship are indicative of the dangers of relying on a legal system which does not have a strong precedent in how it defines or engages with art. For the institution, it is better to self-censor than to risk a criminal charge. Adler has also noted several other examples of artists being censored before the legal system can enact punishment or investigation,[115] with simply the presence of the obscene or the risk of public outrage and damage to

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[111] ibid
[112] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[113] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1370
[114] Henry Lydiate, 'Censorship: Mapplethorpe' [1996] 201 Art Monthly 54, 54
[115] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1370

reputation preventing these works from being exhibited. The self-censorship or institutional censorship of art reveals a critical truth about the nature of obscenity law and how art is defined within the law. It illustrates that the legal approach to art is so inconsistent that it is better to avoid displaying a work of art altogether than risk a legal challenge, even where there is specific art legislation which should support the defendant. Moreover, it highlights that Institutional Art Theory plays a hand even before law is involved so law cannot avoid being impacted by art theory. Ultimately, in the case of obscenity, it is often artists with strong and favourable reputations that will withstand a legal challenge, while the lesser known artist is more fearful of such interest and must tread more carefully when deciding whether to create or exhibit their work.[116]

v. Interpreting Institutional Influence in the Courtroom

From assessing obscenity law, and considering the outcomes reached in copyright and taxation, it is clear that the interpretation of art simply cannot occur without the involvement of the art world. This is both due to the behaviours of the art world and the way law incorporates both the Institutional and Artist Led theories of art. As shown through Institutional Art Theory, institutions define art and forge connections between art, the art world and lay people.[117] Thije notes that institutions are 'also authoritarian, patriarchal locations where the highest products of civilisation are presented as example and future.'[118] Museums tell us how to understand a work of art through curationism, elitism and their biased selection.[119] We also trust that they understand art and believe that when an institution purchases a work of art, it is endowed with 'authority and status'.[120] Art in the art world and art in law have fundamentally different base points from which they begin to define art because the market allows art to be 'reconstructed and recreated' while law prefers art to be an object 'finalised at the point of the last

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[116] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 342

[117] Catharine Abell, 'Art: What it Is and Why it Matters' [2012] 3 Philosophy and Phenomenological Research 671 – 691, 682

[118] Steven ten Thije, *The Emancipated Museum* (The Mondrian Fund 2017) 58 - 59

[119] ibid 65

[120] Dana Arnold, *Art History: A Very Short Introduction* (OUP 2004) 73

contact with its creator.'[121] It is the role of the court to utilise these interpretations of art to solve the Art Conundrum and reach a finalised judgment where art is in contestation.

Thije also suggests that institutional influence in art is a result of a double standard held by art institutions. Although institutions aim to increase the understanding of art, they also keep art 'shrouded in mist' to solidify their role as art connoisseurs.[122] When this is compounded with the perceived lack of transparency as to how the art world values art,[123] it is arguable that art can only be understood with institutional input. When the art world refrains from commenting on art it leads to difficult questions concerning commerciality, authenticity and originality.[124] The art market, and the wider art world, influence behaviours because works of art are 'the merchandise of the art market'. They are economically invested in art as a commodity, as will be examined in the next chapter, and are, therefore, intrinsically concerned with desirable outcomes for art in law.

Introducing the Institutional and Artist Led theories of art into law while trying to remain in control is a precarious act because the art world has a significant self-interested legal interest in art concerning legal certainty of ownership, property rights and acquisition.[125] By accepting institutional comments on art, the court empowers the institution in law even though often the art world is suspicious of law. Often, art world actors are advised to avoid escalating disputes to court to limit the reaches of law and legal involvement.[126] Moreover, if the court were to impose a blanket definition of art it would be vehemently rejected by the art world[127] due to the impact on business and property rights. Calls for

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[121] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294
[122] Steve ten Thije, *The Emancipated Museum* (The Mondrian Fund 2017) 58 - 59
[123] Anne L Bandle, '"Legal Questions of Art Auctions" (Rechtsfragen der Kunstauktion): Seminar Held by the Europe Institute, University of Zurich and the Center of Art and Law, Zurich, 13 April 2011' [2011] International Journal of Cultural Property 449, 449
[124] Cynthia Freeland, *But Is It Art?* (OUP 2001) 317
[125] Erik Jayme, 'Globalization in Art Law: Clash of Interest and International Tendencies' [2005] 38 Vanderbilt Journal of Transnational Law 927, 941
[126] Francis Lennard, The Impact of Artists' Moral Rights Legislation on Conservation Practice in the United Kingdom and Beyond' (ICOM Committee for Conservation: 14th Triennial Meeting, The Hague, Netherlands, Sep 2005) 5
[127] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 84

more regulation[128] are heavily opposed by the British Art Market.[129] Consequently, when law considers these additional art theories, the court must also be aware that institutional opinions on art are far from neutral. The art world is not going to promote a legal interpretation of art that would severely restrict creativity or the flow of art in the market. Therefore, although the involvement of the art world is useful to the court, there are limits to its functionality because it is not an unbiased theory of art.

As the art world protects its interests and restricts the interpretation of art, the judiciary cannot interpret art without institutional involvement. In turn, Leiboff argues that law in fact relies on the art expert because it does not trust its own 'amateur response' to art,[130] trusting the opinion of the art world more than its own. Soucek builds on this stance stating that relying on institutional interpretations of art allows the court to outsource judgements and avoid making value judgements altogether.[131] This allows institutions to have a direct influence upon law. So much so that Stromholm argues that moral rights evolved due to the societal connotations associated with authors and creators rather than purely legal interests.[132] Consequently, the institutional theory of art continues to be considered as one of the fundamental theories of art because the art institution has such a clear impact on every interpretation of art.

In the instance of the Indecent Displays Act,[133] it is the institutional setting which protects the work of art rather than the content of the work itself.[134] Again, this reliance on institutional approval enshrined into statute further highlights the recognised legitimacy of the art institution by law through unconsciously buying into the Institutional Art Theory. Moreover, Thomas reinforces Weinstocks argument that to reach better

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[128] Don Thomson, *The Orange Balloon Dog: Bubbles, Turmoil and Avarice in the Contemporary Art Market* (Quarto Publishing Plc 2018) 139
[129] Simon Stokes, 'Implementing the Artist's Resale Right (droit de suite) Directive into English Law' [2002] 13(7) Entertainment Law Review 153, 156
[130] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 310
[131] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 425
[132] Stig Stromholm, 'Droit Moral, - The International and Comparative Scene from a Scandinavian Viewpoint' [2002] Scandinavian Studies in Law 217, 224
[133] Indecent Displays (Control) Act 1981
[134] Paul Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art' [2000] Criminal Law Review 652, 655; Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 37

outcomes in obscenity cases, we need to overtly use art theory and bridge the gap 'between the artistic community and the general public'.[135] Where the court has not considered the significance of art theory in obscenity judgments, disconnect had arisen between the court and the institution. The Gibson trial[136] was brought through the strict liability offence of outraging public decency rather than through the OPA or IDCA. If the court had factored in the artistic significance of Gibson's work, it is unlikely that a prosecution would have occurred. Therefore, the role of the art world in these matters cannot be ignored because it can drastically impact legal outcomes. Moreover, although there is an ongoing risk of prosecution, Thomas notes the importance of displaying and creating potentially obscene art. Thomas argues that a triumph over obscenity law is perhaps not just for the artist alone, but also for those who visit the museum, those who see the work and for the benefit of art.[137] This is because each time the court declares a form of art as not obscene, it allows the creation of similar works to avoid legal debate, as supported by the cladistic theory of art.

Henley is a strong advocate for exploring the realms of potentially indecent or extreme art but notes that 'artists often confuse the *right to create* with the *privilege* to show. While art educators must embrace an artist's freedom of expression, this freedom extends only to the work's right to exist'.[138] Henley's observation crucially suggests that art cannot always be exempt from prosecution by law. Although Henley's comments were made about his role as an art educator, it reinforces the notion that obscenity laws should not prosecute the obscene artist who creates art, it should be used to regulate the exposure of these works when they cause offence. This, in turn, suggests that law should not prosecute unless there is a direct offence which cannot be justified under the statutory provisions which protect art that is in the public interest. These statutory

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[135] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 356

[136] *R v Gibson* [1991] 1 All ER 439 (CA)

[137] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 360

[138] David Henley, 'Art of Disturbation: Provocation and Censorship in Art Education' [1007] 50(4) Art Education, Literature, Media and Meaning 39, 40

provisions support art on the basis of Institutional Art Theory, further emphasising its role in the legal definition of art.

Outside of obscenity law, institutional theories of art are included where legal formalism and property law do not suffice. Karlen notes that there is some legal authority which 'seems partly to acknowledge the aesthetic expertise of the art world represented by art experts.'[139] This was undeniably clear in both the taxation case of *Brancusi*[140] and the copyright case of *Blanch v Koons*[141] which returned progressive judgments on art. From these cases, it is deducible that testimony from artists and those in the art world could help to improve legal interpretations of art. Where this has not occurred, such as in *R v Lemon*,[142] the court is often unable to reach a judgment that does not unfairly restrict creativity. Therefore, it is not surprising that following *Brancusi*,[143] the court has continued to subtly engage with art theories that promote creativity and embrace the new schools of art. As Jasiewicz notes, courts already invite subjective testimony from art experts to help guide the judiciary where legal formalism is not sufficient to define art.[144] This shows that the courts acknowledge that there is an important input that can only be provided by the art world. Art must be engaged with to be understood but the *Bleistein*[145] approach restricts the court from doing so. Thus, the interpretation of art is often left to the institution and indirectly introduced into law through expert testimony or statutory provisions such as the defence for art in the IDCA.[146]

This 'active participation'[147] is something Kearns argues is critical to the experience of art. Kearns states that a charge of obscenity only becomes possible when 'viewing of an object out of context. Only when the object is responded to in an aesthetic context can a

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[139] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 54
[140] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[141] *Blanch v. Koons* 467 F3d 244 (2d Cir 2006)
[142] *R v Lemon* [1979] AC 617
[143] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[144] Monika Isla Jasiewicz, 'A Dangerous Undertaking: The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases' [2014] 26 Yale Journal of Law and the Humanities 143, 176
[145] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[146] Indecent Displays (Control) Act 1981, s 4(b)
[147] Paul Kearns, 'Essay 2: A Critique of the Obscene in Art, Pornography, Law and Society' in Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 193

work of art result. Only when not can obscenity be achieved.'[148] Kearns' statement is crucial. The emphasis on context is damning of obscenity law as inept to judge art and reinforces the significance of context in the Art Conundrum. This is critical because Kearns is drawing a direct link between the ability to understand art and the failures of the legal system to not consider the artistic context when judging on a work of art. Art cannot be judged without considering the art theories which support the work. For Kearns, obscenity cases arise due to the fallout caused by the ignorance of the judiciary to engage with these theories and the context in which they present themselves. Consequently, Kearns is very critical of obscenity law, arguing that it is an archaic area of law which harkens back to a legal system grasping at power and control.[149]

The largest limit on the influence of the art world is that the court is predisposed to avoid deliberating on art and prioritises the use of legal formalism in the initial instance. Where possible, the judiciary will prioritise legal aims and reasoning to avoid empowering the art world in court and to simplify the process of art in law. As has been shown in the previous two chapters, the role of legal formalism is indivisible from the legal interpretation of art. Law prefers a straightforward definition of art as opposed to the elaborate interpretation so often proposed by the art world. So much so that even where expert testimony argues otherwise, law continues to prioritise judgments based on legal ease. For example, in the copyright case of *Castle Rock Entertainment Inc v Carol Publishing Group, Inc*[150] concerning the fair use of copyright for the television show Seinfeld, it was decided that expert testimony is not needed if the outcome is logical and obvious. Alternatively, even where expert evidence is included, there is no guarantee that the court will incorporate it into its judgment. When considering the merits of the case, Watkins draws on 'the prevalent attitude within the courts, that whilst artistic merit might be acknowledged, it was not an issue which could override that of obscenity'.[151] These cases highlight that while the court does indeed engage with art theories such as the institutional theory of art, these theories will be limited if they are found to overcomplicate the process of reaching a judgment on art.

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[148] ibid
[149] ibid 194
[150] *Castle Rock Entertainment Inc. v. Carol Publishing Group* 150 F. 3d 132 (2nd Cir. 1998)
[151] Dawn Watkins, 'The Influence of the Art for Art's Sake Movement Upon English Law, 1780 - 1959' [2007] 28(2) The Journal of Legal History 233, 250 - 251

Where the consideration of art theory will overcomplicate the judgment, the court is capable of avoiding it altogether through the common law. In adherence with *Bleistein*,[152] the court will continue to avoid engaging with art theory where it is too overtly challenging. However, the use of strict liability and the circumvention of the artistic defence within section four of the Obscene Publications Act 1959, has led Kearns to the conclusion that obscenity law is ultimately inept.[153] Moreover, Kearns' arguments are echoed by those of Lewis who argues that reform in the area of obscenity law is long overdue.[154] Where the common law is inept, there must be some redress or remedy available. Thus, if obscenity law is inept when it ignores art theory, the incorporation of art theory into law is unavoidable. Walker states that contestation between art and obscenity law is inevitable.[155] Art will always eventually conflict with the boundaries of taste and taboo[156] because art is inherently created to push these boundaries. Adler notes that it is the role of art specifically to question pre-set boundaries and that in order to protect ourselves from obscenity, we must sacrifice art or vice versa.[157] When this boundary is pushed, law subtly supports Institutional Art Theory and the presence of the gallery to reduce the necessity for the court to wade into the legal definition of art. However, if pushed too far, then law circumvents the engagement with art theory by relying on strict liability in common law offences which removes the necessity to consider the artistic merit of the work.

Leiboff argues that 'the law cannot trust itself to judge the artistic, and requires the intervention of those who can be trusted to make judgements concerning taste and artistic or cultural value. However, the experts who can be trusted to assess the validity of an artistic thing can only guide the courts.'[158] This is a crucial statement. It encapsulates

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[152] *Bleistein v Donaldson Lithographing Co.* 188 US 239 (1903)
[153] Paul Kearns, 'The Ineluctable Decline of Obscene Libel: Exculpation and Abolition' [2007] Criminal Law Review 667, 675
[154] Tom Lewis, 'Human Earrings, Human Rights and Public Decency' [2002] 1(2) Entertainment Law Review 50, 67
[155] John A Walker, 'Art and Obscenity by Kerstin Mey' [2007] 14 The Art Book 52, 52
[156] ibid
[157] Amy M Adler, 'Post-Modern Art and the Death of Obscenity Law' [1990] 99(6) The Yale Law Journal 1359, 1378
[158] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 298

the approach of the court to utilise expert evidence as a guide without creating an overtly binding precedent which enshrines the institution into law. Much like with other theories of art, the Institutional and Artist Led theories operate as additional considerations within the wider understanding of art in law. Thus, for Kaplan and Thomas it is not necessarily important who is best to judge art, rather we should be focused on for what and why we are making the judgement.[159] For law, the reason why the judgment is being made is dependent on the legal context in which the artwork arises. It is clear that the art world and related art theories can aid the court in reaching a judgment on art but as stated, there are limits to how effective it can be. The Art Conundrum facilitates the involvement of the art world because the court can rely on the relevant art theories where appropriate. The art world aids to an extent in the legal definition of art by becoming another step within the multifaceted approached of the Art Conundrum. Perhaps the most accurate comment to sum up the influence of the art world is the reality that 'the public relies heavily on the verdict of the art market's insiders'[160] and whether directly or indirectly, so does law.

Law begins with legal formalism before considering the logical legal approach and additional theories of art including the Institutional and Artist Led theories, either through considering the general public's opinion or by explicitly seeking out involvement from the art world. The role of the art world is to provide further guidance in the process of defining art, however, ultimately it is the court that will reach the decision. Law will always have the final comment and draw its own conclusion on definition and value[161] so the Art Conundrum simply facilitates the process in reaching a legal judgment. In conclusion, as highlighted in obscenity and previous chapters, the interaction between law and the influential art world is a delicate and complicated relationship but the involvement cannot be ignored. Ultimately, the influence of the art world must be considered alongside the other elements of the Art Conundrum when reaching a legal

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[159] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 357

[160] Mark A Reutter, 'Artists, Galleries and the Market: Historical Economic and Legal Aspects of Artist-Dealer Relationships' [2001] 8(1) Jeffrey S Moorad Sports Law Journal 99, 121

[161] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 308

definition of art, as reliance solely on legal formalism and the *Bleistein*[162] approach is often not possible.

vi. Conclusion

Obscenity law does not provide a concrete definition of what is to be considered art. Nor does it commit art to the typically formalist definition in which art is a physical entity or commodity. When read deeply, it can be argued that obscenity law subconsciously promotes the expansive nature of art and is dependent on institutional interpretation to be understood and protected in law. What is clear from observing these cases is that obscenity law discreetly acknowledges the significance of art theory by allowing art to exist in the public realm even when it may cause shock or be offensive. Therefore, any definition of art should also embrace the merit and importance of art as special property and promote art as a 'culture independent of standard.'[163] The law achieves this through the Art Conundrum because it allows the court to utilise a definition of art which ensures that the artwork receives the relevant statutory protections and also facilitates judicial reliance on expert testimony to support the legal aim of the court. But this is only when the court feels it is necessary to reach a verdict which recognises the importance of the artwork in question.

Undeniably, the significance of art has been recognised by the relevant statutes and through the reduced number of recent prosecutions of obscene art. Yet, it is important to note the ability of the court to circumvent these areas of legislation through the common law and through reluctance to acknowledge the work as art, as in the language of the *Gibson*[164] case leads to a potentially superficial acknowledgement of the significance of art. When art is tried under the strict liability offences of the common law, it is stripped of its special status as is all too often the case when art and law collide. By ignoring the significance of art theory, the court does not need to engage with the elements of the work that may be outside of the judiciary's ability, as per the precedent set in *Bleistein*.[165] In

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[162] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[163] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 84
[164] *R v Gibson* [1991] 1 All ER 439 (CA)
[165] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

light of this, the application of obscenity law and the impact of the common law upon art has led to various outcomes for how art is defined and prosecuted. Additionally, the legal definition of art is even further fragmented by the lack of precedent or judicial guidance that is not restricted to a case-by-case basis.

In conclusion, the relationship between art and obscenity is tumultuous. In recent years, the effect of obscenity has declined to such an extent that obscenity trials are rare. So rare, that some academics and critics have called for the abolition of the offence altogether.[166] However, the presence a legitimate prosecution under obscenity statute or the common law has led to indirect censorship of art which is further regulated by art world actors. As a result, it is hard to define exactly what is art from obscenity law, with the regulation of art not occurring solely within law but also prior to its display. Assessing obscenity law emphasises that the Art Conundrum does indeed operate within the law and that, again, law regulates art to reach preferential legal outcomes whether or not they are beneficial or detrimental to art.

[166] Paul Kearns, 'The Ineluctable Decline of Obscene Libel: Exculpation and Abolition' [2007] Criminal Law Review 667, 675

VII

Droits Moraux & Droit de Suite

Moral Rights, the Artist's Resale Right and the Problem of Commodification

> 'Copyright is a property interest, protecting the economic, exploitive interests of the artist. In contrast, moral rights, or droits moral, is a bundle of rights which protect an artist's personality and artistic reputation.'[1]
>
> Cordia A Strom, 1984

> 'There is a widely held belief, particularly among civil lawyers, that the concept of moral rights is a relatively novel intruder into common law copyright systems; and that such systems, by dint of Article 6bis of the Berne Convention, are being compelled, kicking and screaming, to dilute their pure economic approach to copyright with alien personality rights.'[2]
>
> Gerald Dworkin, 1994

In assessing the legal definition of art and the way in which law interacts with art, it has been shown that, thanks to the theoretical base elucidated earlier, art is sometimes treated as a special from of property while in others it is treated no differently than a chattel. Through treating art like a chattel, law commodifies the object and places the focus of the court on the legal purpose which is often linked to the economic interests of the parties involved. By assessing case law and statutory provisions, it is clear that the definition of art rests on abstractions of art theory from which the court will only sometimes imply significant meaning. Yet, the court often falls short of formally stating that it is doing so. Particularly within the United Kingdom, the English legal system frequently alludes to the importance of art theory without overtly relying too heavily on it. To do so would contradict the ability of the court to treat art like a commodified form

[1] Cordia A Strom, 'Fine Art: Protection of Artist and Art' [1984] 1 Entertainment & Sports Law Journal 99, 113

[2] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia VLA Journal of Law and the Arts 229, 229

of property. Consequently, legal definitions of art continue to be largely dependent on both the jurisdiction and the area of law in question. However, when the court does acknowledge the significance of art theory in art, it draws a clear distinction between art and other property. This is no more evident than in the contemporary iteration of the Artist's Resale Right (*Droit de Suite*) and Moral Rights (*Droits Moraux*).

Art is clearly recognised as, at least to some extent, special property. The existence of an area of specific artist's rights contrasts directly with the general approach of law to engage with art theory. Moreover, it is a complete shift from the approach taken in *Gibson*,[3] where the court did not recognise the significance of Gibson as an artist. The existence of these personal rights afforded to the artist is an explicit statement of the uniqueness of art as property, the implication being that artists should be given additional rights to protect their creations, its value and their own reputation. Irrespective of the amount of variation in decisions due to jurisdiction, the Artist's Resale Right (ARR) and Moral Rights (MR) present a critical position which cannot be ignored. Therefore, it is essential to consider the impact and importance of artist's rights as the final central legal area in this study of the relationship between art and law. To begin, it is critical to address the recurrent theme of art as a commodity to frame the assessment of artist's rights as a clear development of property rights afforded to art.

i. Art as a Commodity Worth Protecting

The designation of art as a commodity which can be exchanged, valued and coveted is, in many ways, critical to its significance. As has already been demonstrated by the predisposition for legal formalism, the role of judiciary and the influence of the market, artworks are often perceived to be some form of commodity to which we prescribe specific values. These values then dictate how art is viewed, handled and protected. It is the intrinsic theory-based value of art which grants it special privilege over other forms of chattels and forces the necessary requirement of a legal definition.[4] However, when the significance of this theory is removed or separated from art for legal and transactional purposes, art becomes irrevocably susceptible to commodification. Understanding the

[3] *R v Gibson* [1991] 1 All ER 439 (CA)
[4] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 810

unavoidable reality of art as a commodity is critical to understanding the legal definition of art. The role of legal formalism and the influence of the market both directly and indirectly enshrine art as a commodity. The relationship between art and its commodification is inevitable and is a fundamental feature in the legal definition of art.

Law doesn't meddle in the realm of art without prompt. Rather, art is always brought to the attention of the law by interested parties. These parties often hold either an economic or proprietary interest which, when these interests are at risk, instigates law to intervene.[5] From appropriation art claims to tax allowances, parties will attempt to define art based on their own specific economic interests or intentions. This leads to catchy headlines, such as 'Appropriation: Where there's money, there's a lawsuit',[6] because those who bring these lawsuits usually seek to gain or protect their own economic position. With the exception of claims for obscenity, the clear majority of art law cases are private claims in civil law. Therefore, it is not surprising that legal disputes in art can almost always be linked back to an economic interest, with the commodification of art being inherently prevalent within almost every legal case. By addressing the commodification of art in both the art market and law, it is shown that art is fundamentally treated as a commodity and this has led to a legal definition of art which is consciously aware of this reality. Consequently, the legal definition of art must remain flexible enough to accommodate the proprietary interests held within artworks and restrict the significance of art theory to promote economic interests.

The treatment of art as a commodity originates within the artworld itself. The art trade has existed as long as art has been created[7] and is the notable signifier of which artworks are to be considered valuable and important. The art market evaluates art through sales and valuations which gives clear numerical values to works of art. Although the works may be aesthetically incomparable, these evaluations create comparable measurements

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[5] Louise Harmon, 'Law, Art and the Killing Jar' [1994] 79 Iowa Law Review 367, 399

[6] ArtLyst, 'Jeff Koons And Pompidou Center Lose Plagiarism Lawsuit in France' (ArtLyst, 10 March 2017) <http://www.artlyst.com/news/jeff-koons-pompidou-center-loses-plagiarism-lawsuit-france/> accessed 15th March 2018

[7] Mark A Reutter, 'Artists, Galleries and the Market: Historical Economic and Legal Aspects of Artist-Dealer Relationships' [2001] 8(1) Jeffrey S Moorad Sports Law Journal 99, 100

for those outside of the artworld.[8] The power of the market is astronomically important within the artworld and thus, Reutter states that 'it can be said that without market success there is no art, but only a hobby'[9] because it is the market and the valuations which gives this hobby its title. This is incredibly significant because it shows that although the significance of art theory in art is immeasurable,[10] the market also focuses directly on art as a tradable commodity to give it a value.

The value of the art market is astronomical. Valuations of works circulating in the market at any one time in 2018 were estimated to be $400 billion,[11] with Henley estimating that London's art market was worth more than £9 billion alone in 2016.[12] The magnitude of this market has contributed to the desirability of works of art for both investment and status. In 2016, it was reported that 72% of art collectors considered the investment value of the work as a factor in purchasing. Thus, it is evident that 'financial investment is clearly a leading 'use' of art'.[13] This is not a recent development. Art has always been an investment commodity, with Landes noting that 'economists since Veblen' have noted that art is a 'prestige' good which 'signals wealth and good taste'.[14] Moreover, this desire for prestige and status has further bolstered the influence of the art market. Collectors rely on experts to guide them in making good investments[15] with branches of economics being dedicated solely to understanding the equations of value within the art market.[16] Where art cannot be commodified, as in the case of some contemporary works which resist commodification, 'it lacks the empirical validation of the market',[17] which harms

[8] ibid 113 - 114
[9] ibid 114
[10] ibid 113
[11] Don Thomson, *The Orange Balloon Dog: Bubbles, Turmoil and Avarice in the Contemporary Art Market* (Quarto Publishing plc 2018) 141
[12] Darren Henley, *The Arts Dividend: Why Investment in Culture Pays Off* (Elliott & Thompson Limited 2016) 171
[13] Matt Brown, *Everything You Know About Art is Wrong* (Batsford 2017) 23 - 24
[14] William Landes & Daniel B Levine, 'Economic Analysis of Art Law' in Victor A Ginsburg & David Throsby (eds), *Handbook of the Economics of Art and Culture* (North-Holland 2006) 235
[15] Matt Brown, *Everything You Know About Art is Wrong* (Batsford 2017) 23 - 24
[16] Margarita Vega, 'Once Again, What Counts as Art?' [2016] 44 Philosophia 633 – 644, 634
[17] Grayson Perry, *Playing to the Gallery* (2nd edn, Penguin Books 2016) 39

the way in which the art is received and limits its exposure. Art that does not play to commodification risks being looked upon less favourably than those that do.

Even institutions within the artworld benefit economically from the commoditisation of art as museums and galleries utilise their ownership of particular artworks to draw in visitors. Berger argues that publicity images which utilise works of art trade on the perception of affluence which is associated with art alongside the cultural authority art is considered to hold. [18] The first of these is a clear nod to the idea of art as a valuable commodity accessible largely only to the 'rich and beautiful',[19] echoing Landes' sentiments.[20] Museums can trade on this perception through ticketed exhibits, calls for donations and merchandising. For example, Berger details how 'The National Gallery sells more reproductions of Leonardo's cartoon of '*The Virgin and Child with St Anne and St John the Baptist*' than any other picture in their collection.' [21] Why? Because the painting was the subject of a proposed purchase, whilst it was still relatively unknown, for two and a half million pounds.[22] The amount of money attached to this work thrust it into the limelight and emphasised just how critical valuations are in the perception of art. When art is worth a lot of money, it becomes interesting and worth acknowledging. This is clearly commodification at play.

Reproductions of art, such as those of Leonardo's cartoon of '*The Virgin and Child with St Anne and St John the Baptist*' capitalise on art because art can be easily made into a profitable commodity. Art has become more commoditised than ever with the emergence of printing techniques and the digital age, which allows for 'uniformly repeatable "commodities" … mass production'[23] of works of art. Unlike other areas of the arts, such as music or literature, art is a physical object which can be owned and handled.[24] This

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[18] John Berger, *Ways of Seeing* (Penguin Books Ltd 1972) 135
[19] ibid
[20] William Landes & Daniel B Levine, 'Economic Analysis of Art Law' in Victor A Ginsburg & David Throsby (eds), *Handbook of the Economics of Art and Culture* (North-Holland 2006)
[21] John Berger, *Ways of Seeing* (Penguin Books Ltd, 1972) 23
[22] ibid
[23] Marshall McLuhan & Quentin Fiore, *The Medium Is the Massage* (Penguin Publishing Ltd 2008) 50
[24] Stina Teilmann, 'Art and Law: An Introduction' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 11 - 12

lends nicely to its commodification because the reproduction of art results in a new object that is similar, or in many cases identical, to the original. The debate concerning the new object then shifts to one of authenticity and the spiritual value that the original has that the copies do not. How do we know that the object has this spiritual value? It is worth more money than the copy.[25] So even in the case of originals vs. copies that are physically identical, we rely on the monetary value of the original to indicate prestige irrespective of whether the key element which separates the two is based in art theory.

The notion of prestige and the spiritual value of art is so significant that everyday objects are commodified differently when associated with art. For example, part of Gustav Metzger's '*Recreation of First Public Demonstration of Auto-Destructive Art*' was once thrown away because it was a 'garbage bag filled with discarded paper and cardboard.'[26] The outcry which resulted from this was phenomenal and it draws distinctly back to the perception that the bag is *more* than *just* a garbage bag because it is a work of art and is therefore valuable, as supported by art theory. For the cleaner, the bag was full of rubbish of little value and logically it was thrown away. Had the cleaner known that the bag was worth a substantial economic sum, this would not have occurred. As a response to the action, the Tate offered compensation to Metzger,[27] a critical point as it further equates the loss of part of the work of art with its monetary value, again realigning art with economics and the commodity. The Metzger example highlights that, when commodified, even rubbish can be given an economic value which makes it so significant that to throw it away would be outrageous. Again, this is undeniably commodification in action.

This perception and treatment of art as a commodified value asset is echoed within the legal system. Law naturally commoditises art by giving rights to artists and owners alike. Historically, art has been treated like any other form of property with the laws governing

[25] John Berger, *Ways of Seeing* (Penguin Books Ltd 1972) 5
[26] Marett Leiboff, 'Art Actually! The Courts and the Imposition of Taste' [2009] 3 Public Space: The Journal of Law and Social Justice 1, 7
[27] Sam Jones, 'How auto-destructive artwork got destroyed too soon' (The Guardian, 27 Aug 2004) <https://www.theguardian.com/uk/2004/aug/27/arts.artsnews1> accessed 13 May 2019

sales of artworks being 'largely the same as those covering a sack of potatoes'.[28] Such a generalised approach to art links directly with the perception of art as a form of property which draws similar proprietary interests as normal objects. Consequently, it is not surprising that many laws concerning art, such as copyright and ARR, are either property rights[29] or personal rights[30] which aim to protect the economic interests of the artist or owner of a work. Even within the realm of obscenity and 'public morality law, 'there is little differentiation between art and other objects'.[31] Although we see some legal exceptions or accommodations for art in law, many of these are predicated on the notion that art will generally be treated as property *unless* there is an explicit reason not to. For every exceptional rule for art in law, there are many which state that art is not exceptional at all, simply a chattel which should be governed by the appropriate laws.

As all previous legal analysis chapters have suggested, law often misunderstands art and the importance of art theory. Law interprets art in a way that it deems necessary to function, to reach the optimal legal outcome. Law is concerned with the legal problem by solving the Art Conundrum within a specific legal context. The reluctance of law to deal with art outside of the specific legal context leads to judgments which can wrongly categorise works or strip them of their nature as art, as was the case in both *Haunch of Venison*[32] and *Gibson*.[33] Legal judgments often contrast drastically with that of the art world and, in particular, the artist. This is because art cannot escape its treatment as property or as a commodified object in law. Thus, where the court does expand beyond these principles that are enshrined in legal formalism, the artist within a legal context faces increased scrutiny and so they must often need to justify their work and its value using other theories of art. The commodification of art is unavoidable because of its economic value which requires the court, again, to focus on the specific legal interests ahead of those in art theory.

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[28] Franklin Feldman & Stephen Weil, *Art Works: Law, Policy, Practice* (Practicing Law Institute 1974) 5
[29] Leonard D DuBoff, *Art Law in a Nutshell* (West Publishing Company 1984) 189
[30] Cordia A Strom, 'Fine Art: Protection of Artist and Art' [1984] 1 Entertainment & Sports Law Journal 99, 113
[31] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27
[32] *Haunch of Venison Partners Ltd v Revenue and Customs Commissioners* [2008] WL 5326820
[33] *R v Gibson* [1991] 1 All ER 439 (CA)

The subject of art as a commodity was succinctly summarised, albeit indirectly, in the infamous Adam Ant case[34] concerning facial makeup and whether the face could be considered a canvas. The Adam Ant case gave not only definitive comments on the idea/expression dichotomy but also summarised the reality of how law treats art. In the case of Adam Ant's facial makeup, the English courts decreed that 'a painting is not an idea: it is an object.'[35] Such a claim is monumental because it defines art as a chattel and a physical object. The reduction of art to merely an object has been highly criticised, with Harmon stating that law has little appreciation for the ethereal values in art.[36] Instead, Harmon argues, law focuses on empirical evidence and only intervenes in the world of art because 'the business of the law is to protect private property'.[37] Ultimately, the legal stance towards art is one which designates art as a form of property which must be managed with respect to the art market and laws governing ownership. As established when assessing the judicial approach to art, law attempts to refrain from passing utilitarian or art theory-based comments on the status of art. Moreover, the way in which art is created, managed and sold by the art market dictates that law may simply need to follow the pattern of commodification. Although there are so many intangible aspects to art, the commodification of art by law and the art market is inevitable. It steers the way in which we understand, define and handle art, framing art as an asset class.

ii. Rebalancing Commodification: Expanding Artist's Rights

Up until this point, I have not addressed the rights of artists within the legal system and have purposely avoiding expanding on them in previous chapters where it would have been possible to do so. The reason I have not addressed the legal position of artists and the number of rights, besides copyright, which have been bestowed upon them until now is twofold. First, they are a relatively new and historically resisted phenomenon in the English Legal System and second, they share several similarities with more established areas of law, like copyright and taxation. Leiboff notes that law has created a boundary in

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[34] *Merchandising Corporation of America Inc v Harpbond* [1971] 2 All ER 657
[35] ibid at 46
[36] Louise Harmon, 'Law, Art and the Killing Jar' [1994] 79 Iowa Law Review 367, 405
[37] ibid

which intangible property rights, such as copyright and moral rights sit.[38] Thus, it is important to consider artist's rights relative to historically established areas of law to avoid over emphasising their weight. Moreover, the outcomes of this chapter on artist's rights will mirror some of the outcomes reached in earlier chapters. By addressing artist's rights in this way, it allows for an understanding of artist's rights as a recent symbolic expansion on developed areas of art law. Although the development and conclusions are linked, artist's rights as a separate concept are valuable as indicative of a modern move towards balancing the art market and legally recognising the importance of art and artists. However, law still refrains from developing the concept of art much further than already established. This shows that even modern laws which develop specifically related to the world of art are restrictive in embracing art theory and aim to facilitate an easy resolution in art law issues.

The empowerment of the artist is a tricky topic. The emergence of artist's rights aligns with the nouveau concept of the Artist Led Theory. Both artist's rights and the Artist Led Theory enshrine the artist with a position considered to be worth protecting. The work of the artist, their reputation and their image are recognised as integral factors to defining and handling art. However, artist's rights do not comment on the work and avoid this theoretical discussion. They focus on the pure economic interests within the work of art. Thus, as will be abundantly clear, law continues the trend of resisting art theory in the legal definition of art and instead focuses on the economic and commercial realities faced by the artist, similar to those in copyright law. Although the artist may feel more empowered, the art itself continues to be left definitively vulnerable in the legal system because limited attention is paid to its worth in art theory.

The emergence of these new legal rights which affect artists, commonly known as artist's rights, is still relatively novel in the English legal system. Beginning as a largely Franco-German concept, *droits moraux* and *droit de suite*[39] are historically a pinnacle of French

[38] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 304
[39] Jonas Brown-Pederson, 'The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs systems' [2018] 3 LSE Law Review 115, 116

law.[40] Following their implementation in the Berne Convention of 1886 under Article 6[bis],[41] artist's rights have slowly crept into legal systems across the world. As states voluntarily choose to adhere to the Berne Convention, the implementation of artist's rights varies drastically depending on jurisdiction.[42] The English legal system reluctantly incorporated the Berne Convention principles and fully implemented them in the beginning of the 21[st] century.[43] While civil law systems have been receptive promoters of both moral and artist's rights,[44] the common law largely resisted these developments due to concerns surrounding the economic impact.[45] As copyright within the English legal system prioritises commercial interests, the implementation of ARR was much easier and more welcome than the introduction of moral rights, as they are a much more personal set of rights. Ultimately, within the English legal system, moral rights did not appear as statutory rights until 1988 with the introduction of the CDPA.[46] This change was largely due to the persistence of the European Union[47] and has only come into full effect in the last decade. Whether Brexit will affect the status of ARR in United Kingdom is unclear. Although it has been noted as a possibility, for now, ARR is here to remain.[48]

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[40] Jessica Mieselman, 'How Jeff Koons, 8 Puppies, and a Lawsuit Changed Artists' Right to Copy' (Artsy, August 14 20170 <https://www.artsy.net/article/artsy-editorial-jeff-koons-8-puppies-lawsuit-changed-artists-copy> accessed 15th March 2018

[41] Berne Convention 1886, art 6[bis]

[42] Francis Lennard, The Impact of Artists' Moral Rights Legislation on Conservation Practice in the United Kingdom and Beyond' (ICOM Committee for Conservation: 14th Triennial Meeting, The Hague, Netherlands, Sep 2005) 1

[43] Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016) 111

[44] Jonas Brown-Pederson, 'The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs systems' [2018] 3 LSE Law Review 115, 118 – 119

[45] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia VLA Journal of Law and the Arts 229, 229; Simon Stokes, 'Implementing the Artist's Resale Right (droit de suite) Directive into English Law' [2002] 13(7) Entertainment Law Review 153, 156

[46] Copyright, Design and Patents Act 1988

[47] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32

[48] Simon Stokes, '10 Years of Artist's Resale Right (ARR) in the UK 2006-2016: A Fair Share for Artists or a Levy on the Art Market' [2016] 27 Entertainment Law Review 125, 126

The introduction of ARR and the recent enforcement of moral rights illustrate that modern developments in art law are also driven in part by commodification. ARR is a definitively commodity-based approach to art, with artists having three years[49] to claim extended royalties for a sale of art. Prior to ARR, works of art were valuable commodities in which the artist was perceived to not be getting their fair share.[50] ARR was introduced to readdress this balance. Despite its introduction being controversial,[51] ARR acknowledges the monumental monetary value that works of art hold and aims to ensure that artist's also benefit from the commodification and sale of a work of art.[52] By introducing legal provisions which centre on the economic effects and interests in art, it serves as a clear legal acknowledgement of the significance of art as a commodity. According to Solow, ARR also incentivises artists to uphold the value of their works of art to ensure that collectors feel value certainty in the assets and continue to buy and sell the artist's work.[53] Alternatively, although moral rights are seemingly a positive move forward for the artist, the reality is that once the artist has sold the work, they relinquish control over the art and most rights are moved as property rights to the new owner. Those rights which remain with the artist are limited[54] to ensure that the new owner can protect their economic and proprietary interests in the work.[55] This is critical because it reinforces the reality that law favours treating artworks like property and thus their ownership, sale and legal rights fall in line with the process of commodification.

Critically for the commoditisation of art, many of these artist's rights can be waived.[56] In turn, the *droit de suite* and *droits moraux* are more symbolic of redressing the imbalance between the artist and the art market than they are of law's prioritisation of art theory

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[49] Simon Stokes, 'Implementing the Artist's Resale Right (droit de suite) Directive into English Law' [2002] 13(7) Entertainment Law Review 153, 157
[50] Simon Stokes, '10 Years of Artist's Resale Right (ARR) in the UK 2006-2016: A Fair Share for Artists or a Levy on the Art Market' [2016] 27 Entertainment Law Review 125, 125
[51] ibid
[52] John L Solow, 'An Economic Analysis of the Droit de Suite' [1998] 22 Journal of Cultural Economics 209, 221 - 222
[53] ibid
[54] Karen E Gover, 'Artistic Freedom and Moral Rights in Contemporary Art: The Mass MoCA Controversy' [2011] 69(4) The Journal of Aesthetics and Art Criticism 355, 362
[55] ibid 363
[56] ibid

and the special category of art. The concepts of 'art' and the 'artist' continue to be loaded terms with limited legal guidance even within this new area of law. As a common law institution, the English legal system was hesitant to implement both ARR and moral rights,[57] reaffirming the observation, from copyright, that English law does not openly support laws in favour of art theory if they might impede property laws. As shown through the Art Conundrum, law contains art to the specific legal context in which it arises to ensure that judgments do not impact on wider laws. Therefore, assessing artist's rights will not only reveal that these rights are symbolic and limited in application but also show that even in areas that artists may feel that they have the greatest representation, law continues to restrict art theory to reduce the burden on legal process.

iii. Droit de Suite – The Artist's Resale Right

The Artist's Resale Right (ARR) extends specifically from the economic rights of the artist. When we consider economic rights, copyright is the largest and most commonly used. ARR can be seen as an extension of copyright which applies specifically to artists. This empowerment of artists, beyond the traditionalism of copyright, is a recent development which has enshrined the importance of artist protection in statutory legislation. It holds a clear symbolic value as it recognises the asymmetrical relationship between art and law and directly aims to correct this market imbalance. ARR expands the power of the artist by creating a legal requirement for a proportion of most art sales to be paid to the artist as a royalty. It has a direct impact upon the art market and is one of the very few and sparse legal regulations that we see placed on the market. ARR readjusts some of the powers of the market by investing in the artist's economic position and ensuring that, where possible, they too benefit from appreciations in value. A useful summary of ARR states:

> 'The Artist's Resale Right (ARR) entitles creators ('authors') of original works of art (including paintings, engravings, sculpture and ceramics) to a royalty each time one of their works is resold through an auction house or art market professional.

[57] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia VLA Journal of Law and the Arts 229, 229

> The right to this royalty lasts for the same period as copyright, so since January 2012 ARR has applied to qualifying works by artists who have been dead for less than 70 years.'[58]

ARR takes from as a sliding scale of qualification, like that of VAT, identifying the percentage of sale, which is allocated as a royalty for the artist,[59] as shown below:

> 'Portion of the sale price % amount for Artists' Resale Right:
> From €1,000 to €50,000 – 4%
> From €50,000.01 to €200,000 – 3%
> From €200,000.01 to €350,000 – 1%
> From €350,000.01 to €500,000 – 0.5%
> Exceeding €500,000 – 0.25%'[60]

Although not all sales qualify for ARR – the artwork must sell for more than €1000 to be applicable and involve an art market professional[61] – the mere existence of this legislation suggests that there is a legally recognised special nature to art because there is an interest in protecting the economic rights of the person who created the work. It recognises that there is a clear imbalance in economic realities due to the functions of the art market, which suggests that there is a definitive legal interest in protecting artists because they are valued by law. Consequently, the English legal system has continued to place importance on this emerging right. In 2011, several amendments were made to the initial 2006 act,[62] which further expanded the applicability of ARR to ensure that allocation of royalties is accurate. These changes came into effect in 2012.[63] This is in direct contrast to Carleton's observation in 1991 that 'writers and composers receive royalties; as a matter of course, painters and sculptors do not.'[64] The contemporary quality of this change indicates the potential for the field of art law to develop, which,

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[58] Intellectual Property Office, 'Guidance: Artist's Resale Right' (IPO 2014) <https://www.gov.uk/guidance/artists-resale-right> accessed 05 October 2017
[59] The Artist's Resale Rights Regulations 2006, s 3 & sch 1
[60] ibid sch. 1
[61] ibid s 12(3)
[62] The Artist's Resale Rights Regulations 2006
[63] The Artist's Resale Right (Amendment) Regulations 2011; Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016) 111
[64] William A Carleton (III), 'Copyright Royalties for Visual Artists: A Display-Based Alternative to the *Droit de Suite*' [1991] 76 Cornell Law Review 510, 513

although still suffering from a complex web of challenges, is recognised by law as an area that needs active improvement. The codification of ARR into statute is a move which further establishes explicit engagement with art theory by legally recognising the importance of the artist and that they deserve fairer treatment in art sales. However, the impact of ARR is limited. Although it protects the interests of the artist and notes the economic value of art, it does not explain, define or even attempt to expand on what art is. Consequently, ARR is largely an economic right which can be considered an extension of copyright principles. This comparison between ARR and copyright is immeasurably useful. Though ARR deals with levies placed on sales, rather than copies, ARR possesses several characteristics which are directly aligned with the principles of copyright. As copyright is a well-established area of law, the comparison returns a verdict that ARR can be interpreted as an extension of an already well-regarded area of law, one which promotes the importance of protecting economic interests and avoids overtly engaging with art theory.

The most obvious comparison between copyright and ARR is the duration of each principle. ARR lasts for the same length of time as copyright, lifetime plus 70 years after death.[65] This a crucial similarity because it draws the distinction between art and non-art objects, something which copyright failed to do, by specifically affording art an additional economic right. ARR is a strong indicator of law's ability to divide art from non-art objects in a stricter fashion, based on the copyright principle of separating copyrightable works from those which cannot be copyrighted. Additionally, like copyright, ARR values originality above copies.[66] Original works are protected by ARR requiring any copy to be one of a limited edition. ARR does not state an upper limit to this number.[67] The focus on the original, and the importance of protecting originality, emerges as a repetitive commentary from earlier copyright analysis, dictating that art which is original will qualify as worthy of protection and drawing back to sentiments repeated in art theory. The similarities in application and structure of ARR and copyright are vital indications of the importance being placed by the law on protecting and defining art.

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[65] Intellectual Property Office, 'Guidance: Artist's Resale Right' (IPO 2014) <https://www.gov.uk/guidance/artists-resale-right> accessed 05 October 2017

[66] The Artist's Resale Rights Regulations 2006, s 4

[67] DACS, 'Artist's Resale Right: In Detail' (DACS 2019) <https://www.dacs.org.uk/for-artists/artists-resale-right/in-detail.aspx> accessed 20th October 2018

As ARR is a new concept in the English legal system, it is not a stretch to suggest that ARR has been modelled on copyright, which is one of the most significant property and economic rights. Stokes specifically refers to ARR as a result of a 'copyright directive' from the European Union.[68] The notion that this newly implemented right has been moulded on the foundations of copyright is critically revealing as it implicates the protection of artists and art as a legitimate focus of the legal system. However, it also indicates that what can be understood about art from ARR mirrors what can be understood about art from copyright. Thus, ARR cannot 'comprehend such non-monetary economies'[69] as the significance of art theory because, like copyright, it is stuck with an economic focus. It does not introduce any new elements into the legal definition of art beyond stating that artists must be granted an additional right to combat the asymmetries of the art market. Although an emergence of a resale right based on the solid foundations of copyright appears to be a triumph for the artist, as they receive ongoing benefits from the continuous sales and purchases of their work, it is not formed from an appreciation for art theory.

Yet, there is one critical difference between ARR and copyright. ARR cannot be relinquished, nor can it be 'bought and sold' like other economic rights.[70] The unrelinquishable nature of ARR is indispensable. In correlation with Cladistic Art Theory, it suggests that the history of art and artistic ownership is integral to art as an object. The artwork becomes associated with the artist and is therefore subject to legal regulations owing to this association.[71] Through ARR, the theoretical trajectory of the artwork is acknowledged as being unrelinquishable, and therefore it implores any appropriate definition of art to accept the nature of art as devoid of separation from its author and, by default, art theory. If ARR cannot be separated, law discreetly acknowledges that art is a

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[68] Simon Stokes, 'Implementing the Artist's Resale Right (droit de suite) Directive into English Law' [2002] 13(7) Entertainment Law Review 153, 157

[69] William A Carleton (III), 'Copyright Royalties for Visual Artists: A Display-Based Alternative to the *Droit de Suite*' [1991] 76 Cornell Law Review 510, 535

[70] Artquest, 'The Artist's Resale Rights Regulations 2006> (Artquest, University of the Arts London, 2018) <https://www.artquest.org.uk/artlaw-article/the-artists-resale-right-regulations-2006/> accessed 12th February 2018

[71] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375, 379

special form of property which receives an economic property right unlike those afforded to normal chattels. Again, law appears to be subtly engaging with art theory by providing an approach that implies that the theory of art is critical in its legal handling. This is a definitive break from the basic legal position of art being treated as chattels, subject to the Sale of Goods Act.[72] It suggests, by its existence, that the English legal system must acknowledge the nature of artistic works as greater than that of mere property while also granting a clear legal protection to artists.

However, not every party to an art transaction is pleased with the introduction of ARR, particularly in art markets, such as London, where many transactions occur. For some, ARR has become an additional and unwanted levy in the purchase of art.[73] The characterization of ARR as a tax is highly controversial. But ARR is often considered to be controversial right.[74] Thus it is possible to interpret the requirement to pay the artist a percentage of the sale as an additional tax placed upon the seller and relevant parties (i.e. analogous to a VAT levied by the artist).[75] This comparison to VAT reveals, again, that although ARR is a new phenomenon in the English legal system, it is still bound to another approach to art which restricts overt engagement with art theory. The criticism of ARR as a form of taxation reenergizes previous debates concerning property, commodification and the handling of art by law.

Initially, ARR can be compared to VAT because of the similarities in their formation. VAT is a percentage-based tax which must be paid on most goods and services. Similarly, ARR is a percentage-based tax which must be paid when an artwork is resold. As the rate of VAT which must be paid can vary depending on circumstance,[76] so too the royalty rate which must be paid under ARR can vary, although on a much smaller scale. Moreover, like VAT, ARR must be paid and cannot be avoided through contract or waiver.[77] Although there are some key differences, such as the eternal implications of VAT compared with

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[72] Sale of Goods Act 1979
[73] Simon Stokes, '10 Years of Artist's Resale Right (ARR) in the UK 2006-2016: A Fair Share for Artists or a Levy on the Art Market' [2016] 27 Entertainment Law Review 125, 125
[74] ibid
[75] The Artist's Resale Rights Regulations 2006, s13
[76] See *i. Value Added Tax*, in ch V. Taxation
[77] The Artist's Resale Rights Regulations 2006, s 8

the perpetuity period of seventy years from death for ARR,[78] many features of each are analogous. It is not a stretch therefore to refer to ARR as a tax on art that is resold.

However, unlike VAT, the application of ARR is limited, thereby rejecting those who comment on ARR as a heavy tax. ARR is present in larger transactions but in smaller transactions it does not apply. This arguably suggests that for law, the protection of art prioritises valuable works above all. This is a clear theme throughout art law as throughout both copyright and taxation, there are nods towards the importance of value in the legal approach to art. Fishman criticises the focus on value by ARR and similar reserved rights as they only benefit artists that 'can help themselves, and fails to benefit the overwhelming number of poor artists.'[79] From this, it can be deduced that the actual impact on the majority of the market is fairly limited with only the largest transactions really benefiting from the application of ARR and the amount being paid out is 'very small'.[80]. This is further exemplified by the statistics found in the Intellectual Property Office's IPO survey of ARR[81] which suggested that ARR is heavily weighted towards expensive transactions and is not present in the majority of art sales. Although this is a generously negative view of ARR, it is a critical view to take when considering the application of ARR as indicative of law's approach to art. When it comes to ARR, it cannot be divorced from its economic rights origin. Law restrains art, once again, in economic and commercial terms therefore binding the legal definition of art with the concepts of value and the commodity.

Considering ARR as a form of copyright or taxation presents some interesting challenges to how art is defined by law, namely concerning the ever-present issue of commodification. Through the commodification by the artist in the first sale, the royalties which follow accrue because the object is deemed to be art. ARR takes the standard legal

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[78] Intellectual Property Office, 'Guidance: Artist's Resale Right' (IPO 2014) <https://www.gov.uk/guidance/artists-resale-right> accessed 05 October 2017

[79] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 480, 490

[80] Simon Stokes, '10 Years of Artist's Resale Right (ARR) in the UK 2006-2016: A Fair Share for Artists or a Levy on the Art Market' [2016] 27 Entertainment Law Review 125, 126

[81] Intellectual Property Office, *Artist's Resale Rights - Summary of IPO Survey Findings* (IPO 2014) 25

approach of legal formalism to define the work of art. The formalist approach identifies art based on physical characteristics and often takes form as a list of objects. Under ARR, it is stated that 'for the purposes of these Regulations, "work" means any work of graphic or plastic art such as a picture, a collage, a painting, a drawing, an engraving, a print, a lithograph, a sculpture, a tapestry, a ceramic, an item of glassware or a photograph'[82] but excludes copies that are not limited in number under the authority of the artist. This is a clear example of the formalistically limited approach law takes towards art and again reemphasises the artwork as a commodity which aligns with both the Trade Tariff[83] and CDPA[84] treatment of art. Even within the context of ARR, a judgment will favour legal process over the role of art theory. The court may acknowledge that the connection with the artist is a significant consideration in art theory but to reach an outcome in law, the court will follow the already defined trajectories of copyright and taxation. This again highlights the role of the Art Conundrum in facilitating the optimal legal outcome by allowing the court to repeatedly reduce the work of art to a chattel even where the statute would suggest that there is a more overt theory of art present. Through comparing ARR with VAT and copyright, it is shown that although there are also some clear similarities and differences, the significance of ARR as an expression of law's approval of art theory is limited.

iv. Droits Moraux – Moral Rights

By contrast, *Droits Moraux* or Moral Rights are personal rights which aim to be less economically based than ARR. [85] Moral rights concern the ongoing relationship between the author and their work, entitling the author to several privileges even when they no longer hold possession or legally own the work. These privileges mainly revolve around the ability of the author to associate or disassociate with a work. Although moral rights aim to be more personal and, similar to ARR, may suggest more overt art theory in

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[82] The Artist's Resale Rights Regulations 2006, s 4
[83] HM Revenue & Customs, 'Commodity information for 9701100000' (05 October 2017) <https://www.trade-tariff.service.gov.uk/trade-tariff/commodities/9701100000#overview> accessed 06 October 2017
[84] Copyright, Designs and Patents Act 1988
[85] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 490 – 491

statutory law, the consideration of art theory is again limited. In reality, moral rights are restricted by copyright legislation and are largely waivable within the common law. Consequently, when assessed in practice, moral rights reinforce legal aims to facilitate and appease economic interests above acknowledging art theory, in line with the general approach to art. Thus, art is again restricted to a problem through which the Art Conundrum is applied to reach a suitable legal judgment.

There are four different moral rights in English law, as expressed in chapter IV of the CDPA under sections 77 – 89.[86] These sections specifically define the rights given to authors to ensure they are credited for their own legitimate works and to ensure that these works are preserved as intended. The four moral rights are listed as:

1. the right to be identified as author or director[87]
2. the right to object to derogatory treatment of a work[88]
3. false attribution of work[89]
4. the right to privacy of certain photographs and films.[90]

The relationship between artists, moral rights and law is tumultuous. Another French led concept,[91] moral rights were inconsistently enforced as contractual terms before their legitimisation as statutory law.[92] Their codification in the CDPA attempted to clarify some of the individual contractual terms that were interpreted with drastic variation.[93] However, the complexity of moral rights themselves, being a bundle of several different rights with different conditions and requirements, has led to an area of law which is less clear than that of ARR. The common theme throughout moral rights is the focus on the power of the author, with moral rights often being claimed as artist's rights alongside ARR. But to what extent are they really empowering for the artist? In the English legal

[86] Copyright, Design and Patents Act 1988
[87] ibid ss 77 - 79
[88] ibid ss 80 - 83
[89] ibid ss 84
[90] ibid ss 85
[91] Leonard D DuBoff, The Deskbook of Art Law (Oceana Publications 1977) 797
[92] Fine Arts Copyright Act 1862, 46 & 47 Vict ch 57, ss 7; Copyright Act 1956, ss 43; Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia-VLA Journal of Law and the Arts 229, 232
[93] Copyright Designs and Patents Act 1988, ss 77 – 89, 94 – 95 & 103

system, statutory moral rights are largely waivable. If an artist wants to protect their moral rights, they must continue to rely on enforcement through individual contractual terms.[94] Again, the field of moral rights is a clear indicator of the differences between common and civil law countries,[95] reinforcing the notion that in common law countries, economic values are put ahead of the appreciation of art theory.

Moral rights are not aimed specifically at the visual artist but rather at creators and authors, covering a range of different media. These rights align with the larger picture of the CDPA in creating a legal structure for creative fields which can be subject to copyright values. This association with the CDPA also reveals that although moral rights are personal rights, they arise within the corps of economic rights. As a consequence, moral rights are generally bound by the economic terms of a contract, with courts tending to favour equitable rather than punitive remedies.[96] The perpetuity period of moral rights is also linked directly to copyright,[97] reinforcing the economically centred link between artist's rights and commercial interests. Brown-Pederson argues that the codification of moral rights within the CDPA restricts them to purely economic interests, thus creating insufficient moral rights which do not appreciate the theory value of art.[98] It is once more a reflection on the reduction of art to property and the alienation of art from being overtly associated with art theory in law. The impact of the CDPA upon moral rights is unavoidable as it frames the legal structure of each right and limits their application to economic terms. Thus, although apparently personal, moral rights are more economically focused than driven by the artist's perceptions. For many artists, moral rights are meant to reflect the idea that the 'artwork is an extension of its creators'[99] but the statutory application of moral rights within the CDPA limits the power of the artist to ensure that

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[94] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia-VLA Journal of Law and the Arts 229, 233

[95] Jonas Brown-Pederson, 'The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs systems' [2018] 3 LSE Law Review 115, 118/119

[96] Copyright, Designs and Patent Act 1988, s 103

[97] ibid s 86

[98] Jonas Brown-Pederson, 'The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs systems' [2018] 3 LSE Law Review 115

[99] Cyrill P Rigamonti, 'Deconstructing Moral Rights' [2005] 47(2) Harvard Int Law Journal 353, 353 – 55

the economic interests within the work supersede those of the artist. This is no more evident than in the Massachusetts Museum of Contemporary Art (Mass MoCA) Controversy,[100] an American case which relies on moral rights legislation adopted from the Berne Convention[101] in a similar fashion the English legal system.[102]

In the Mass MoCA controversy, the artist Christoph Büchel, chose not to complete his artwork '*Training Ground for Democracy*' due to artistic differences between himself and Mass MoCA. Although Mass MoCA had invested heavily in the artwork, Büchel argued that they had no right to show the work in its unfinished state. When tried in court, the judgment found in favour of Mass MoCA, stating that as long as they put up a disclaimer that the work was unfinished, it could be presented.[103] Mass MoCA, however, ultimately chose not to exhibit the artwork at all. Reflecting on this, it seems clear that for the artist there is more to an artwork than the physical form itself. It holds a substantial value which cannot be quantified or understood without the artist's consent and approval. For the artist, this integrity is critical for viewing the work. Although Mass MoCA clearly recognised this by deciding not to show the artwork,[104] the judgment that the artwork should and could be shown is reflective of law's approach to art. The verdict of this case highlights that often the law chooses to reflect economic interests and investments over protecting art theory and the artist's intent. Gover notes that 'the dominant conception of artistic freedom also entails freedom from financial and logistical constraints such as museum budgets, and exhibition deadlines'[105] which suggests that moral rights should not be governed by economic principles at all. However, art in law is not free of economics or context. Nor can it be. It must be contained in order to reach a legal judgment. Thus, we have a clear stalemate between the interests of artists who favour artistic integrity and law, which promotes moral rights law as heavily influenced by economic principles.

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[100] *Massachusetts Museum of Contemporary Art Foundation v Büchel* No 08-2199 1st Cir (2010)
[101] Ann M Garfinkle, Janet Fries, Daniel Lopez and Laura Possessky, 'Art Conservation and the Legal Obligation to Preserve Artistic Intent', [1997] 36(2) Journal of the American Institute for Conservation 151, 165 – 179
[102] Visual Artists Rights Act 1990
[103] *Massachusetts Museum of Contemporary Art Foundation v Büchel* No 08-2199 1st Cir (2010)
[104] Karen E Gover, 'Artistic Freedom and Moral Rights in Contemporary Art: The Mass MoCA Controversy' [2011] 69(4) The Journal of Aesthetics and Art Criticism 355, 356
[105] ibid 355

As law focuses on reaching sufficient legal judgments, the judiciary attempt to avoid engaging with art theory by predominantly engaging with the copyright legislation that underpins the statute.

The biggest indicator of the restrictive application of moral rights in English law is that they can be waived. Brown-Pederson strongly criticises the U.K. approach to moral rights, stating their waivable nature as the biggest failure in implementation. He argues that their philosophical grounding suggests that this should not be the case.[106] Although the implication of moral rights recognises the importance of acknowledging the artist, artistic identity and the value of an artwork, this gesture does not enshrine them as immovable elements of art law. They have little impact beyond the facilitation of economic relations concerning created content. As a consequence, the notion of artistic freedom or artist's rights becomes 'much more limited than the rhetoric of artistic freedom would imply: it means simply that the artist has the right to be acknowledged as the author of the work.'[107] This observation is critical as it emphases not just that moral rights are limited, but also that perceptions of what moral rights *should* be, are also incompatible. Although the artist may feel they have a consistent right to the work and that it is their property, once the work has been sold and passes into the public domain, the artist must relinquish full control.[108]

This is reflected in the necessity of enforcing moral rights through the contract.[109] A clear example of the vital nature of the contract is the positive ruling for the screenwriter who was contracted to write a script for a show on the BBC.[110] Within the contract, the BBC stipulated that they could make 'minor non-structural alterations to the script without consent of the author'.[111] When the BBC and the screenwriter disagreed with the deletion

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[106] Jonas Brown-Pederson, 'The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs systems' [2018] 3 LSE Law Review 115, 120

[107] Karen E. Gover, 'Artistic Freedom and Moral Rights in Contemporary Art: The Mass MoCA Controversy' [2011] 69(4) The Journal of Aesthetics and Art Criticism 355, 361

[108] ibid 361

[109] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia-VLA Journal of Law and the Arts 229, 233

[110] *Frisby v British Broadcasting Corp* [1967] Ch. 932

[111] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia-VLA Journal of Law and the Arts 229, 234

of a line from the text which the writer thought was crucial to the script, the court found in his favour, indirectly protecting artistic interest.[112] Although the legal debate focused not on moral rights but on the extent of copyright as to whether it was limited copyright or a copyright license, the case emphasised that law will often avoid considering moral rights in abstract, favouring contractual terms and legal jargon. Therefore, the artist must protect their moral rights through the contract. Ultimately, both art and the artist remain at the mercy of the market because law focuses so heavily on the economic interests in art. This results in art being handled as property for economic gain, irrespective of artistic integrity or interest and leads directly into the ongoing perception of art as a valuable investment.

Moral rights, like ARR, do little to aid in providing a concrete legal definition of art. Moral rights do not consider what is art but rather focus on the rights of the artist as one of many different types of author who can create a variety of content, of which art is only one. An author within the definition of the CDPA is based on a causal relationship[113] in which you are an author because you create the work,[114] thus authors within moral rights are not explicitly considered to be artists. For all their failures, moral rights present themselves as 'the sickly children of the Berne parent',[115] failing to truly protect the interests of artists and the cultural, social or political values of art. The symbolism of moral rights may give hopes of appreciating artistic recognition and integrity, but these hopes remain concerned with economic interests rather than the theoretical ones of what art is or who is the artist.

Assessing moral rights exemplifies the overall legal approach to art. The English legal system prioritises solving the problem of art based in the specific legal context, as shown through the Art Conundrum, and is not concerned with finding the perfect legal definition of art. For moral rights, although these rights are seemingly important to the artist to protect the artistic merit and integrity of their work, they are not integral to the functioning of law and thus hold mostly symbolic value. As a result, moral rights are not

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[112] ibid
[113] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 379
[114] Copyright Designs and Patents Act 1988, s 9
[115] Gillian Davies & Kevin Garnett (eds), *Moral Rights* (Sweet & Maxwell 2010) 80

given priority or made unrelinquishable because a permanently applicable moral right would further complicate the problem of art in law. It is not that these are not important rights, it is simply that they are designed to function peripherally to ensure an easy and effective legal outcome.

v. The Limited Effect Of Artist's Rights

Artist's rights, both the *droit de suite* and *droits moraux*, have a limited effect, with *droits moraux* ultimately able to be waived.[116] Although adhesion to *droit de suite* (ARR) is mandatory, critics have also suggested that the presentation of an ARR royalty as an economic right which cannot be refused reduces the efficiency of the right itself, improving the sale share for bigger brand artists and forcing lesser known artists to reduce prices.[117] Therefore, when applied in practice, artist's rights are largely symbolic and heavily focused on the economic interests in art. Artist's rights aim to protect the commercial interests of the artist without delving into defining truly what art is. Consequently, artist's rights tend to benefit only big-name artists and provide limited support for the emerging or unknown artist.[118] The abstractly applied artist's rights do not solve the problem of art but rather extend protection to the economic interests of the artist without directly addressing the significance of art theory.

When the significance of art theory is not acknowledged in a work of art, it increasingly opens the work up to commodification. Granting artists rights, such as the ability to disassociate with a work or assert their rights as an author gives some legal power back to the artist in that they can control their image and restrict false representations. However, without supporting this with art theory in law, it further compounds the problem of commodification because the artwork can then be sold through association with the artist. By linking the painting to the artist, it becomes a branded commodity,

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[116] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia-VLA Journal of Law and the Arts 229, 229 & Simon Stokes, 'Implementing the Artist's Resale Right (droit de suite) Directive into English Law' [2002] 13(7) Entertainment Law Review 153, 156

[117] William A Carleton (III), 'Copyright Royalties for Visual Artists: A Display-Based Alternative to the *Droit de Suite*' [1991] 76 Cornell Law Review 510, 534

[118] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 490

furthering the economic interest in art. This is a large criticism of the English law approach to moral rights, with some deeming them to be empty reflections of moral rights which aim to 'pacify economic interests'.[119] The confinement of moral rights within copyright means that moral rights in English law will always be directed by economic interests.

Barron makes a strong criticism of the relationship between commodification, authorship and art in law. Barron states that art is amenable to 'propertisation' through economic property rights and to personalisation through moral rights claims of authorship. Barron argues that 'U.K. law clearly privileges the former over the later. Nonetheless, the very existence of a moral rights regime effects a major conceptual disruption within the overall framework established by the CDPA.'[120] This is a critical comment as Barron accepts that within the English legal system moral rights cannot be divorced from their economic influence but this does not mean that they are not a significant inflection point in the incorporation of art theory within law. Moral rights are trapped within the CDPA and must adhere to the economic principles which govern them. However, their existence is useful in highlighting that there is more to art than simply the commodification approach, an approach which Barron also notes is 'deeply embedded within U.K. copyright doctrine'.[121] The mere existence of moral rights is a legal recognition of the importance of art theory within art and acknowledging that there is more to artistic integrity than economic value. Consequently, moral rights explicitly name the author and the work have a right to be legally protected and supported. Moral rights should therefore be taken as a symbolic recognition of the potential for law to expand on theory in art, authorship and the notion of cultural identity if a case requires it.

As established in previous chapters, the use of legal formalism in the legal definition of art leads to a skewed view of art which does not account for the value of art theory. It avoids the nuances of art and reduces art to a physical thing, a mere chattel.[122] As

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[119] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia-VLA Journal of Law and the Arts 229, 257

[120] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 401

[121] ibid

[122] *Merchandising Corporation of America Inc v Harpbond* [1971] 2 All ER 657

explored in Chapter IV on copyright, a formalistic approach restricts art and increases uncertainty when art cannot be easily defined because it does not fit neatly into one of the prescribed categories. DuBoff suggests that the use of these formalist techniques represents an 'extremely cautious and restrictive approach to defining art, which is probably attributable to the newness of the field'.[123] The overall the introduction of moral and economic rights such as ARR should be a welcome addition to the field of art law because they suggest that there is something inherently unique about art, purely through their existence as legal principles. However, the formalist approach will inevitably stunt the development of these rights. Ultimately, the connection between artist's rights and the CDPA[124] will reduce their significance in art theory and reach similar conclusions to that of copyright law. Both the reliance on reducing art to formalistic descriptions and the prioritisation of economic interests above art theory leads to the resolution that law continues to promote a commoditised view of art.

The final sentiment on the commodification of art comes from Thomson, a leading scholar who writes prominently about the economics of the art market. Thomson argues art is 'more like gold than like stocks, bond or real estate' because it 'produces no income stream, just a potential capital gain'.[125] This is a critical statement. It highlights that art is treated like property, but it is not fundamentally an economic or fiscal concept. Rather it is perceived to be valuable and therefore becomes a viable investment, much like gold. As long as art is perceived as valuable and must be expressed in a physical form, as per the idea/expression dichotomy, then it will always be commodified. Brown supports Thomson's view by stating that the best way to respond to criticisms of art is in financial terms,[126] highlighting that collectors buy art because of its asset value not because of its worth in art theory. Thus, law often follows the precedent set by the market from which these collectors buy. This reality establishes art as a highly sought-after commodity and shows that, ultimately, the commodification of art is inevitable.

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[123] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 304

[124] Copyright, Designs and Patents Act 1988

[125] Don Thomson, *The Orange Balloon Dog: Bubbles, Turmoil and Avarice in the Contemporary Art Market* (Quarto Publishing plc 2018) 141

[126] Matt Brown, *Everything You Know About Art is Wrong* (Batsford 2017) 23

vi. Conclusion

Reflecting on ARR and moral rights reveals that the legal approach to art cannot ignore the significant impact of commodification upon art. Following recurrent themes from larger areas of law, such as copyright and taxation, artist's rights provide a similarly muddled view of the relationship between art and law. The largest criticism of the English legal system's approach to artist's rights is that, in the United Kingdom, artists rights are empty facilitators of an established economic art market.[127] Although it aims to rebalance the economic relationship between artists and the art market, law continues to avoid active and obvious engagement with art theory. The assumption is made that artist's rights empower the artist but rather it is clear that they empower the facilitation of law to govern economic disputes which arise in art. It further eases the problem of art within the specific legal and largely economic context in which it arises. Thus, law continues to rely on the Art Conundrum to solve the problem of art within the specific context of law driven by the economic interests of the legal outcome.

The basis of ARR and moral rights being so closely entwined with economics leads to outcomes which favour commercial decisions and procedures rather than exploring the significance of art theory in law. This is clear from the link between legal formalism and artist's rights in which the artwork is again simplified in law to a physical object. Rather than define art outright, both ARR and moral rights utilise formalist definitions to identify what is a work of art. The plethora of listed forms again reduces art to the notion of commodity and chattel which has become synonymous with art in law. This allows law to utilise the Art Conundrum to solve art on a reductively based theory of art rather than engage with expansive art theory because it is not necessary in this area of law. In adherence with other areas of law, only when legal formalism is not sufficient will the court consider additional theories of art and follow the pattern of restricting the judgment to the context of the case.

Law does not need to define art expansively to operate artist's rights. Many of these rights are agreed or waived through contract law, allowing the parties to establish definitions

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[127] Gerald Dworkin, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' [1994] 19 Columbia VLA Journal of Law and the Arts 229, 257

for their own purposes. The focus of artist's rights is clearly rooted in economic rights and as such, little definition can be drawn about art and art theory from this area of law. Nuances can be drawn about how law appreciates art and its value in society, but it provides little clear commentary on what art is. The area of artist's rights becomes another instance in which law operates utilising the Art Conundrum as the definition of art is critically determined based on context and legal aim. Often for the case of artist's rights, much of the context is likely to be provided by any governing contracts. Again, we reach the fundamental legal approach to art, that defining art is not paramount to the function of law and thus law must only define art insofar as required and strictly on a case-by-case basis.

VIII

Consolidating the Legal Definition of Art

The Finality of the Art Conundrum

> 'As the case law and statutes clearly indicated, the legal definition of art greatly depends upon who is doing the defining.'[1]
>
> Leonard D DuBoff, 1989

> 'Law need not define art uniformly. Art may mean different things in different places in the law. All that the courts need concern themselves with is understanding what the purposes of the legal protections are. Once a court has determined this, it can seek to connect the law with the aesthetic theory that best aligns with that doctrinal purpose. Courts are perfectly suited to perform that.'[2]
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> Christine H Farley, 2005

> "What is art?" will undoubtedly remain a quintessential unanswerable question. But, as we have seen, the law has frequently been required to address exactly this issue. The results are as interesting and enigmatic as the question; and will continue to involve the interface between and reconciliation of two almost diametrically opposed disciplines.'[3]
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> Henry Lydiate, 2011

The legal definition of art is inconsistent and difficult to pin down. Although a wide multitude of laws handle art,[4] as seen in previous chapters, when "art" is referred to in

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[1] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm. & Ent. L. J. 303, 350

[2] Christine H Farley, 'Judging Art' (2005) 79 Tulane Law Review 805, 857

[3] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 147

[4] Bruno Boesch & Massimo Sterpi, *The Art Collecting Legal Handbook* (Thomas Reuters UK Ltd 2016) xi - xiii

legal discourse, it is hardly recognised as an independent legal concept.[5] Rather, art is often referred to by proxy as a prestigious state of being but one which is confined to physical form. Consequently, legal academics often avoid entering the 'perennial debate'[6] of defining art broadly and settle for defining art with regards to a specific legal field. With limited commentary on art in the law, drawing trends becomes increasingly difficult. The term "art" can mean different things depending on who is defining it[7] and the time or context in which it is being considered.[8] For some, art cannot be defined at all.[9] For others, art can be 'anything you can get away with.'[10] Defining art is easy for neither the lawmaker or the art theorist[11] as the 'bounds of aesthetics'[12] and the collective concept of art continues to expand.[13] As art also has different social and cultural attachments, definitions are largely context specific.[14] With so many different interpretations of what can be considered art, reaching a coherent legal definition of art is challenging.

Under the Art Conundrum, the legal definition of art is a multi-layered concept applied by law dependent on the legal context. Each of the previous legal chapters has identified both an area of law and the relevant key considerations for defining art. These considerations feed into the larger theory of the Art Conundrum. These key trends range from the predisposition for legal formalism and adherence to the *Bleistein*[15] approach to the subtle influence of the art world and the effects of commodification. The approach to art begins with the *Bleistein* approach under which the court attempts to avoid overt

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[5] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368, 373
[6] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 337
[7] Bridget Watsaon Payne, *How Art Can Make You Happy* (Chronicle Books LLC 2017) 11
[8] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016) 56
[9] Stephen E Weil, 'Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood' [2001] 62 Ohio St. L. J. 835, 838
[10] Don Thomson, *The Orange Balloon Dog: Bubbles, Turmoil and Avarice in the Contemporary Art Market* (Quarto Publishing plc 2018) 40
[11] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 57
[12] Brian Soucek, 'Resisting the Itch to Redefine Aesthetics: A Response to Sherri Irvine' [2009] 67(2) The Journal of Aesthetics and Art Criticism 223, 223
[13] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 66
[14] Cynthia Freeland, *But Is It Art?* (OUP 2001) xviii
[15] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

engagement with art theory.[16] This is the primary aim of both law and the Art Conundrum, as a legal theory of art which aims to reach sufficient legal outcomes to the problem of art. This is then supported by the predisposition of formalism, the simplest of art theories which defines art based on physical form rather than on theory or merit. Legal formalism allows art to be reduced down to physical outputs and simple lists which can be applied within judicial settings and facilitate the conundrum's initial process. This focus on physical form is also promoted in the treatment of art as property and relies on the inevitable commoditisation of art, through legal formalism, the avoidance of art theory and the impact of the art market, to further reduce the necessity for legal engagement with art theory. Where these are not efficient to solve the legal problem of art, the court will then consider additional art theories, but warily so. These theories are considered within the context of law and are largely introduced through expert testimony to reduce the necessity for the judiciary to engage individually with art theory.

The Art Conundrum is the process of applying these various considerations dependent on the specific legal context, dictating which of these are required to reach a suitable legal outcome. The judiciary aim to make an informed judgment on the art in question with as little overt engagement with theory as possible. The Art Conundrum recognises this desire and facilitates a way in which the court can apply art theory to adhere as closely as possible to the original, but incorrect, statements from *Bleistein*[17] that the court cannot consider art theory in its judgments. Consequently, the application of the Art Conundrum Theory is so subtle that it is already applied on a consistent basis and encapsulates how law reaches a legal definition of art. However, the engagement with the Art Conundrum is often done without explanation leading to the perception of a haphazard approach which facilitates legal decisions on art only enough for the current legal dynamic.

The conclusion of this chapter, and this thesis, is that the legal definition of art has been approached in the wrong way[18] because law is not concerned with finding a utilitarian definition of art. It is difficult to define art without creating a restrictive definition and so

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[16] ibid at 251 - 252
[17] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[18] Catharine Abell, 'Art: What it Is and Why it Matters' [2012] 3 Philosophy and Phenomenological Research 671, 690

much of the English legal system's approach to art goes undefined.[19] Restrictive definitions are so favourable that Leiboff argues that law will go as far as to 'reconstruct the artistic'[20] to create a recognisable legal term. But in doing so, serious problems arise because of 'the unspecialised legal attitude to artistic media.'[21] I argue that, to avoid the risks associated with relying entirely on restrictively defined lists of what constitutes art, law unconsciously applies the Art Conundrum, my umbrella theory under which the courts apply various theories of art dependant on the legal context in which the artwork arises. This approach allows for a circumvention of a singular legal definition of art by utilising an amalgamated theory. The Art Conundrum is the only sufficient way to define art in law, so much so that the court already applies it unknowingly. It builds on Abell's agreement with Gaut that there is no individually necessary component for art status, but rather that there are numerous conditions which can be sufficient to reach art status.[22] It also supports Karlen's observations that defining art is not a 'futile and useless' endeavour, even though there are no readily available definitions of art which are applicable to all areas of law.[23] As 'law need not define art uniformly',[24] it settles for defining law dependent on the specific field of law in which it is being considered. For law, if the boundaries of art cannot be identified,[25] then we must only consider the boundaries of the legal field in which the artwork operates.

i. Summarising The Problem of Defining Art

Defining art is a tricky business. Defining art is 'both hard and subjective' but the law must accommodate for this discrepancy.[26] The interaction between art and law is still a

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[19] Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314, 315
[20] Marett Leiboff, 'Clashing Things' [2001] 10(2) Griffith Law Review 294, 294
[21] Paul Kearns, 'Controversial Art and the Criminal Law' [2003] 8 Art, Antiquity & Law 27, 27
[22] Catharine Abell, 'Art: What it Is and Why it Matters' [2012] 3 Philosophy and Phenomenological Research 671 – 691, 680
[23] Peter H Karlen, 'What Is Art?: A Sketch for a Legal Definition' [1978] 94 The Law Quarterly Review 383, 387
[24] Christine H Farley, 'Judging Art' (2005) 79 Tulane Law Review 805, 857
[25] Arthur C Danto, *What Art Is* (Yale University Press 2013) 26
[26] Derek Fincham, 'How Law Defines Art' [2015] 14 The John Marshall Review of Intellectual Property Law 314

recent development in legal history and the parameters are still in the process of being fixed.[27] Moreover, the field of art law is a 'general speciality'[28] as it encompasses several different areas of law, many of which have already been explored in the earlier chapters preceding this conclusion. Creating any form of definition is likely to favour some areas of law and some existing forms of art while not accounting for others or those that are yet to emerge in dominance.[29] Reducing the expanse of art to one definition is further complicated by the varied international interpretations of art.[30] Alternatively, arguing that anything can be art leads to a definition which is unworkable for law.[31] This exasperation with art is commonplace, as competing theories, such as those addressed as the start of this thesis, cause continuous debate and cynicism.[32] With the term 'art' also encompassing several different types and levels of artistic productions, such as the fine arts, ornaments and design,[33] definitions have the potential to become increasingly complicated and fragmented.

The legal definition of art is littered with inconsistencies due to the various statutory and judicial classifications of art. Defining art is difficult because art is an unstable concept which results in a 'very specific ecology' for the field of art law.[34] However, courts have continuously found ways to avoid assessing the significant art theory of an object by addressing external factors such as the purpose, utility, occupation of the creator and number of copies made.[35] Moreover, in many areas, law may force a definition to fit in

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[27] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 497
[28] Ira M Lowe & Paul A Mahon, 'The General Practice of Art Law' [1990] 14 Nova Law Review 503, 503
[29] Kenly E Ames, 'Beyond Rogers v. Koons: A Fair Use Standard for Appropriation' [1993] 93(6) Columbia Law Review 1473, 1519
[30] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 157
[31] Cristin Fenzel, 'Still Life with "Spark" and "Sweat": The Copyright of Contemporary Art in the United States and the United Kingdom' [2007] 24 Arizona Journal of International & Comparative Law 541, 543
[32] Cynthia Freeland, *But Is It Art?* (OUP 2001) 206
[33] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 54
[34] Quoting David McClean in Rebecca Waller-Davies, 'Law Less Ordinary | The World of Art' (Features, Lawyer2B 2014) <https://l2b.thelawyer.com/issues/l2b-autumn-2014/law-less-ordinary-the-world-of-art-law/> accessed 11 December 2017
[35] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 161

order to appease the problem of art[36] and further reduce the legal consideration of art theory by 'pigeonhol[ing] judicial opinions into them'.[37] These decisions are largely based on the legal prioritisation of the property interests invested in art[38] and the necessity to reach a binding judgment, even if it is confusing to understand. These hidden economic interests are often weighted against each other to reach legally sound judgments, to the detriment of a definitive approach towards art.[39] When a legal definition cannot accommodate art, catch-all provisions such as '"but not limited to,"' are used in an attempt to remedy the inadequacy of the legal definition. This creates a broad definition[40] which can be applied as necessary to solve the legal problem but does little to clear the confusion of what exactly is the legal definition of art.

The general understanding of the legal approach to art has not changed significantly over time, it is still largely vague and fragmented. For law, art is still a conundrum which needs to be solved and, repeatedly, academics have argued that the legal definition of art is far from complete. In 1981, Karlen called for the court to look beyond cases, statutes and commercial interests and consider philosophical thought to reach a definition of art.[41] A decade later, Boggs argued in 1992 that the law in relation to art needed re-examination.[42] While in 2005, Tamm argued that the dynamic between art and law must continuously be scrutinised[43] as it has not yet settled itself. In 2013, Davies discussed the

[36] James J Fishman, 'The Emergence of Art Law' [1977] 26 Cleveland State Law Review 481, 495
[37] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 441
[38] Cordia A Strom, 'Fine Art: Protection of Artist and Art' [1984] 1 Entertainment & Sports Law Journal 99, 99
[39] Erik Jayme, 'Globalization in Art Law: Clash of Interest and International Tendencies' [2005] 38 Vanderbilt Journal of Transnational Law 927, 929
[40] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm. & Ent. L. J. 303, 343
[41] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 56
[42] James S G Boggs, 'Who Owns This?' [1992] 68 Chicago-Kent Law Review 889, 908
[43] Ditlev Tamm, 'Art and Copy - A Legal Historian's Reflections on Copyright' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 161

importance of establishing a hybrid definition of art,[44] calling on both Gaut[45] and Stecker's[46] commentary from the turn of the millennium. Yet, in 2017, Shore noted that those laws which affect art, in this instance copyright, continue to be 'very nuanced with a lot of grey areas'.[47] Art continues to be a big problem, an impasse of sorts, which needs to be solved in order to reach a clear legal definition of art. However, the reason this great reckoning of the legal definition of art has not occurred is because law is already capable of defining art sufficiently enough for its purposes. This sufficiency is achieved through the subtle use of the Art Conundrum.

The Art Conundrum creates a sufficient legal definition of art because it makes a multitude of art theory disposable to the court. To suggest that individual areas of law, such as copyright, align to only one art theory is not a 'sustainable'[48] approach. As explored in previous chapters, relying on singular theories of art always leads to a legal definition of art which fails to encompass the variety of artistic presentation. Barron has suggested that it is best to understand law's categories of art in their singularity, specific to the legal system and not adhering to a singular art theory.[49] On this assumption, when considering art in law, it is important to restrict the legal definition of art to its specific legal context and consider any art theory which may be relevant. As shown throughout, the courts already do this. By jumping between different theories of art, law and the judiciary have created an inconsistent guide to defining art.[50] However, reframing this approach in the form of the Art Conundrum accepts that the very nature of defining art is inconsistent. The Art Conundrum allows the court to weigh the multitude of economic, proprietary and artistic interests specific to the case. It does not impose a strict standard

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[44] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)
[45] Berys Gaut, ''Art' as a Cluster Concept' in Noel Carroll (ed) *Theories of Art Today* (University of Wisconsin Press 2000); Denis Dutton, 'But They Don't Have our Concept of Art' in *in* Noel Carroll (ed) *Theories of Art Today* (University of Wisconsin Press 2000)
[46] Robert Stecker, 'Is It Reasonable to Attempt to Define Art?' Concept' in Noel Carroll (ed) *Theories of Art Today* (University of Wisconsin Press 2000)
[47] Robert Shore, *Beg, Steal & Borrow - Artists Against Originality* (Elephant Books, 2017)
[48] Anne Barron, 'Copyright Law and the Claims of Art' [2002] IPQ 4 Sweet & Maxwell Ltd and Contributors 368 – 401, 379
[49] ibid 398
[50] Robert Kirk Walker & Ben Depoorter, 'Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard' [2015] 109 Northwestern University Law Review 343, 374–75

on this weighting, nor does it require the court to give a drawn-out explanation of the process used in reaching the definition of art. Instead it accepts that art is a volatile concept that law must be capable of defining. In line with Davies, the Art Conundrum recognises art to be a broad category which requires a broad definition, rather than rely on a narrow or singular theoretical basis.[51] The Art Conundrum is not a singular theory but rather an encapsulation of several. It embraces multiple theories to create the most *reasonable* approach to defining art in law.

For Gaut, a contemporary philosopher, art is fundamentally a 'cluster concept'.[52] There is no singularly appropriate definition of art, rather art is a cluster of different conditions which when combined create a work of art.[53] A cluster approach is 'anti-essentialist' because it allows for several different ways under which something can qualify as art.[54] Davies also calls for a 'multistranded account'[55] due to the multiplicity of art. The desire for a hybrid definition is on the basis that combining several different theories of art will avoid the weaknesses of each individual theory.[56] This should, in turn, create a superior definition of art,[57] with hybrid definitions being indicated as the most plausible definition.[58] Consequently, transforming these approaches from art criticism into law is possible through the Art Conundrum. As the court considers several different theories in defining art, as highlighted through the previous chapters, each of these approaches compounds into the cluster definition of the Art Conundrum. The Art Conundrum builds upon cluster and hybrid definitions by allowing art to be defined in several different ways and to the varying degrees of required thresholds. However, unlike Gaut's cluster of conditions to form a work of art in art theory, the Art Conundrum instead accepts that

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[51] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)
[52] Berys Gaut, ''Art' as a Cluster Concept' in Noel Carroll (ed) *Theories of Art Today* (University of Wisconsin Press 2000)
[53] Catharine Abell, 'Art: What it Is and Why it Matters' [2012] 3 Philosophy and Phenomenological Research 671, 680
[54] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)
[55] Stephen Davies, 'Defining Art and Artworlds' [2015] 73 Journal of Aesthetics & Art Criticism 375 – 384, 377
[56] ibid
[57] ibid
[58] Robert Stecker, 'Is It Reasonable to Attempt to Define Art?' Concept' in Noel Carroll (ed) *Theories of Art Today* (University of Wisconsin Press 2000)

there is a cluster of appropriate approaches which can be used to define art and that law must only satisfy any many of these as is necessary to reach a definition of art as required by the *legal* context. Consequently, these different theories within the Art Conundrum are held together by one common thread, the significance of the legal context in understanding and defining art.

ii. The Importance of Legal Context in Defining Art

Context is critical to understanding art and is the crucial element of the Art Conundrum. For example, a pile of bricks within the Tate is not the same as a pile of bricks on a building site. One is a work of art and the other is materials for trade.[59] Another example would be the stark difference between Warhol's soup cans which are considered works of art while regular Campbell's cans are not. Although not immediately evident, when given the correct context, there is a clear distinction between the two. The soup can example is a perfect embodiment of the importance of context in the definition of art,[60] Warhol's cans are made art by their context as artworks presented by the artist. In the Gibson case, viewing the work as a sculpture was critical to being understood as a work of art.[61] Without understanding its contextual significance, as did occur in the case,[62] Gibson's work would merely be viewed as two foetuses adorned as earrings, an undeniably obscene act. Moreover, some artistic styles, such as appropriation art, rely heavily on context as a central pillar in the work itself.[63] Context can entirely dictate the meaning of a work[64] and artists can, and often do, manipulate this to 'force viewers to re-evaluate the

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[59] *Lucasfilm v Ainsworth* [2011] UKSC 39; Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017

[60] Elizabeth Winkowski, 'A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art' [2013] 12 John Marshall Review of Intellectual Property Law 746

[61] Rosalind Coward, 'Life Outside the Womb?' [1989] 34(2) New Statesman and Society 39, 39

[62] *R v Gibson* [1991] 1 All ER 439 (CA)

[63] Elizabeth Winkowski, 'A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art' [2013] 12 John Marshall Review of Intellectual Property Law 746, 747

[64] Kenly E Ames, 'Beyond Rogers v. Koons: A Fair Use Standard for Appropriation' [1993] 93(6) Columbia Law Review 1473, 1481

meaning that they unconsciously assign' to objects.[65] So much so that Dewey argues that art cannot exist for art's sake, rather it is grounded 'in the context of live human experience'.[66] Art has several purposes and is not created to just exist but is often created with a goal to change a perspective or to further human experience.[67] Taken to extremes, art itself is a language of communication and it is how it is presented, communicated and utilised which guides the definition.[68]

For Servi, the definition of art in art theory changes dependent on time and context.[69] While for Perry, the definition of art continuously changes reactively over time to developments in art itself.[70] So too does the legal definition of art. In considering art and obscenity, the Tate museum stated that 'art acts a mirror to the culture of its time',[71] again linking the definition of art with contextual analysis. As art continues to evolve and change, the judicial interpretation of art also changes with time. The difference between *Olivotti*[72] and *Brancusi*[73] is a clear example of this. A legal definition for one moment in time is not applicable for another so the legal approach to art must be malleable enough to accept this fact. Therefore, by restricting the definition of art to its legal context, law can facilitate the changing approach to art over time. As the legal context does not substantially change, art will always be considered within a similar context irrespective of differences in time.

The Art Conundrum is about understanding art within the contextual lens of the legal field in which it is begin assessed. For two of the most contemporary academics whom research in the field of aesthetics, art theory and law, Farley[74] and Soucek,[75] context is

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[65] ibid
[66] John Dewey, *Art as Experience* (Penguin Books 2005) 8; Madhavi Sunder, 'Intellectual Property Experience' [2018] 117 Michigan Law Review 197, 231 - 232
[67] Matt Brown, *Everything You Know About Art is Wrong* (Batsford 2017) 20 - 25
[68] John Berger, *Ways of Seeing* (Penguin Books Ltd 1972) 33
[69] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016) 56
[70] Grayson Perry, *Playing to the Gallery* (2nd edn Penguin Books 2016) 107
[71] Tate, 'Essay: Art and Pornography' [Tate, 2018] <https://www.tate.org.uk/art/art-and-pornography> accessed 25th September 2018
[72] *United States v Olivotti & Co* 7 Ct Cust App 46 (1916)
[73] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[74] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805
[75] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381

critical to understanding art. For Soucek, judgments in law cannot be considered outside of their 'contextual specificity',[76] because context dictates the way in which judgments in art and art theory are applied. The artwork must be defined relative to the problem in which it is involved, whether that be copyright, obscenity or such like. As demonstrated in earlier chapters, the approach to art is heavily dependent on the context in which the artwork arises because it limits the considerations taken by the court to define art. The legal definition of art in copyright can rely much more heavily on legal formalism because of the CDPA[77] whereas the definition under obscenity law is likely to consider more institutional input. To understand a work of art depends on the way it is viewed[78] so the Art Conundrum restricts the viewpoint to that of the specific legal issue at hand. Through this, the artwork is understood relative to the interests of the court and the parties involved, restricting the expanse of indefinable art to art which can be defined for a specific legal purpose. As there is a stark difference in the notion of art for legal purposes and 'art tout court',[79] or art for art's sake, the Art Conundrum focuses in on the specific legal context in which the art arises and reduces the expansive nature of art in law.

Similar to the appropriation artist relying on a contextual understanding of their work,[80] the judiciary place the artwork into the specific legal context. This allows the court to draw its definition from this new contextual reading as it is not concerned with the abstract definition of art. As 'the legal definition of art greatly depends upon who is doing the defining',[81] for legal purposes, the definition of art is always dependent upon the judiciary's contextual analysis of the specific legal issue. As demonstrated by both case law and the relevant statutory provisions, the legal lens does not need to consider all

[76] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 385
[77] Copyright, Designs and Patents Act 1988
[78] James S G Boggs, 'Who Owns This?' [1992] 68 Chicago-Kent Law Review 889, 908
[79] Brian Soucek, 'Aesthetic Exports and Experts' (The Future of Aesthetics and the American Society for Aesthetics Essay Competition, Spring 2016) <https://aesthetics-online.org/page/futureaesthetics> accessed 16 April 2019, 4
[80] William Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003) 260
[81] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm & Ent L J 303, 350

aspects of art, culture or art theory[82] because it only needs to consider those which are directly questioned by the legal issue. By utilising context as a zoning tool, it creates a limitation on the definition of art adhering to the nature of law as requiring limitation[83] to reach strong judgments. As 'legal terms are always defined within the context of the statute',[84] it is logical for art too to be defined within the legal context as dictated by the legal issue within which it is brought to the court.

By relying on a malleable multistrand approach to defining art in law, the risks of introducing concrete and immovable definitions of art are outweighed by the interests in allowing the legal definition of art to remain supple. DuBoff states that the definition of art will always have a degree of vagueness because 'a more precise definition, although desirable, would not do justice to the diverse interests involved'.[85] With so much contestation within the art world itself, it seems unreasonable or improbable that the courts would ever introduce a rigid approach to art.[86] Attempting to solve the legal problem of art by creating detailed definitions would lead to criticism that the categories are too narrow[87] and force law to overtly engage with art theory in contravention of *Bleistein*.[88] As art has a habit of questioning any definition of itself,[89] ultimately any rigid definition of art will become insufficient over time so the legal definition of art must remain flexible. The Art Conundrum allows for flexible boundaries in the definition of art because art is defined dependant on the requirements of its legal context rather than solely by the features of the art itself.

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[82] Marett Leiboff, 'Lawyers look at the Elgin Marbles, but stars keep them firmly in sights' (The Conversation, 10 Oct 2014) <http://theconversation.com/lawyers-look-at-the-elgin-marbles-but-stars-keep-them-firmly-in-sight-32798> accessed 31 May 2018
[83] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 55
[84] ibid
[85] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm. & Ent. L. J. 303, 351
[86] Peter H Karlen, 'What Is Art?: A Sketch for a Legal Definition' [1978] 94 The Law Quarterly Review 383, 406
[87] Stephanie Wickenden, 'Artistic Works and Artists' Rights - Redrawing the Law' (The Bar Council, 2014) <https://www.barcouncil.org.uk/media/313944/_46__stephanie_wickenden.pdf> accessed 19 November 2017, 5
[88] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[89] Amy M Adler, 'Why is Art on Trial' [1993] 22 Journal of Arts Management, Law and Society 322, 331

iii. Realising the Application of the Art Conundrum

The Art Conundrum is the resultant approach utilised by the court to solve the problem of art within the legal context in which it arises. It is the definitive explanation of how the court defines art and how it reaches binding judgments in art law. As it is natural for art to question any definition it is given,[90] the legal approach to art has been decidedly hesitant to enshrine a specific theoretical definition of art. The legal foundation for defining art is one of avoidance and feigned ignorance of art theory. This is exemplified by a range of key developments in the legal definition of art which have been addressed throughout the entirety of this thesis. By avoiding deliberation in the court, the legal definition of art is reached by covertly applying the various art theories, standards and tests as dictated as necessary by the legal context. This approach, when not consolidated, lacks consistency and clear direction. Thus, the Art Conundrum is a way of addressing and encapsulating these standards into one singular approach.

To define art, the court will first rely on legal formalism and commodification to both physically and theoretically reduce art to property and its economic interests. This is prevalent through statutory provisions in the CDPA,[91] the HMRC tax codes[92] and the consistent adherence to *Bleistein*.[93] Only when this is not sufficient to reach a legal definition of art, will the court begin to look to external influences and reluctantly engage with further art theory. This further engagement is often subtle or covert, promoting predominantly institutional interpretations of art as support, such as Institutional Art Theory and the Artist Led Theory, as explored in both the study of obscenity and the outcome of *Brancusi*.[94] Importantly, as explained in Chapter III, any theories considered are always applied relative to the legal context. This ensures that the consideration of art theory is only as is necessary to reach a binding judgment. The Art Conundrum is the

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[90] ibid
[91] Copyright, Designs and Patents Act 1988
[92] HM Revenue & Customs, 'Trade Tariff' (19 July 2020) <https://www.trade-tariff.service.gov.uk/sections> accessed 20 July 2020
[93] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[94] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

culmination of this approach, encapsulating the legal approach to art into a singular multistrand, or 'cluster', theory.

In summary, the Art Conundrum enables the court to predominantly use legal formalism, commodification and the influence of the art world to act as guiding forces in obtaining a definition of art for the specific legal purpose while also attempting to adhere to *Bleistein*[95] and the idea that the judiciary is not capable of judging art. The Art Conundrum appreciates that law both directly and indirectly engages with art theory but ensures that the focus of this engagement is to solve the specific legal problem. Therefore, the Art Conundrum Theory is the most suitable summarisation of the current approach to art in law. The legal definition of art is inarguably a conundrum because each work of art has multiple interpretations and it is the role of the court to find the most suitable answer, even if the final judgment does not align with popular ideas. The sporadic nature of art, from art being classified as non-art in *Henderskelfe*[96] to the abstract bronze work of Brancusi,[97] shows that law solves the problem of art by creating a complex riddle for interpreting which art theories are required to reach a judgment. As shown through the previous case study chapters, the approach in copyright, for example, is different to that of the approach in taxation. However, all legal definitions of art are fundamentally cut from the same cloth and can be linked back to one theory, the Art Conundrum. Law utilises the Art Conundrum to assess the different legal values and interests in each art law case.

Karlen summarises the judicial approach to defining art as 'rely[ing] upon legal definitions which probably will be less precise than those used to define other legal terms'.[98] The Art Conundrum adheres to this reality because it capitalises on being only as precise as is necessary. The Art Conundrum does not immediately cull the breadth of art. Rather it allows the legal issue to dictate which elements of art are necessary to consider, reducing the general concern that the breadth of the definition of art is often

[95] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[96] *HM Revenue & Customs v The Executors of Henderskelfe* [2014] EWCA Civ 278
[97] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[98] Peter H Karlen, 'What Is Art?: A Sketch for a Legal Definition' [1978] 94 The Law Quarterly Review 383, 351

too large.[99] For example, the Art Conundrum is capable of embracing the broad elasticity of the Institutional Art Theory[100] but avoids the pitfalls of empowering the art world by ensuring that the legal delineation of art remains in the hands of the judiciary, as shown by the dissenting opinions of the artworld in *Gibson*.[101] Moreover, where an additional theory does not produce sufficient guidance, as was the case in conflicted institutional opinions in Mass MoCA,[102] then the court will choose to reduce the impact of this art theory in its legal judgment. By acknowledging that art is broad in nature,[103] the Art Conundrum can build upon those statutes which already exist that target specific contextual art problems[104] and decrease the restriction of artistic creativity which is often a fallout of judicial decisions[105] by restricting judgments to a case-by-case basis, as is the current trend. Through the Art Conundrum, law remains flexible enough to accommodate art. It facilitates this flexibility by allowing the judiciary to solve the problem of art depending on where in law it arises and specifies that it is only solving the problem of art within this specific context. This ties the interpretation to the boundaries of the case, a common technique in law which ensures that it does not have a lasting and irreversible impact on later cases. Where these decisions are not explicitly tied, as in *Bleistein*,[106] *Olivotti*[107] and *Brancusi*,[108] the aim has been to further develop the general baseline approach to art but not create a restrictive or binding template.

By utilising the Art Conundrum, the court is able to reach an appropriate definition which is sufficient for the legal issue at hand. It is an amalgamation of the sporadic approach to

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[99] Leonard D DuBoff, 'What is Art – Toward a Legal Definition' [1989] 12 Hastings Comm. & Ent. L. J. 303

[100] David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' [2003] Intellectual Property Quarterly 38, 66

[101] *R v Gibson* [1991] 1 All ER 439 (CA)

[102] *Massachusetts Museum of Contemporary Art Foundation v. Büchel*, No. 08-2199 1st Cir. (2010)

[103] Stephen Davies, 'Definitions of Art' in Berys Gaut & Dominic Lopes, *Routledge Companion to Aesthetics* (3rd edn, Routledge 2013)

[104] Erik Jayme, 'Globalization in Art Law: Clash of Interest and International Tendencies' [2005] 38 Vanderbilt Journal of Transnational Law 927, 939

[105] Isaac Kaplan, 'Art Copyright, Explained' (Artsy, 4 Aug 2016) <https://www.artsy.net/article/artsy-editorial-art-copyright-explained> accessed on 21st June 2018

[106] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)

[107] *United States v Olivotti & Co* 7 Ct. Cust App 46 (1916)

[108] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)

art into one singular process. Where possible, law will attempt to avoid deliberating on art. Whether that be through an over reliance on the *Bleistein approach*[109] or the repetition of the expansive yet vague principles from *Brancusi*,[110] law does not want to pin itself to a rigidly singular definition of art. Art is a complex and complicated concept which law has realised it does not need to fully understand in order to reach sufficient legal judgments. As is seen in copyright, taxation, obscenity and artist's rights, the legal approach to art is diverse enough to reach appropriate outcomes while providing limited but sufficient guidance. From the various theories of art considered and the manifestations of these in law, from legal formalism to commodification to the role of the art world, the court has found a way to reach a legal definition of art, time and again. Each of these elements is utilised by the judiciary where necessary to ease the process of reaching a legal judgment on the art in question. These themes combine within the Art Conundrum to ensure that there is always a legal judgment at the end of any art law question.

The Art Conundrum is by no means a perfect way of defining art, but it is the most effective definition that law can achieve. When defining art, 'no single interpretation of art is ever right… [so] the court's consideration and the balancing of the facts is a difficult task'.[111] Transplanting art into different contexts is also a problematic issue,[112] which raises constant questions as to the durability of a definition of art which changes dependant on the specific legal field it arises in. There is uncertainty as to whether law can truly appreciate art theory because the context of law is so different from that of the art world and is guided by regulation, statute and governmental interest.[113] However, Wacks states that, in general, justice can never be truly attained in law because the law is based on ideals which cannot be achieved in absolute terms.[114] Therefore, when applied

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[109] *Bleistein v Donaldson Lithographing Co* 188 US 239 (1903)
[110] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[111] Natalie Náthon, 'The Case of Silk Sandals and Jeff Koons: Appropriation in Art, Copyright Infringement and Fair Use' [2013] 151 Studia Luridica Auctoritate Universitatis Pecs Publicata 151, 160 - 161
[112] Brian Soucek, 'Aesthetic Exports and Experts' (The Future of Aesthetics and the American Society for Aesthetics Essay Competition, Spring 2016) <https://aesthetics-online.org/page/futureaesthetics> accessed 16 April 2019, 2
[113] ibid
[114] Raymond Wacks, *Law: A Very Short Introduction* (OUP 2015) 23

to art, if the ideal of art cannot legally be achieved in absolute terms then they must be achieved as closely as possible. Through accommodating for the various art theories in art, the Art Conundrum facilitates a context specific definition of art which is led by the requirements of the case and is sufficient for the legal purpose at hand. It does not need to be utilitarian because it is sufficient enough to be case specific.

In conclusion, the Art Conundrum is the only way in which law is capable of defining art and continues to be malleable enough to adapt and incorporate changes in art. It is subtly applied by the judiciary and ingrained into the law as the most sufficient legal approach to art. As the Art Conundrum is already subconsciously applied throughout the English legal system, I have encapsulated the legal approach to art into this singular procedural theory to ease the explanation of the legal definition of art so that it may finally become clear and consolidated. These key developments have been explored throughout this thesis to reach the conclusive view that the Art Conundrum is truly the only way in which to define art in law. Thus, for the legal definition of art, the closest we will ever be to a legal definition of art is through the recognition of the Art Conundrum's fundamental appreciation for the multiplicity of art. The 'perennial debate'[115] of 'what is art?' will continue to rage on but, for the legal definition, an explanation of art exists. This explanation of the legal definition of art can be found in the Art Conundrum's approach.

iv. Harmonising Art & Law: An Open Ending

Law and art are two difficult concepts to harmonise. Often it is said that art and law cannot be reconciled.[116] There is a clear disparity between art and law as the standards of social stability that law seeks to obtain cannot be met[117] because art continues to

[115] Daniel Thomas, 'The Relationship between Obscenity Law and Contemporary Art in the United Kingdom, the United States and Other Jurisdictions' [2007] 12 Art, Antiquity and Law 337, 337

[116] Monika I Jasiewicz, 'A Dangerous Undertaking: The Problem of Intentionalism and Promise of Expert Testimony in Appropriation Art Infringement Cases' [2014] 26 Yale Journal of Law and the Humanities 143, 181

[117] Robert Kirk Walker & Ben Depoorter, 'Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard' [2015] 109 Northwestern University Law Review 343, 345

outrun any rigid standards set by law.[118] While law attempts to classify the artistic, art continues to evolve and focus on expanding categories of art.[119] Moreover, the potential impact of law on art is astronomical so it is critical that art is dealt with attentively.[120] For Karo, 'attempts to explain and rationalise the gap between law and art seem to be missing something: namely, the sheer clumsiness and rigid reactivity of law in the face of art's fluidity and transgressive potentiality.'[121] The judiciary do not need to close this gap between art and law because the Art Conundrum accepts this discordance between art and law. The legal approach to art is sufficient as the Art Conundrum facilitates the judiciary to benefit from just enough exposure to the world of art to reach a decision.[122] The application of the Art Conundrum appreciates the existence of this gap and facilitates a solution by requiring law to define art only insofar as is necessary to reach a satisfactory outcome, even if that means ignoring elements which may be considered critical to the theoretical comprehension of the artwork. This prevents law from becoming a burden upon art which restricts the development of art.[123] By utilising the Art Conundrum, the judiciary is given the ability to pay specific attention to the needs of the problem rather than being bound to a prescriptive definition of art.

In 1998, Kearns predicted that the legal definition of art may 'reappear to cover all manner of created product fashioned by self-legitimising artists'.[124] This promotion and adherence to Artist Led Theory has not come to fruition in law. These attempts to predict the future 'ambit' of how the word art will be interpreted by the legal system are inaccurate because art outruns its definition. Teilmann states that art 'exists in a continual process of transformation: art redefines itself incessantly'[125] and thus the

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[118] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 451
[119] *Kelley v. Chicago Park District* 635 F3d 290 7th Cir (2011) at 6
[120] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 56
[121] Marko Karo, 'The Art of Giving and Taking: A Figurative Approach to Copyright Law' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 97 - 98
[122] Peter H Karlen, 'What Is Art?: A Sketch for a Legal Definition' [1978] 94 The Law Quarterly Review 383, 407
[123] Ditlev Tamm, 'Art and Copy - A Legal Historian's Reflections on Copyright' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 161
[124] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 158
[125] Stina Teilmann, 'Art and Law: An Introduction' in Morten Rosenmeier & Stina Teilmann (eds), *Art and Law: The Copyright Debate* (Narayana Press 2005) 12

future of art is inevitably uncertain. Rather than creating a definition which will not outlast the continuous evolution of art, the Art Conundrum ensures an ongoing reassessment of the interests which affect art to continuously reach a definition which is adequate for both the artwork and the specific context in which it arises. This open approach would be welcomed by lead academics such as Farley, who argues that we should not focus on just one strain of art theory but rather welcome several to create more 'open and thoughtful [judicial] resolutions'.[126] The Art Conundrum allows for the utilisation of a range of art theory to ensure that art at any point in time has a sufficient definition by avoiding the caveat of defining art in abstract and focusing on defining art in law.

In conclusion, the question, "what is art" will continue to be the fundamental ontological question. Seemingly cases which seem to solve the artistic problem, such as the *Brancusi*[127] case, do not solve the question of "what is art?" as, in reality, this question 'is only the beginning'.[128] These cases aid later definitions of art by creating general guidelines for the legal approach to art. However, law must, and can, reach a definition of art which is workable for the purposes at hand by harmonising these two polarised topics as closely as is required for law to reach a legal judgment.[129] This definition is reached through the Art Conundrum, which has the necessary capacity to 'absorb new content'[130] as art evolves and changes.

Although questions of art may seem unanswerable, it is clear from the case law and statutory provisions that legal definitions of art are extracted time and time again.[131] One of the fundamental functions of art is to highlight that there are multiple ways to view an

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[126] Christine H Farley, 'Judging Art' (2005) 79 Tulane Law Review 805, 809
[127] *Brancusi v United States* 54 Treas Dec 428 (Cust Ct 1928)
[128] Brian Soucek, 'Aesthetic Judgement in Law' [2017] 69 Alabama Law Review 381, 389
[129] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 147
[130] Peter H Karlen, 'Art in the Law' [1981] 14 The MIT Press 51, 51
[131] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgement in the Star Wars Case: Lucasfilm Limited v. Ainsworth' [2012] 4 Journal of International Media and Entertainment Law 111, 140 - 141

object or to approach a problem.[132] The Art Conundrum builds upon this philosophy to emphasise that the legal system does not need to have one rigid approach to art. There is no requirement for a uniform definition. Rather, art can be many things provided it operates within the legal parameters that it arrives in.[133] Law can embrace the complexity of art by restraining it to the specific legal context in which it arises. In summary, the legal definition of art is a complex web of legal and artistic interests that are manipulated by the court dependent on the legal context in which the art arises. Art in the law is not outrightly definable. It is complex and malleable and changes dependent on the legal context. Art in the law is, indeed, a conundrum.

[132] Lorenzo Servi, *Art is Everywhere: How to Really Look at Things* (BIS Publishers 2016), 107

[133] Christine H Farley, 'Judging Art' [2005] 79 Tulane Law Review 805, 857

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