

## COPYRIGHT SUBSISTENCE IN CONTEMPORARY TIMES: A DEAD SHARK, AN UNMADE BED AND BRIGHT LIGHTS IN AN EMPTY ROOM

DAVID TAN\* and CHAN YONG NENG\*\*

Singapore has seen a proliferation of contemporary art exhibitions and auctions in recent years. Installation art, like the infamous shark suspended in a tank of formaldehyde, can be worth millions of dollars in the world of contemporary art. This article examines whether installation artworks can satisfy the requirements for the subsistence of copyright in Singapore. The intrinsic characteristics of installation art, including the transient nature of particular works and its frequent use of ready-made and natural objects, seem to be in conflict with the statutory definition of an ‘artistic work’ and with the copyright subsistence requirements of fixation and originality. The authors argue that there should not be a *per se* rule either against the recognition of installation works as sculptures—a specific category of artistic works—or more generally as artistic works. It will examine three of the most famous—and controversial—Turner Prize-nominated and winning works as illustrative case studies. The article also suggests that ‘artistic purpose’ is likely to have a more prominent role in the evaluative criteria used by courts for the classification of ‘artistic works’, particularly in the courts’ approach to non-propositional installation works.

### I. INTRODUCTION

Singapore has played host to the world-renowned artist Cai Guoqiang at the National Museum in 2012, whose installation *Head On* featured replicas of 99 life-sized wolves running through the air and crashing into a glass wall.<sup>1</sup> Tatzu Nishi created a temporary whimsical hotel room built around the Merlion for the Singapore Biennale in 2011.<sup>2</sup> Installation art has a “central role in contemporary art” and has been

---

\* Associate Professor, Faculty of Law, National University of Singapore. The authors would like to acknowledge the research assistance of Slawosz Feym Fliegner and the insightful comments of the anonymous reviewer.

\*\* LL.B. (Hons.), National University of Singapore.

<sup>1</sup> See “Cai Guoqiang: Head On” (August 2010), online: Singapore Art Gallery Guide <[http://www.sagg.com.sg/page/index.php?option=com\\_content&task=view&id=295](http://www.sagg.com.sg/page/index.php?option=com_content&task=view&id=295)>. See also “Favorite Cultural Moment 2008—Newsweek on Cai Guo-Qiang’s ‘Head On’” (2008), online: Deutsche Bank Art Works <<http://db-artmag.com/en/53/news/newsweek-on-cai-guo-qiangs-head-on/>>.

<sup>2</sup> See Kristiano Ang, “The Hotel that Ate Singapore’s Merlion” *The Wall Street Journal* (25 March 2011), online: WSJ Blogs <<http://blogs.wsj.com/scene/2011/03/25/the-hotel-that-ate-singapores-merlion/>>; Anita Hackethal, “Tatzu Nishi: The Merlion Hotel at Singapore Biennale 2011” (25 February 2011), online: Designboom <<http://www.designboom.com/art/tatzu-nishi-the-merlion-hotel-at-singapore-biennale-2011/>>.

dubbed “everybody’s favorite medium”.<sup>3</sup> Challenging the conventional notions of visual art, the installations attempt to engage a viewer’s “visual, aural, tactile, kinetic and olfactory”<sup>4</sup> faculties and the viewer is “given a role within the [installation], as opposed to just looking at painting or sculpture”.<sup>5</sup> In 2005, Damien Hirst’s installation, the infamous shark preserved in formaldehyde solution, was purchased by Steve Cohen for US\$12 million.<sup>6</sup> Similarly, after Ai Weiwei’s exhibition of his installation *Sunflower Seeds 2010* in the Tate Modern, a tonne of Ai’s porcelain sunflower seeds was sold at an auction for US\$782,000 in 2012.<sup>7</sup> Many installations are also sold in the form of photographs, drawings, diagrams, specimens, scale models, manifestos, maps and narrative descriptions following their removal, allowing the artists to receive further commercial gains from the reproduction of their installations and the licensing of other derivative works.<sup>8</sup> The significant commercial value associated with installation art therefore, highlights and affirms the need for an installation artist to retain ownership and control of his or her work. Accordingly, granting copyright protection will provide installation artists with one such legal mode of ownership and control.

While a complete three-prong study of the issues of copyright subsistence, copyright infringement and the defence of fair dealing with regard to installation art is necessary to comprehensively ascertain the scope of protection that copyright law can provide for installation artists, this article will only adopt a narrower interrogation of the threshold issue of subsistence to debunk any potential misconceptions that the inherent nature of installation art will prevent the law’s recognition of copyright subsistence in all installations. For illustrative purposes, this article will consider three prominent installation works, namely: Damien Hirst’s *The Physical Impossibility of Death in the Mind of Someone Living* (“Shark”), Martin Creed’s *The Lights Going On and Off* (“The Lights”) and Tracey Emin’s *My Bed*. The former nominations of the above three works for the Turner Prize, one of Britain’s most prestigious contemporary art honours, have been described as some of “Turner Prize’s most controversial moments”.<sup>9</sup>

Damien Hirst’s works have been described as “an experiment whose aim is to uncover the human form”.<sup>10</sup> In 1992, Hirst was nominated for the Turner Prize

---

<sup>3</sup> Nicolas De Oliveira, Nicola Oxley & Michael Petry, *Installation Art in the New Millennium: The Empire of the Senses* (London: Thames & Hudson, 2003) at 13.

<sup>4</sup> Faye Ran, *A History of Installation Art and the Development of New Art Forms: Technology and the Hermeneutics of Time and Space in Modern and Postmodern Art from Cubism to Installation* (New York: Peter Lang Publishing, 2009) at 140.

<sup>5</sup> Claire Bishop, *Installation Art: A Critical History* (New York: Routledge, 2005) at 102.

<sup>6</sup> Donald N. Thompson, *The \$12 Million Stuffed Shark: The Curious Economics of Contemporary Art* (New York: Palgrave Macmillan, 2008) at 63.

<sup>7</sup> See “Chinese Dissident Ai Weiwei’s Sunflower Seeds Pull In \$782,000” *International Business Times* (11 May 2012), online: International Business Times <<http://www.ibtimes.com/chinese-dissident-ai-weiweis-sunflower-seeds-pull-782000-698049>>.

<sup>8</sup> Ran, *supra* note 4 at 139.

<sup>9</sup> Marie-Claire Chappet, “The Turner Prize’s Most Controversial Moments” *The Telegraph* (20 October 2011), online: The Telegraph <<http://www.telegraph.co.uk/culture/art/turner-prize/8834871/The-Turner-Prizes-most-controversial-moments.html>>.

<sup>10</sup> Sebastian Egenhofer, Herbert Molderings & John Gray, *Re-Object*, ed. by Eckhard Schneider (Bregenz: Kunsthau Bregenz, 2007) at 159.

for his installation *Shark*, which comprises of a shark preserved in formaldehyde solution “within a steel and glass vitrine three times longer than high and divided into three cubes”.<sup>11</sup> Contrastingly, Martin Creed’s works are characterised by “conceptual stringency and a touching, deceptive, simplicity”.<sup>12</sup> In 2001, Creed was awarded the Turner Prize for *The Lights* which consists of an empty room in which a pair of lights are programmed to turn on and off in five-second intervals.<sup>13</sup> Tracey Emin, famous for her confessional art, presents intimate details of her private life with immediacy, raw openness and often, sexual provocation.<sup>14</sup> In 1999, Emin’s *My Bed*, consisting of her stained bed and detritus, such as soiled underwear and condoms, was nominated for the Turner Prize.<sup>15</sup> Using these three controversial works as illustrative examples, this article will demonstrate that installation works generally, can satisfy the requirements for the subsistence of copyright in Singapore.

## II. SUBSISTENCE OF COPYRIGHT IN INSTALLATION ART—UNDERSTANDING THE LEGISLATIVE AND THEORETICAL FRAMEWORKS

Under the Singapore *Copyright Act*,<sup>16</sup> an installation must satisfy four requirements for copyright to subsist in the work. Firstly, ss. 27(1)-(3) of the *Copyright Act* stipulate that copyright can only subsist in a work where the work is connected with Singapore in some way.<sup>17</sup> In particular, the author must either be a citizen of Singapore or a person resident in Singapore. Otherwise, the work must be published in Singapore or if it is an artistic work, must be “situated in” or “attached to” a building situated in Singapore.<sup>18</sup> Secondly, s. 27 of the *Copyright Act* provides that copyright can *only* subsist in a “literary, dramatic, musical or artistic work”.<sup>19</sup> Of these four categories of works, an installation work is more likely to be an ‘artistic work’. The term ‘artistic work’ is further defined in s. 7 to include, *inter alia*, sculptures and works of artistic craftsmanship.<sup>20</sup> Thirdly, s. 27 provides that copyright can only subsist in “original” works and imposes a requirement

<sup>11</sup> Damien Hirst, “The Physical Impossibility of Death in the Mind of Someone Living, 1991”, online: Damien Hirst <<http://www.damienhirst.com/the-physical-impossibility-of->>.

<sup>12</sup> Martin Creed, *Martin Creed: Works* (London: Thames & Hudson, 2010) at 6.

<sup>13</sup> Martin Creed, “Martin Creed Work No. 227”, online: Martin Creed <<http://martincreed.com/site/works/work-no-227>>.

<sup>14</sup> Neal Brown, *Tracey Emin* (London: Tate Publishing, 2006) at 7.

<sup>15</sup> Saatchi Gallery, online: Saatchi Gallery <[http://www.saatchi-gallery.co.uk/artists/artpages/tracey\\_emin\\_my\\_bed.htm](http://www.saatchi-gallery.co.uk/artists/artpages/tracey_emin_my_bed.htm)>.

<sup>16</sup> *Copyright Act* (Cap. 63, 2006 Rev. Ed. Sing.).

<sup>17</sup> Ng-Loy Wee Loon, *Law of Intellectual Property of Singapore* (Singapore: Sweet & Maxwell, 2009) at para. 6.3.10.

<sup>18</sup> *Copyright Act*, *supra* note 16, ss. 27(1)-(3).

<sup>19</sup> See also Ng-Loy, *supra* note 17 at para. 6.1; *Real Electronics Industries Singapore (Pte) Ltd v. Nimrod Engineering Pte Ltd* [1995] 3 S.L.R.(R.) 909 (H.C.) [*Real Electronics*].

<sup>20</sup> The definition is an exhaustive one. An “‘artistic work’ means (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not; (b) a building or model of a building, whether the building or model is of artistic quality or not; or (c) a work of artistic craftsmanship to which neither paragraph (a) nor (b) applies...”: *Copyright Act*, *supra* note 16, s. 7.

of originality.<sup>21</sup> Lastly, it must be shown that the installation is reduced to a material form.<sup>22</sup>

During the parliamentary readings of the *Intellectual Property (Miscellaneous Amendments) Bill*, the then-Minister for Law, Professor S. Jayakumar emphasised that the proposed amendments to the *Copyright Act* “will provide more benefits to our local creators and give a greater push for the development of Singapore’s creative industries”.<sup>23</sup> Similarly, at the second reading of the *Copyright (Amendment) Bill*, Professor Jayakumar stated that the proposed amendments to the *Copyright Act* were to “further [the] efforts to make Singapore a knowledge economy and a global centre for innovation and creative industries”.<sup>24</sup> The Law Minister’s statements underscore the reality that Singapore’s copyright regime is heavily influenced by economic or utilitarian rationales and aims to encourage the creation and dissemination of cultural works by providing copyright protection as an economic incentive to creators. This approach bears close similarity to the copyright clause of the United States (“U.S.”) *Constitution* which seeks to incentivise creativity and innovation for the progress of science and useful arts.<sup>25</sup>

In the same vein, legal commentator Alina Ng argues that “[a]uthors may seek as much financial remuneration for their works through the market for as long as is necessary to provide an economic incentive for authors to create and produce works”.<sup>26</sup> Granting copyright protection to installation artists facilitates such financial remuneration to incentivise further production. Richard Posner, adopting an economic analysis of copyright law, argues that a “work will be created only if the difference between expected revenues and the cost of making copies equals or exceeds the cost of expression”.<sup>27</sup>

Natural rights justifications of copyright, which propose that an author or creator is entitled to a reward by virtue of his or her efforts in the creation of the work,<sup>28</sup> appear to also be accepted by the Singapore Court of Appeal which held that “where someone has expended effort in creating something that has some literary value, it is worthy of protection, irrespective of the precise quantum of intellectual input

---

<sup>21</sup> See generally, *Virtual Map (Singapore) Pte Ltd v. Suncool International Pte Ltd* [2005] 2 S.L.R.(R.) 157 (H.C.) [*Virtual Map*]; *Flamelite (S) Pte Ltd v. Lam Heng Chung* [2001] 3 S.L.R.(R.) 610 (C.A.) [*Flamelite*]; *Auvi Pte Ltd v. Seah Siew Tee* [1991] 2 S.L.R.(R.) 786 (H.C.) [*Auvi*]; *Real Electronics*, *supra* note 19.

<sup>22</sup> See *Copyright Act*, *supra* note 16, s. 16(1): “a literary, dramatic or musical work was made shall be read as a reference to the time when, or the period during which, as the case may be, the work was first reduced to writing or to some other material form”.

<sup>23</sup> Sing., *Parliamentary Debates*, vol. 78, col. 126 (15 June 2004) (Professor S. Jayakumar).

<sup>24</sup> Sing., *Parliamentary Debates*, vol. 78, col. 1051 (16 November 2004) (Professor S. Jayakumar).

<sup>25</sup> “To Promote the Progress of Science and Useful Arts, by Securing for Limited Times to Authors and Inventors the Exclusive Right to their Respective Writings and Discoveries”: see U.S. Const. art. I, §8, cl. 8.

<sup>26</sup> Alina Ng, “The Social Contract and Authorship: Allocating Entitlements in the Copyright System” (2009) 19 *Fordham I.P. Media & Ent. L.J.* 413 at 422.

<sup>27</sup> William M. Landes & Richard A. Posner, “An Economic Analysis of Copyright Law” (1989) 18 *J. Legal Stud.* 325 at 327.

<sup>28</sup> See Wendy J. Gordon, “A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property” (1993) 102 *Yale L.J.* 1533 at 1547; John Locke, *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988) at 288-296.

involved in producing it or the literary merits or novelty of the work product”.<sup>29</sup> According to this rationale, installation art should be granted copyright protection where artists expend effort in the creation of their installations.

However, contemporary art, especially more unusual installations that challenge conventional norms, often requires explanations for them to be perceived as art. One can look at a painting by Michelangelo, Claude Monet or Pablo Picasso and confidently declare it to be ‘art’. On the other hand, Marcel Duchamp’s *Fountain* (a urinal signed with the pseudonym “R. Mutt”) or Jeff Koons’ inflatable balloon steel sculptures will require some interpretive guidance. Glen Cheng argues that “[u]nfamiliar works often require explanation by way of theory and history in order to be understood as art... [and that the] law should be informed by aesthetic theory in making determinations of art-status”.<sup>30</sup>

Cheng emphatically pronounces that “[b]y failing to protect important advances in recent art, current copyright law discourages innovation and frustrates copyright law’s goal of ‘promoting the creation and publication of free expression’” and argues that copyright law “should therefore seek to extend equal protection to all categories of art”.<sup>31</sup> Of the major philosophical theories of art,<sup>32</sup> three theories stand out as being the most useful to the counsel of copyright law, and despite criticisms, they appear to have been relied upon by courts to form an adjudicative guide: aesthetic definition theory of art (“AD”), institutional theory (“IT”) and historical definition (“HD”).

The AD theory is concerned with “the distinctly contemplative experience that art provides to its viewers or listeners” and contemplates “that what makes art unique is that artworks alone were created with the intent to transport their audiences into the state of sympathetic and meditative introspection known as the ‘aesthetic experience’”.<sup>33</sup> It focuses on the purpose or aesthetic intent of the artist, and allows for “bad art”.<sup>34</sup> Generally, there are two dominant versions of AD. The first version, the content-oriented AD, examines a work for “the aesthetic properties of unity, diversity, and intensity... [that are inferred] from the work’s nonaesthetic properties, such as shape, sound, structure, and symmetry”.<sup>35</sup> The second version of the theory, the affect-oriented AD, “focuses on the audience’s response to an artwork as the critical factor that defines art”.<sup>36</sup> The AD theory, particularly the affect-oriented AD version, has been implicitly approved in a number of fair use decisions, as evident in the U.S. Supreme Court’s decision in *Campbell v. Acuff-Rose Music Inc*<sup>37</sup> and the recent Second Circuit Court of Appeals decision in *Cariou v. Prince*.<sup>38</sup>

The IT theory emphasises the primacy of the role that ‘agents’ of the world of art—its artists, art audiences, critics, curators and philosophers—play in defining

<sup>29</sup> *Asia Pacific Publishing Pte Ltd v. Pioneers & Leaders (Publishers) Pte Ltd* [2011] 4 S.L.R. 381 at para. 36 (C.A.) [*Asia Pacific Publishing*].

<sup>30</sup> Glen Cheng, “The Aesthetics of Copyright Adjudication” (2012) 19 UCLA Ent. L. Rev. 113 at 136.

<sup>31</sup> *Ibid.* at 115 [internal citations omitted].

<sup>32</sup> See generally, *ibid.* at 135-162.

<sup>33</sup> *Ibid.* at 142.

<sup>34</sup> Noel Carroll, *Philosophy of Art: A Contemporary Introduction* (London: Routledge, 1999) at 160-164.

<sup>35</sup> Cheng, *supra* note 30 at 143, 144.

<sup>36</sup> *Ibid.* at 144, 145.

<sup>37</sup> 510 U.S. 569 at 583 (1994).

<sup>38</sup> 714 F.3d 694 at 707 (2nd Cir. 2013) [*Cariou*].

art. By accepting the testimonies of such agents and all individuals who accumulate sufficient knowledge, experience and understanding of art theory and history, it allows for the recognition of “readymades, abstract art, found sounds, and other revolutionary pieces that [have] prove[n] difficult for many prior art theories” as art.<sup>39</sup> Melville Nimmer argues that “[i]f a work might arguably be regarded as a work of art by any meaningful segment of the population... then the work must be considered a work of art for copyright purposes”.<sup>40</sup> Notwithstanding criticisms that a judicial adoption of IT can result in evaluations of art becoming a popularity contest that confers art-status solely on the number and social prestige of experts that can vouch for it, IT nonetheless supports an important evidentiary process which allows judges to listen to what experts—like museum curators and art critics have to say—and reduces the degree of aesthetic judgments that courts have to make. The U.S. courts have accepted numerous *amicus curiae* briefs filed in high profile cases like *Cariou* and *National Endowment For The Arts v. Finley*,<sup>41</sup> where art world agents like the Association of Art Museum Directors, The Metropolitan Museum of Art, The Museum of Modern Art,<sup>42</sup> the Andy Warhol Foundation for the Visual Arts<sup>43</sup> and the Rockefeller Foundation<sup>44</sup> were influential in shaping the judges’ evaluation of artistic works.

The HD theory attempts to connect artworks to their historical lineage<sup>45</sup> and “seeks to synthesize the major theories of art discussed above by understanding art with reference to historical context”.<sup>46</sup> Much like judicial precedents, HD is capable of adopting new works of art through comparison to established works, akin to the common law method of analogous reasoning and incrementalism. The advantages of HD to copyright litigation lie not only in its methodological familiarity with the legal fraternity, but also in its ability to synthesise the explanatory power of other aesthetic theories while insulating itself from their shortcomings.<sup>47</sup>

HD thus has a strong practice argument in its favor, namely that it explains art in the same manner that we naturally evaluate art: through comparison and not definition according to necessary and sufficient terms. Moreover, HD seeks to bar entrance of non-artworks into the Art-world by requiring artists and curators,

---

<sup>39</sup> Cheng, *supra* note 30 at 147.

<sup>40</sup> Melville B. Nimmer & David Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas* (New York: Matthew Bender, 1990) at §2.08[B][1].

<sup>41</sup> 524 U.S. 569 (1998) [*Finley*].

<sup>42</sup> *Cariou*, *supra* note 38: “Brief for Amici Curiae the Association of Art Museum Directors, The Art Institute of Chicago, The Indianapolis Museum of Art, The Metropolitan Museum of Art, The Museum of Modern Art, Museum Associates, dba Los Angeles County Museum of Art, The New Museum, The Solomon R. Guggenheim Foundation, The Walker Art Center, and The Whitney Museum of American Art in Support of Appellants and Reversal”, Appellate Brief, (2011) WL 5517864 (C.A.2) (WL Int).

<sup>43</sup> *Ibid.*: “Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal”, Appellate Brief, (2011) WL 5517867 (C.A.2) (WL Int); “Reply Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal”, Appellate Brief, (2012) WL 764714 (C.A.2) (WL Int).

<sup>44</sup> *Finley*, *supra* note 41: “Brief Amicus Curiae for the Rockefeller Foundation in Support of Respondents”, Appellate Brief, (1998) WL 55169 (U.S.) (WL Int).

<sup>45</sup> Carroll, *supra* note 34 at 63.

<sup>46</sup> Cheng, *supra* note 30 at 149.

<sup>47</sup> *Ibid.*

as in Institutional Theory, to explain how the new works closely resemble and incorporate elements in artworks of other art regards.

The HD theory has been applied in at least three Circuit Court decisions in determining the art-status of a disputed object.<sup>48</sup>

In summary, in appropriate cases where courts have to determine the art-status of an object, expert testimony from art curators, historians, or philosophers should be welcomed. Such testimonies may be relevant to ascertaining the artist's purpose or intent (under the AD theory), confirming the status of the work within the art world (under the IT theory) and locating the work within a historical lineage of family resemblances or genres (under the HD theory). While one often marvels at the kaleidoscopic and enigmatic creations of installation artists, the "sheer diversity in terms of appearance, content and scope" of installation art causes much difficulty in the classification of these installations into the categories of literary, dramatic, musical or artistic works.<sup>49</sup> Admittedly, aspects of certain installations may qualify as a literary<sup>50</sup>, dramatic<sup>51</sup> or musical work.<sup>52</sup> However, where the installations involve an object or an assemblage of objects, these installations will have to be categorised as 'artistic works' under the *Copyright Act* in order to gain copyright protection. In this regard, such installations will generally qualify as an 'artistic work' under the *Copyright Act* based on any one of these three categories: (i) the installation comprises one or more objects which falls within the definition of "sculpture"; or (ii) the installation comprises one or more objects which falls within the definition of "a work of artistic craftsmanship"; or (iii) the assemblage of objects in the installation site or space falls within the definition of "sculpture" or "a work of artistic craftsmanship". In addition, two further requirements need to be satisfied: fixation and originality. Installation art can be of a transient nature and this would be at conflict with the requirement of fixation or reduction to material form.<sup>53</sup> The mere display of ready-mades or natural objects may not satisfy the subsistence standard of originality.<sup>54</sup> In such evaluations, judges should be guided by expert evidence and be informed by the relevant theories of art.

<sup>48</sup> E.g., *Kieselstein-Cord v. Accessories by Pearl Inc*, 632 F.2d 989 (2nd Cir. 1980) [*Kieselstein-Cord*]; *Baillie v. Fisher*, 258 F.2d 425 (D.C. Cir. 1958); *Rosenthal v. Stein*, 205 F.2d 633 (9th Cir. 1953).

<sup>49</sup> Bishop, *supra* note 5 at 6.

<sup>50</sup> See e.g., Barbara Kruger's 2010 installation work, *past/present/future*, which wraps the floor and walls of the room with printed texts that speak directly and loudly to the spectator in a chorus of voices: Barbara Kruger, "exhibition pieces (3-4)", online: Barbara Kruger <<http://www.barbarakruger.com/art/exhibit6.jpg>>.

<sup>51</sup> See e.g., Kelly Mark's 2009 installation work, *All in a Day's Work*, a "durational performance piece" that consists of an artist talk from 9 a.m. to 5 p.m. with two fifteen minute breaks and a one hour lunch: Kelly Mark, "All in a Day's Work—2009", online: Kelly Mark <<http://www.kellymark.com/AllInADaysWork1.html>>.

<sup>52</sup> See e.g., Bill Fontana's 2011 installation work, *White Sound*, that introduced the noise of a Dorset beach to London's Euston Road: Bill Fontana, online: Bill Fontana Sound Sculptures <[http://resoundings.org/Pages/WHITE\\_SOUND2.html](http://resoundings.org/Pages/WHITE_SOUND2.html)>.

<sup>53</sup> See e.g., Damien Hirst's *A Thousand Years*, where a vitrine is split in half by a glass wall: a hole in this partition allows newly hatched flies from a box reminiscent of a die in one half, to fly into the other where a fly killer hangs above a decaying cow's head. The corpses of the flies inside the vitrine accumulate whilst the works are on exhibition: Damien Hirst, "A Thousand Years, 1990", online: Damien Hirst <<http://www.damienhirst.com/a-thousand-years>>.

<sup>54</sup> See e.g., Marcel Duchamp's *Fountain* features a standard urinal, laid flat on its back rather than upright in its usual position: "Marcel Duchamp, *Fountain* 1917, replica 1964", online: Tate <<http://www.tate.org.uk/art/artworks/duchamp-fountain-t07573>>.

### III. SCULPTURES AS ARTISTIC WORKS UNDER THE COPYRIGHT ACT

Section 7(1) of the *Copyright Act* provides the definition of an ‘artistic work’ and does not expressly include installation works. Section 7(1) stipulates:<sup>55</sup>

“artistic work” means—

- (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- (b) a building or model of a building, whether the building or model is of artistic quality or not; or
- (c) a work of artistic craftsmanship to which neither paragraph (a) nor (b) applies, but does not include a layout-design or an integrated circuit within the meaning of section 2(1) of the *Layout-Designs of Integrated Circuits Act* (Cap. 159A)

This provision is similar to the definitions contained in s. 10 of the Australian *Copyright Act 1968*<sup>56</sup> and s. 4(1) of the United Kingdom (“U.K.”) *Copyright, Designs and Patents Act 1988*.<sup>57</sup> Section 7(1) further provides that, for the purposes of the *Copyright Act*, sculpture “includes a cast or model made for purposes of sculpture”.<sup>58</sup> Ng-Loy Wee Loon points out that pursuant to the scheme of the *Copyright Act*, the s. 7(1) list is not exhaustive because some of the terms used in this definition are defined in an “open-ended” manner.<sup>59</sup> Hence, a “sculpture” under the *Copyright Act* potentially includes other definitions beyond just a cast or model made for the purposes of sculpture.

#### A. Approaches to the Definition of Sculpture in Various Jurisdictions

The Singapore courts to date have not enunciated any evaluative criteria for the determination of a sculpture under s. 7(1) of the *Copyright Act*. The U.K. Court of Appeal in *Lucasfilm Ltd v. Ainsworth* cautioned that “it is not possible or wise to attempt to devise a comprehensive or exclusive definition of ‘sculpture’ sufficient to determine the issue in any given case”.<sup>60</sup> Not surprisingly, these inherent difficulties have resulted in the courts expressing different tests. The uncertainty that results from this divergence of approaches has been acknowledged by various academics.<sup>61</sup>

In Australia, Angel J. in *Wildash v. Klein* held that “[a]lthough the definition of ‘sculpture’ is not exhaustive, in so far as the word remains undefined it must be given its ordinary meaning, in accordance with orthodox principles of construction”.<sup>62</sup>

<sup>55</sup> *Copyright Act*, *supra* note 16, s. 7(1).

<sup>56</sup> *Copyright Act 1968* (Cth.), s.10.

<sup>57</sup> *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48, s. 4(1) [*CDPA*].

<sup>58</sup> *Copyright Act*, *supra* note 16, s. 7(1) [emphasis added].

<sup>59</sup> Ng-Loy, *supra* note 17 at para. 6.1.26.

<sup>60</sup> [2010] Ch. 503 at para. 77 (C.A.) [*Lucasfilm* (C.A.)].

<sup>61</sup> See e.g., Tania S.L. Cheng, “Does Copyright Law confer a Monopoly over Unpreserved Cows?” (2006) 28 Eur. I.P. Rev. 276 at 281; Anne Barron, “Copyright Law and the Claims of Art” (2002) 4 Intellectual Property Quarterly 368 at 383-388. See also Simon Stokes, “Categorising Art in Copyright Law” (2001) 12 Ent. L. Rev. 179; David Booton, “Framing Pictures: Defining Art in UK Copyright Law” (2003) 1 Intellectual Property Quarterly 38.

<sup>62</sup> [2004] 16 N.T.L.R. 66 at para. 11 (N.T.S.C.) [*Wildash*].



In New Zealand, the Court of Appeal in *Wham-O Manufacturing Co v. Lincoln Industries Ltd* held that a “sculpture should in some way express in three-dimensional form an idea of the sculptor”.<sup>63</sup> Within the U.K., the courts have articulated different formulations in *Metix (UK) Ltd v. G.H. Maughan (Plastics) Ltd*<sup>64</sup> and *Breville Europe plc v. Thorn EMI Domestic Appliances Ltd*.<sup>65</sup>

Subsequently, the U.K. Supreme Court (“UKSC”) sought to reconcile the divergent tests for ‘sculpture’ laid down in prior English decisions and those of other jurisdictions in the *Lucasfilm* case when it had to deliver the final word on whether the Stormtrooper helmets in the *Star Wars* movies were sculptures that would attract copyright protection.<sup>66</sup> Mann J., the trial judge, had prescribed nine “guidelines, not rigid requirements” for the determination of whether a work is a sculpture.<sup>67</sup> These guidelines were later approved by the Court of Appeal and the UKSC. However, these so-called “guidance factors” appear to be a clumsy mélange of overlapping factors, exclusionary considerations and illustrative examples.<sup>68</sup> The nine guidelines can be summarised as follows:<sup>69</sup>

1. “Some regard has to be had to the normal use of the word”;
2. A sculpture is not confined to what “one would expect to find in art galleries”;
3. “It is inappropriate to stray too far from what would normally be regarded as sculpture”;
4. “No judgment is to be made about artistic worth”;
5. “Not every three-dimensional representation of a concept can be regarded as a sculpture”;
6. “It is of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well”;
7. Having another use “does not necessarily disqualify it from being a sculpture”;
8. The “purpose” is important, and this artistic purpose may be discerned from the context of the display of the work; and
9. “The process of fabrication is relevant but not determinative”.

The UKSC termed this the “multi-factorial approach”.<sup>70</sup> The Court noted that “normal English usage is important, though not determinative” of what constitutes a sculpture and brings to the forefront of the evaluation a consideration of whether the work was created with an “artistic purpose”.<sup>71</sup> Lionel Bently and Brad Sherman are of the view that under U.K. law today, if an object was created with an artistic purpose in mind, then courts are more likely to protect the work.<sup>72</sup>

<sup>63</sup> [1984] 1 N.Z.L.R. 641 at para. 63 (C.A.) [*Wham-O*].

<sup>64</sup> [1997] F.S.R. 718 at 721, 722 [*Metix*].

<sup>65</sup> [1995] F.S.R. 77 at 94 [*Breville*].

<sup>66</sup> *Lucasfilm Ltd v. Ainsworth* [2012] 1 A.C. 208 (S.C.) [*Lucasfilm* (S.C.)].

<sup>67</sup> *Lucasfilm Ltd v. Ainsworth* [2008] EWHC 1878 (Ch) at para. 119 [*Lucasfilm* (H.C.)].

<sup>68</sup> *Ibid.* at para. 118.

<sup>69</sup> *Ibid.* See also *Lucasfilm* (S.C.), *supra* note 66 at para. 36.

<sup>70</sup> *Lucasfilm* (S.C.), *ibid.* at para. 47.

<sup>71</sup> *Ibid.* at para. 37.

<sup>72</sup> Lionel Bently & Brad Sherman, “Copyright Aspects of Art Loans” in Norman Palmer, ed., *Art Loans* (London: Kluwer Law International, 1997) at 239, 267. See also Simon Stokes, *Art and Copyright*, 2nd ed. (Oxford: Hart Publishing, 2012) at 165.

In the 1928 U.S. landmark case of *Brancusi v. United States*, a bronze object “*Bird in Flight*” by Constantin Brancusi was originally classified as an article of metal within the provisions of para. 399 of the *Tariff Act of 1922*.<sup>73</sup> In albeit a brief judgment, the *Brancusi* decision comes the closest to an open discourse with aesthetic theories of art. The Customs Court was required to explicitly declare whether the claimed sculpture was mere industrial pipe, on which a customs tax was due, or whether it was an original sculpture, free from customs tax. Despite its title “*Bird in Flight*”, the three-dimensional object did not look like a bird and the court had considerable difficulty determining whether it was an artistic work. The court eventually relied on expert testimony on the nature of postmodern art and the art-status of Brancusi’s work, including the artist’s purpose when moulding the piece of metal, in reaching its holding that the object constituted an artwork.<sup>74</sup> Waite J., delivering the judgment for the court, noted that:<sup>75</sup>

Without the exercise of rather a vivid imagination, [*Bird in Flight*] bears no resemblance to a bird except, perchance, with such imagination it may be likened to the shape of the body of a bird. It has neither head nor feet nor feathers portrayed in the piece.

Nonetheless, Waite J. accepted the testimonies of Brancusi and other witnesses “who have been familiar with art and art works in their study and in museums and as artists and writers upon art... [who] declared the production to be a piece of sculpture and a work of art”.<sup>76</sup> Almost 40 years later, the Customs Court, referring to the *Brancusi* decision, was of the view that “[i]n upholding the plaintiff’s claim, the [*Brancusi*] court did recognize the influence of new schools of thought in modern art for its understanding of what constitutes art”.<sup>77</sup> Although these decisions are not directly relevant for the determination of what constitutes a sculpture under the Singapore *Copyright Act*, the judicial willingness in other jurisdictions to consider the expert views of those working in the art world as curators, critics and artists—an implicit approval of the AD, IT and HD theories<sup>78</sup>—provides a persuasive voice for local courts when faced with more exotic and esoteric contemporary installation works, to keep an open mind about what might be classified as an artistic work:<sup>79</sup>

[T]here has been developing a so-called new school of art, whose exponents attempt to portray abstract ideas rather than imitate natural objects. Whether or not we are in sympathy with these newer ideas and the schools which represent them, we think the facts of their existence and their influence upon the art world as recognized by the courts must be considered.

---

<sup>73</sup> 54 Treas. Dec. 428 (Cust. Ct. 1928) [*Brancusi*]. The stenographic minutes are reprinted in Margit Rowell, *Brancusi vs. United States: The Historic Trial, 1928* (Paris: Adam Biro, 1995).

<sup>74</sup> Rowell, *ibid.* at 111-115.

<sup>75</sup> *Ibid.* at 113.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Miniature Fashions, Inc v. United States*, 55 Cust. Ct. 154 at 158 (Cust. Ct. 1965).

<sup>78</sup> See also Christine Haight Farley, “Judging Art” (2005) 79 Tul. L. Rev. 805 at 854, 857.

<sup>79</sup> Rowell, *supra* note 73 at 115.

### B. A Proposed Test for “Sculpture” in Singapore

*Lucasfilm* (S.C.) is of important persuasive authority in determining the appropriate test for a ‘sculpture’ in Singapore since s. 4(1) of the U.K. *CDPA* is *pari materia* with s. 7(1) of the Singapore *Copyright Act*. As the nine guidance factors articulated in *Lucasfilm* (S.C.) is an unwieldy test in practice, the authors submit that the following two-prong test, which succinctly encapsulates these factors, could instead be considered by Singapore courts:

- (1) Does the work in question fall within the ordinary meaning of ‘sculpture’ and the meaning to which that word has to ordinary members of the public?
- (2) Is the work in question produced with an artistic purpose?

Notably, numerous courts, including the Singapore Court of Appeal,<sup>80</sup> have expressed the need to avoid acting as judges of artistic merit in a court of law.<sup>81</sup> Various academics have also indicated a similar sentiment.<sup>82</sup> By shifting the inquiry towards that of artistic purpose, the proposed test will reduce the need for judicial aesthetic judgment. The emphasis on artistic purpose finds a parallel in the conceptual separability test in U.S. law proposed by Robert Denicola and applied by the Second Circuit Court of Appeals<sup>83</sup> that asks whether the designer is motivated by purely aesthetic and not functional considerations.<sup>84</sup> Furthermore, as David Booton argues, a consideration of artistic purpose in the test for ‘sculpture’ reconciles the test with the “institutional theory of art”, which recognises that “social context and the identification of an object as work of art depends not on any features exhibited by the object itself but rather upon that object’s position within a set of established social rules and practices”.<sup>85</sup> Tom Palmer also highlights that an artwork depends “not only on the creative activity of the artist but—even more—on the activity of its audience. In order to exist as an art work, an object must have an audience that can appreciate it”.<sup>86</sup> In light of the reciprocal nature of art,<sup>87</sup> a sculpture must naturally

<sup>80</sup> *Asia Pacific Publishing*, *supra* note 29 at para. 30.

<sup>81</sup> See *Lucasfilm* (H.C.), *supra* note 67 at para. 118; *Bleistein v. Donaldson Lithographic Co*, 188 U.S. 239 at 251 (1903); *Smith v. Goguen*, 415 U.S. 566 at 573 (1974).

<sup>82</sup> Lindsay Harrison, “The Problem with Posner as Art Critic: *Linnemeir v. Board of Trustees of Purdue University Fort Wayne*” (2002) 37 *Harv. C.R.-C.L.L. Rev.* 185 at 203; Keith Aoki, “Contradiction and Context in American Copyright Law” (1991) 9 *Cardozo Arts & Ent. L.J.* 303 at 303, 304; Robert C. Denicola, “Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles” (1983) 67 *Minn. L. Rev.* 707 at 708.

<sup>83</sup> *Brandir International, Inc v. Cascade Pacific Lumber Co*, 834 F.2d 1142 at 1145 (2nd Cir. 1987).

<sup>84</sup> Denicola, *supra* note 82 at 741. In U.S. law, utilitarian articles are excluded from copyright protection by statute, and the courts must often determine whether an object that has a utilitarian function nevertheless has artistic properties that can be either physically or conceptually separable from the object.

<sup>85</sup> Booton, *supra* note 61 at 63.

<sup>86</sup> Tom G. Palmer, “Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects” (1990) 13 *Harv. J.L. & Pub. Pol’y* 817 at 847. See also Margaret Chon, “New Wine Bursting From Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship” (1996) 75 *Or. L. Rev.* 257 at 264.

<sup>87</sup> Particularly, with regard to installation art, writers have commented on the “closely linked” relationship of artist and audience who engage in a “continuing debate” of the work. See De Oliveira, Oxley & Petry, *supra* note 3 at 17. See also Tatja Scholte & Glenn Wharton, eds., *Inside Installations: Theory and Practice in the Care of Complex Works* (Amsterdam: Amsterdam University Press, 2011) at 11.

have been created for a purpose where it is intended to be appreciated for its “visual appeal”, as recognised by Mann J. in *Lucasfilm* (H.C.).<sup>88</sup>

The proposed test is consistent with the positions taken in *Lucasfilm* (S.C.), *Breville*, *Wham-O*, *Metix* and *Wildash*. Despite the varying expressions, the above cases concertedly recognise the relevance of the ordinary meaning of the word ‘sculpture’. Moreover, as recognised by Mann J. in *Lucasfilm* (H.C.), Laddie J.’s definition of sculpture in the *Metix* case (“a sculpture is a three-dimensional work made by an artist’s hand”) has an element of “artistic creation inherent in the test” where the phrase “artist’s hand” implies the presence of an artistic purpose.<sup>89</sup> Lastly, the proposed test is also consistent with the *Copyright Act*, which provides for an inclusive definition of “sculpture”.

#### IV. WORKS OF ARTISTIC CRAFTSMANSHIP AS ARTISTIC WORKS UNDER THE COPYRIGHT ACT

Section 7(1) of the Singapore *Copyright Act* provides that ‘artistic work’ can mean “a work of artistic craftsmanship”. Unfortunately, ‘a work of artistic craftsmanship’ is not defined in the *Copyright Act*. In addition, the Singapore courts have not offered a definition for ‘a work of artistic craftsmanship’.

##### A. Approaches to the Classification of a Work of Artistic Craftsmanship in Various Jurisdictions

Conti J. in *Sheldon v. Metrokane* highlights that “the evolution of authority upon the meaning and implications of the statutory notion of artistic craftsmanship... reveals the existence of a formidable area of complexity”.<sup>90</sup> Other judges have noted that “the addition of the adjective ‘artistic’ requires that the craftsman... must set out to produce something which possesses those attributes suggested by the word itself”<sup>91</sup> but at the same time, courts and academics recognise the need to avoid any judicial aesthetic or artistic judgment,<sup>92</sup> thus creating a conflicting conundrum. Unsurprisingly, as a result, the courts have not articulated a consistent test for works of artistic craftsmanship.

In the U.K., in the leading case of *George Hensher Ltd v. Restawile Upholstery (Lancs.) Ltd*,<sup>93</sup> the House of Lords could not come to an agreement on the appropriate definition of ‘a work of artistic craftsmanship’. The judges in *Hensher* each articulated a different test.<sup>94</sup> Furthermore, as Simon Stokes illustrates, subsequent cases to *Hensher* which rule on the issue of artistic craftsmanship “do little to clarify things”.<sup>95</sup> In Australia, the High Court in *Burge v. Swarbrick*, referring to Lord

<sup>88</sup> *Supra* note 67 at para. 118.

<sup>89</sup> *Ibid.* at para. 121.

<sup>90</sup> *Sheldon v. Metrokane* [2004] FCA 19 at para. 118 [emphasis omitted].

<sup>91</sup> *Cuisenaire v. Reed* [1963] 5 F.L.R. 180 at 194 (Vic. S.C.).

<sup>92</sup> See text accompanying notes 80-82.

<sup>93</sup> [1976] A.C. 64 (H.L.) [*Hensher*].

<sup>94</sup> *Ibid.* at 77, 78 (Lord Reid), at 81 (Lord Morris), at 91 (Lord Simon).

<sup>95</sup> Stokes, *Art and Copyright*, *supra* note 72 at 46.

Simon's approach in *Hensher*, unanimously held that:<sup>96</sup>

[D]etermining whether a work is "a work of artistic craftsmanship" does not turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility. The determination turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations.

On the contrary, in New Zealand, the High Court in *Bonz Group (Pty) Ltd v. Cooke* thought that "for a work to be regarded as one of artistic craftsmanship it must be possible fairly to say that the author was both a craftsman and an artist".<sup>97</sup> The court was of the view that a craftsman is "a person who makes something in a skilful way and takes justified pride in their workmanship", while an artist is "a person with creative ability who produces something which has aesthetic appeal".<sup>98</sup> Subsequent to the divergent case law, commentators similarly disagree on the preferable approach in the classification of works of artistic craftsmanship.<sup>99</sup>

#### B. A Proposed Test for "A Work of Artistic Craftsmanship" in Singapore

Despite the fragmented approaches, three principles are nevertheless ascertainable from the decisions. Firstly, as recognised by the UKSC in *obiter* in *Lucasfilm* (S.C.), "[t]he speeches in the *Hensher* case, difficult though they are, show a general inclination to start with the ordinary meaning of the words of the statute".<sup>100</sup> Secondly, as highlighted earlier, courts and academics alike have cautioned against judges acting as aesthetic arbiters.<sup>101</sup> In particular, Judith Thomson observed that the "overt 'aesthetic suitability' test has been gradually eroded in case law in favour of a more objective 'intent' test".<sup>102</sup> The judges in *Hensher*<sup>103</sup> and Mann J. in *Lucasfilm* (H.C.)<sup>104</sup> similarly consider the intent of the artist to be highly relevant. For example, Lord Simon put forward the inquiry for a work of artistic craftsmanship as follows: given the presence of craftsmanship, what was the "intent of the creator"?<sup>105</sup> Lord Reid stressed that "the maker or designer of a thing should have intended that it should have an artistic appeal".<sup>106</sup> Lord Kilbrandon similarly expressed that the "conscious intention of the craftsman" was the primary test.<sup>107</sup> Thirdly, Lord Reid's and Lord Morris' approaches in *Hensher* require that an artist does not manifestly fail in his artistic intent or purpose, suggesting that a higher threshold of artistry is

<sup>96</sup> (2007) 232 C.L.R. 336 at para. 83 (H.C.A.) [*Burge*].

<sup>97</sup> [1994] 3 N.Z.L.R. 216 at 224 (H.C.).

<sup>98</sup> *Ibid.*

<sup>99</sup> E.g., Booton, *supra* note 61, at 38-68; Judith Thomson, "Works of Artistic Craftsmanship: What is Happening in this 'Formidable Area of Complexity'?" (2010) 32 Eur. I.P. Rev. 113; Justine Pila, "Works of Artistic Craftsmanship in The High Court of Australia: The Exception as Paradigm Copyright Work" (2008) 36 Federal L. Rev. 365 at 378.

<sup>100</sup> *Lucasfilm* (S.C.), *supra* note 66 at para. 29.

<sup>101</sup> See text accompanying notes 80-82.

<sup>102</sup> Thomson, *supra* note 99 at 115.

<sup>103</sup> *Supra* note 93.

<sup>104</sup> *Supra* note 67 at para. 188.

<sup>105</sup> *Hensher*, *supra* note 93 at 95.

<sup>106</sup> *Ibid.* at 78.

<sup>107</sup> *Ibid.* at 97.

required in works of artistic craftsmanship, as compared to sculptures.<sup>108</sup> A plain reading of s. 4(1) of the *CDPA*, which is in *pari materia* with s. 7(1) of the Singapore *Copyright Act*, lends support to their Lordships' suggestion. It states that "artistic work" means "a work of artistic craftsmanship", and the phrase "whether the work is of artistic quality or not", which appears in the context of other categories of artistic works, is intentionally excluded from this category, suggesting that artistic quality is relevant in works of artistic craftsmanship.<sup>109</sup> The intentional inclusion of the term "artistic" in "artistic craftsmanship" also suggests an inherent requirement of artistry.

Significantly, the above three principles are consistent with Kendall Walton's normative theory of art, which appears to synthesise the AD, IT and HD theories.<sup>110</sup> Walton postulates that for a work to fall within a specific category of works of art, it must share a number of features characteristic of that category. Correspondingly, the courts' requirement that a work falls within the ordinary meaning of 'artistic craftsmanship' will require that a work shares features common to things that had been previously recognised as works of artistic craftsmanship. Acknowledging that the status of art is often conferred by the audience,<sup>111</sup> Walton further contends that an artist's intent to create a work of art though relevant is not determinative. Similarly, the courts have affirmed the relevance of artistic intent but have also highlighted that when the artist manifestly fails in his or her intent, such works will not be legally recognised as works of artistic craftsmanship that merit copyright protection. Notably, Justine Pila has also observed that if one were to articulate a legal test for a work of artistic craftsmanship that is grounded on Walton's theory, such a formulation will be "convincing on normative and analytical grounds".<sup>112</sup> Pila also implicitly adopts the AD, IT and HD aesthetic theories of art when she contends that "whether an object is a [work of artistic craftsmanship] depends on both its properties of form and the history of its individual production, meaning the (subjective) intent of its individual author and view of society with respect to its nature".<sup>113</sup>

Thus, building on the three principles distilled from case law and supported by the AD, IT and HD theories, it is proposed that the Singapore courts could consider using the following three-stage sequential test in determining if a work is 'a work of artistic craftsmanship':

- (1) Does the work in question fall within the ordinary meaning of 'a work of craftsmanship' and the meaning to which the words have to ordinary members of the public?
- (2) Is the work in question produced with an artistic purpose?
- (3) Has the creator of the work manifestly and grossly failed in that purpose?

---

<sup>108</sup> *Ibid.* at 78, 81.

<sup>109</sup> See *Copyright Act*, *supra* note 16, s. 7.

<sup>110</sup> Kendall Walton, "Categories of Art" (1970) 79 *Philosophical Review* 344 at 357, 358. In Walton's normative theory, he argues that the categorisation of works of art must take into account the following: (1) the presence in the work of a relatively large number of features standard with respect to the relevant category; (2) the fact that the author of the work intended or expected it to be perceived within the relevant category of work; and (3) the fact that the work is recognised by the society in which it was created as falling within the relevant category.

<sup>111</sup> See also George Dickie, "Defining Art" (1969) 6 *American Philosophical Quarterly* 253 at 254.

<sup>112</sup> Pila, *supra* note 99 at 374.

<sup>113</sup> *Ibid.* at 365.

Although works of artistic craftsmanship in law are a unique category of copyright work by reason of their essential artistic quality, as opposed to sculptures which do not have this explicit statutory requirement, the inquiry in (3) acts as a proxy for a pure aesthetic judgement which reduces the subjectivity of judges in determining what is good art versus bad art. Where the answers to the first two questions are in the positive and the answer to the third question is in the negative, a work will qualify as ‘a work of artistic craftsmanship’.

#### V. ARTISTIC PURPOSE AND THE DIFFERENT ART FORMS

From the case law on sculptures and works of artistic craftsmanship, it is clear that artistic purpose rather than aesthetic judgment is likely to have a more prominent role in the evaluative criteria used by courts in the definition of ‘artistic works’. As such, the nature of the inquiry for artistic purpose will be considered in greater detail.

The High Court in *Lucasfilm* (H.C.) recognised that the artist must have intended for the work to “have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well”.<sup>114</sup> It should be noted that the High Court of Australia was more sceptical of an over-reliance on the testimonies of artists in respect of their subjective intent.<sup>115</sup> Perhaps the evidence of agents of the art world—based on the IT and HD theories—may then have high probative value in this regard. Where an artist deliberately creates a work of visual appeal and has a clear artistic idea or message behind the work, the inquiry for artistic purpose is easily satisfied. However, the inquiry for artistic purpose is less apparent in non-propositional art and accidental or unintentional art. As such, the court’s possible approach towards the artistic purpose inquiry in cases of non-propositional art and accidental/unintentional art will be examined in turn.

##### A. Non-propositional Art

Andy Warhol’s *Campbell’s Soup* paintings were inspired by the iconic presence of tinned food in America, but Warhol left its viewers and critics to personally interpret these paintings in a way they perceived.<sup>116</sup> Randall Bezanson has termed such contemporary artworks that “conveys no single message” as non-propositional art.<sup>117</sup> Similarly, as highlighted by Nicholas De Oliveira, installation art is often non-propositional and encourages the audience to “choose its own interpretation without that of the artist”.<sup>118</sup> Although non-propositional works have no singular meaning or message as intended by the artist, these works can nevertheless still be enjoyed purely for its visual appeal or provoke a range of emotional responses.

<sup>114</sup> *Lucasfilm* (H.C.), *supra* note 67 at para. 118.

<sup>115</sup> *Burge*, *supra* note 96 at para. 64: “intentions may fail to be realised. Further, just as few alleged inventors are heard to deny the presence of an inventive step on their part, so, it may be expected, will few alleged authors of works of artistic craftsmanship be heard readily to admit the absence of any necessary aesthetic element in their endeavours”.

<sup>116</sup> Justin Spring, *Andy Warhol: Fame and Misfortune* (Texas: McNay Art Museum, 2012) at 14.

<sup>117</sup> Randall P. Bezanson, “Art and the Constitution” (2008) 93 Iowa L. Rev. 1593 at 1596. See also Randall P. Bezanson, *Art and Freedom of Speech* (Chicago: University of Illinois Press, 2009) at 280.

<sup>118</sup> De Oliveira, Oxley & Petry, *supra* note 3 at 16.

In fact, as Bezanson argues, the “aesthetic or emotional qualities of the [non-propositional work]... evoke imagination and re-representation” and as such, yield “a message or meaning that is the creation... of the viewer’s independent construction”.<sup>119</sup> Non-propositional art is not devoid of artistic purpose by virtue of its lack of an *ex ante* artist-intended meaning. Conversely, the artistic purpose of the non-propositional artwork is to solicit a myriad of interpretations from its viewers and this artistic purpose has been judicially recognised. As highlighted by Robert Kasunic<sup>120</sup> and Peter Jaszi,<sup>121</sup> the artistic purpose of non-propositional art has been given a nod by the Second Circuit Court of Appeals in the U.S. in *Blanch v. Koons* where the court recognised that Koons’ artwork, *Niagra*, although non-propositional, had the artistic purpose of soliciting an interpretation from its viewer.<sup>122</sup> The U.S. Supreme Court has consistently affirmed the importance of protecting artistic expression under the First Amendment,<sup>123</sup> preferring to sidestep the debate on the value or worth of different kinds of artistic expression:<sup>124</sup>

[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a “particularized message”... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.

As one of the present authors has observed, such art yields “a message or meaning that is the creation not of the artist’s propositional intention but the viewer’s independent construction”.<sup>125</sup> Referring to Warhol’s *Campbell’s Soup* paintings and Prince’s *Marlboro Man* print series, Benzanson argues that “their ‘message’ is their value as an instrument that unleashes the viewer’s own, perhaps idiosyncratic, leap of imagination and perception”.<sup>126</sup> Viewed in this light, non-propositional art that does not convey a particular message is likely to be considered to possess an artistic purpose that weighs in favour of the work being considered an artistic work capable of attracting copyright protection.

### B. *Accidental or Unintentional Art*

Accidental or unintentional art is created in the absence of any artistic intent at its point of production but is subsequently adopted or modified to serve an artistic purpose. This raises questions on whether to qualify such art as ‘artistic work’ since

<sup>119</sup> Bezanson, “Art and the Constitution”, *supra* note 117 at 1596.

<sup>120</sup> Robert Kasunic, “The Problem of Meaning in Non-Discursive Expression” (2010) 57 *Journal of the Copyright Society of the U.S.A.* 399 at 421.

<sup>121</sup> Peter Jaszi, “Is There Such a Thing As Postmodern Copyright?” (2009) 12 *Tulane Journal of Technology & Intellectual Property* 105 at 116.

<sup>122</sup> 467 F.3d 244 at 252 (2nd Cir. 2006). With regard to the purpose of *Niagra*, Jeff Koons testified that: “I want the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives”.

<sup>123</sup> *E.g.*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 at 569 (1995) [*Hurley*]; *Finley*, *supra* note 41 at 602, 603.

<sup>124</sup> *Hurley*, *ibid.* at 569.

<sup>125</sup> David Tan, “What Do Judges Know About Contemporary Art?: Richard Prince and Reimagining the Fair Use Test in Copyright Law” (2011) 16 *Media & Arts Law Review* 381 at 394.

<sup>126</sup> Bezanson, *Art and Freedom of Speech*, *supra* note 117 at 285.



under the Singapore *Copyright Act*, artistic purpose must have a causative role in the initial creation of a work. In the U.S. Second Circuit Court of Appeals, Frank J. in *Alfred Bell & Co Ltd v. Catalda Fine Arts, Inc* recognised that certain acts of creation may be unintentional and may be a result of “bad eyesight or defective musculature, or a shock caused by a clap of thunder”.<sup>127</sup> Frank J. held that despite the artist having no initial intention of creating an artistic work, the act of will to “adopt” the produced work for an artistic purpose by the artist on hindsight was sufficient to satisfy the requirement of causation in the creation of the work.<sup>128</sup> From another perspective, Alan Durham suggests that, with regard to accidental or unintentional art, “[i]n terms of physical causation, if not intellectual planning, the artist could view the inadvertent product of his efforts as ‘created’ rather than ‘discovered’”.<sup>129</sup> These observations are likely to be sufficiently persuasive to Singapore courts that an intent for a work to have an artistic purpose at the point of its production is not required, so long as an artistic purpose was present *when* the work was displayed.

#### VI. APPLICATION OF THE PROPOSED TESTS FOR THE PROTECTION OF INSTALLATION ART AS ARTISTIC WORKS

The application of the proposed tests for the classification of ‘sculpture’ and ‘works of artistic craftsmanship’ to three well-known installation art works can illustrate how these formulations may usefully guide the courts in their determination of what constitutes an artistic work under the Singapore *Copyright Act*. Three of the most famous and controversial Turner Prize-nominated and winning works—Damien Hirst’s *Shark*, Martin Creed’s *The Lights* and Tracey Emin’s *My Bed*—have been chosen as they each possess an unusual feature that characterises installation works of that genre.

##### A. Damien Hirst’s Shark

Hirst’s *Shark* is a paradigmatic example of how a natural or ready-made object, when displayed within an artificial construction as an installation artwork, can qualify as a ‘sculpture’ or ‘a work of artistic craftsmanship’ under the *Copyright Act*.

Falconer J. in *Breville* highlighted that the plain ordinary meaning of a sculpture is the “[a]rt of forming representations of objects etc or abstract designs in the round or in relief by chiselling stone, carving wood, modelling clay, casting metal, or similar processes”.<sup>130</sup> Although the shark *per se* might not be a sculpture, its incorporation into the steel and glass container designed and constructed by Hirst, with the calculated suspension of the shark in formaldehyde solution, falls within the meaning of forming representations of an object by casting metal and similar processes. The entire structure was also produced with an artistic purpose. Damien Hirst envisaged the installation to have a visual appeal which would be enjoyed by its audience as

<sup>127</sup> 191 F.2d 99 at 105 (2nd Cir. 1951).

<sup>128</sup> *Ibid.*

<sup>129</sup> Alan L. Durham, “The Random Muse: Authorship and Indeterminacy” (2002) 44 Wm. & Mary L. Rev. 569 at 588.

<sup>130</sup> *Breville*, *supra* note 65 at 94.

the shark in a gallery setting was “real enough to frighten you”<sup>131</sup> and yet had an element where “fragility was encased” in the container.<sup>132</sup> With a positive answer to both inquiries in the proposed test for a sculpture, Hirst’s *Shark* conclusively falls within the definition of a sculpture under the *Copyright Act*.

Admittedly, a work of artistic craftsmanship was attributed different meanings by the various judges in *Hensher*. Despite these varying definitions, the common ground is that a work of craftsmanship must involve some degree of production by hand that is guided by special training or skill and implies a manifestation of pride in “sound workmanship”.<sup>133</sup> The steel and glass container in Hirst’s *Shark* was constructed by hand and to precise specifications, requiring specific artistic and construction skills.<sup>134</sup> Furthermore, the shark was preserved in a particular manner to evoke a feeling of fear in the audience; such a preservation technique requires the exercise of specific skill and knowledge in the art of preservation.<sup>135</sup> In this regard, Hirst’s work is arguably a work of craftsmanship and satisfies the first limb of the test for artistic craftsmanship. As highlighted above, Hirst’s *Shark* was also created with an artistic purpose. Notably, *Shark* has been recognised for its artistic merit by the Turner committee and was subsequently purchased by Steve Cohen for US\$12 million. Under all three AD, IT and HD theories of art, *Shark* would no doubt qualify as ‘art’ even though its aesthetic merit might polarise critics and audiences. It is therefore, highly unlikely that Hirst has manifestly and grossly failed in the artistic purpose of the work. Hirst’s work persuasively falls within the definition of a work of artistic craftsmanship under the *Copyright Act*.

#### B. *Martin Creed’s The Lights*

Creed’s *The Lights* is unlikely to qualify as a sculpture as the courts will be reluctant to “stray too far from what would normally be regarded as sculpture”;<sup>136</sup> an empty room with lights going on and off is arguably too far beyond the meaning which a sculpture “has to ordinary members of the public”.<sup>137</sup>

In contrast, *The Lights*, viewed as an assemblage of objects, is more likely to fall within the definition of ‘a work of artistic craftsmanship’. Mann J. in *Shelley Films Ltd v. Rex Features Ltd* held that copyright can possibly subsist in a film set as a work of artistic craftsmanship and “it cannot matter that it happens to be made up of numerous, perhaps many thousands, of components in some of which, when considered separately, copyright might not exist, provided the effect and intent overall is artistic”.<sup>138</sup> In *Creation Records Ltd v. News Group Newspapers Ltd*, it was contested that an arrangement of objects around a pool, including a white

<sup>131</sup> Damien Hirst & Gordon Burn, *On the Way to Work* (London: Faber & Faber, 2001) at 19.

<sup>132</sup> Elizabeth Manchester, “Damien Hirst: Mother and Child Divided, exhibition copy 2007 (original 1993)”, online: Tate <<http://www.tate.org.uk/art/artworks/hirst-mother-and-child-divided-t12751/text-summary>>.

<sup>133</sup> *Hensher*, *supra* note 93 at 91.

<sup>134</sup> See Hirst, *supra* note 11.

<sup>135</sup> Thompson, *supra* note 6 at 63.

<sup>136</sup> *Lucasfilm* (H.C.), *supra* note 67 at para. 118.

<sup>137</sup> *Metix*, *supra* note 64 at 721, 722.

<sup>138</sup> [1994] E.M.L.R. 134 at 143 [*Shelley Films*].

Rolls-Royce and the positions of the members of the band Oasis, for the purpose of an album cover constituted a sculpture or a work of artistic craftsmanship under the *CDPA*.<sup>139</sup> In this regard, Lloyd J. reaffirmed the proposition put forward by Mann J. in *Shelley Films*.<sup>140</sup>

In *The Lights*, the façade of the room is intentionally fashioned through the deliberate selection, placement and installation of lights in the room. In the words of Lloyd J., the façade created in Creed's work is the "result of the exercise of... craftsmanship"<sup>141</sup> which also presupposes "special training, skill and knowledge for its production."<sup>142</sup> Significantly, Lord Simon also recognised that works of craftsmanship "cannot be confined to handicraft".<sup>143</sup> *The Lights* will thus satisfy the first limb of the test. Notably, Creed's work is a non-propositional installation. In an interview with BBC, Martin Creed, when asked what the work meant, answered, "I can't explain it. The lights go on and off. I like it, it's full of life. I don't know what other people think of it".<sup>144</sup> Such a response is typical of many contemporary artists, who may have had an artistic purpose or aesthetic intent when they created a particular work, but would steadfastly refuse to express it and prefer to leave it to the critics and audiences to interpret the work. In *Cariou*, the artist Richard Prince refused to give testimony on his intended message when creating the allegedly infringing works, but the Second Circuit, in finding that 20 of the 25 works were transformative fair use, held that "[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work".<sup>145</sup> It is likely the court here will similarly recognise that the artistic purpose of Creed's work is to solicit an independent interpretation from its audience that is unfettered by a preconceived notion that might be influenced by the artist explicitly expressing his aesthetic intent. Lastly, where Creed's work has received public affirmation of its artistic worth and particularly received the Turner Prize, it is unlikely that it can be evidentially shown that Creed has grossly failed in that artistic purpose. Creed's work arguably satisfies all three limbs of the proposed test and is likely to qualify as a work of artistic craftsmanship under the *Copyright Act*.

### C. Tracey Emin's My Bed

*My Bed*, in contrast to Creed's *The Lights*, illustrates that the assemblage of objects in certain installation works can fall within the definition of 'sculpture'. The Court in *Metix* highlighted that "a sculpture is a three-dimensional work made by an artist's hand"<sup>146</sup> and *My Bed* comes squarely within this definition since the individual objects were selectively arranged by Emin resulting in an assemblage made by the artist with her own hands. Falconer J. in *Breville* highlighted that, in plain ordinary

<sup>139</sup> [1997] E.M.L.R. 444 [*Creation Records*].

<sup>140</sup> *Ibid.* at 445. See also Stokes, "Categorising Art In Copyright Law", *supra* note 61 at 182.

<sup>141</sup> *Creation Records*, *supra* note 139 at 445.

<sup>142</sup> *Hensher*, *supra* note 93 at 91.

<sup>143</sup> *Ibid.*

<sup>144</sup> "Critics Split over Turner Winner" (10 December 2001), online: BBC News <<http://news.bbc.co.uk/2/hi/entertainment/1701400.stm>>.

<sup>145</sup> *Cariou*, *supra* note 38 at 707.

<sup>146</sup> *Metix*, *supra* note 64 at 722.

meaning, a sculpture is the “[a]rt of forming representations of objects” and Emin has sought to visually represent and depict her personal bedroom space in *My Bed*.<sup>147</sup> In addition, the assemblage was created with an artistic purpose as Emin intended for *My Bed* to depict a scene that stimulates its viewers by offering multiple “lines of investigative enquiry”.<sup>148</sup> With a positive answer to both inquiries in the test for a sculpture, Emin’s *My Bed* compellingly falls within the definition of ‘sculpture’ under the *Copyright Act*.

In addition, *My Bed* arguably also qualifies as a work of artistic craftsmanship. The assemblage of objects in *My Bed* falls within the ordinary meaning of ‘a work of artistic craftsmanship’ and the meaning to which the words have to ordinary members of the public.<sup>149</sup> Emin’s arrangement and usage of the objects to recreate a scene that conveys “emotional disturbance” with almost “forensic” detail<sup>150</sup> is evident of “special training, skill and knowledge for its production”.<sup>151</sup> Specifically, she crafts the bedsheets in *My Bed* to be “revulsive” in contrast to the characteristic grace and harmony of drapery in art.<sup>152</sup> Furthermore, *My Bed* has received public affirmation of its artistic worth and was nominated for the Turner Prize; it is unlikely it can be evidentially shown that Emin has failed in her artistic purpose. Thus, Emin’s work arguably satisfies all three limbs of the test and is likely to qualify as a work of artistic craftsmanship under the *Copyright Act*.

## VII. OTHER REQUIREMENTS FOR COPYRIGHT SUBSISTENCE

### A. *Artistic Works and the Requirement of Fixation/Reduction to Material Form*

Article 2(2) of the *Berne Convention for the Protection of Literary and Artistic Works* allows for each Member State to decide for itself whether any copyrighted work must have been “fixed in some material form”.<sup>153</sup> Accordingly, s. 16(1) of the Singapore *Copyright Act* provides that literary, dramatic or musical works shall be “reduced to writing or some other material form”.<sup>154</sup> Significantly, this provision makes no reference to artistic works, suggesting that strictly speaking, the requirement of reduction to a material form does not appear to apply to artistic works. But generally, for an artistic work to exist, it often requires inherent fixation, and therefore it may have been unnecessary to stipulate this in the *Copyright Act*. However, this does not hold true for all artistic works, especially for avant-garde installation works that challenge conventional norms. Regardless, some academics contend that the requirement of

---

<sup>147</sup> *Breville*, *supra* note 65 at 94.

<sup>148</sup> *Brown*, *supra* note 14 at 101.

<sup>149</sup> *Creation Records*, *supra* note 139 at 445.

<sup>150</sup> *Brown*, *supra* note 14 at 100.

<sup>151</sup> *Hensher*, *supra* note 93 at 91.

<sup>152</sup> *Brown*, *supra* note 14 at 100.

<sup>153</sup> *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886 (entered into force 5 December 1887) as last revised at Paris on 24 July 1971, 1161 U.N.T.S. 30 (entered into force 15 December 1972), and amended on 28 September 1979, S. Treaty Doc. No. 99-27 (1986), art. 2(2).

<sup>154</sup> *Copyright Act*, *supra* note 16, s. 16(1).

reduction to material form nevertheless applies to artistic works.<sup>155</sup> Courts in the U.K. decisions of *Merchandising Corporation of America, Inc v. Harpbond Ltd*<sup>156</sup> and *J & S Davis (Holdings) Ltd v. Wright Health Group Ltd*,<sup>157</sup> as well as in the Australian case of *Komesaroff v. Mickle*<sup>158</sup> have denied recognising the subsistence of copyright in various artistic works due to a lack of permanence of the subject matter of the work. These developments suggest that judges may nonetheless, apply the requirement of reduction to material form to artistic works. In the U.S., an artistic work must similarly be “fixed in any tangible medium of expression”.<sup>159</sup>

Fixation or reduction can be perceived as a requirement for specification, which is a requirement similar to, but not dependent on, the one made by the idea-expression dichotomy. The requirement of reduction to material form is arguably supported by three key rationales. Firstly, the requirement is needed for evidentiary reasons.<sup>160</sup> It simply is not practicable to sue for infringement of copyright, when the infringed material cannot be presented to the court; the fixation of the work could be used “to prove to the court not only the existence of the plaintiff’s work, but also its exact content.”<sup>161</sup> Secondly, as Yoav Mazeh argues, the requirement of fixation relates to the certainty of third parties; the fixation of a work clarifies the boundaries of that work thereby allowing others to define where the work begins and ends, and so to determine whether they are within its boundaries or outside of them.<sup>162</sup> Thirdly, the requirement ensures that society can be enriched by the work. On this view, copyright law is seen to maintain “a delicate balance between the rights of the author and the rights of society”.<sup>163</sup> Mazeh explains that:<sup>164</sup>

If the purpose of copyright is to restrict potential users from enjoying the work, then it should at least require that the work be fixed in a lasting form, so that at the very minimum, once... the copyright has expired, or even within the term of

<sup>155</sup> See Stokes, *Art and Copyright*, *supra* note 72 at 53, contending that several U.K. and Australian cases have required an artistic work to be reduced to material form; Ng-Loy, *supra* note 17, at para. 6.3.20, arguing that a requirement of reduction to material form is inherent within the definition of ‘artistic work’ itself; Yoav Mazeh, “Modifying Fixation: Why Fixed Works Need to be Archived to Justify the Fixation Requirement” (2009) 8 *Loyola Law & Technology Annual* 109 at 115-116: “One possible explanation for this omission is that artistic works are usually inherently fixed, and thus do not need the Act to require their fixation as a condition to their protection. Artistic works include drawings, photographs, sculptures, and the like”.

<sup>156</sup> [1983] F.S.R. 32 at 45-47 (C.A.) [*Merchandising Corporation of America*]. It was held that no copyright could subsist in cosmetic make-up applied onto the face as a “painting” as the make-up was intended to be removed.

<sup>157</sup> [1988] R.P.C. 403 at 410-412. Whitford J. held that dental models and casts were not sculptures as there were never intended to have “continuing existence”.

<sup>158</sup> [1987] F.L.R. 238 at 245 (Vic. S.C.) [*Komesaroff*]. It was held that a copyright did not subsist in kinetic sand art as there was no “static feature for any length of time” that was identifiable in the work.

<sup>159</sup> See 17 U.S.C. §102(a). See also Mazeh, *supra* note 155 at 113.

<sup>160</sup> Ng-Loy, *supra* note 17 at para. 6.3.16, arguing that the requirement is “evidentiary” in nature; *cf.* William F. Patry, *Copyright Law and Practice* (Washington D.C.: Bureau of National Affairs, 1994), arguing that fixation is needed, not only for the evidence of the contents of the work, but also to the existence of the work.

<sup>161</sup> See Mazeh, *supra* note 155 at 119.

<sup>162</sup> *Ibid.* at 119, 120. See also Wendy J. Gordon, “An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory” (1989) 41 *Stan. L. Rev.* 1343 at 1379.

<sup>163</sup> Mazeh, *ibid.* at 122.

<sup>164</sup> *Ibid.*

copyright—for permitted uses, there will be a fixed copy which the public would be able to use. In this view, the fixation requirement protects the rights of society in the face of the limitations imposed by the rights of the author.

Taking into account the relevant case law and justifications underpinning the reduction requirement, it is likely that the Singapore courts will find that an artistic work must similarly be reduced to material form. Significantly however, as highlighted by Laddie J., “a sculpture made from ice is no less a sculpture because it may melt as soon as the temperature rises” and the requirement does not preclude the copyright protection of all installation artworks which have a “transient existence”.<sup>165</sup> As such, the pertinent question is: what is the degree of permanence required for a work to be considered reduced to material form?<sup>166</sup>

Unfortunately, in this regard, the courts have not clarified the threshold of permanence required. Returning to the rationales of the requirement however, it is clear that minimally, the scope and subject matter of the copyright work must be clearly ascertainable. Furthermore, from *Merchandising Corporation of America* it is clear that the temporary nature of the existence of make-up on a person’s face is insufficient to satisfy the reduction requirement.<sup>167</sup> *Komesaroff* also illustrates that art works which are constantly changing and have no “static aspect”, like sand art, might not satisfy the reduction requirement.<sup>168</sup>

Hirst’s *Shark* clearly satisfies the requirement of reduction to material form. Although *Shark* was moved from gallery to gallery and eventually to Steve Cohen’s place of choice, the work is of continual ‘static’ existence and was never substantially altered. Similarly, Emin’s *My Bed* at the Tate Modern was a work of continual ‘static’ existence in a specific configuration post-assembly and it satisfies the requirement of reduction to material form. Creed’s *The Lights*, however, proves more difficult given the transient nature of the work where the facade of the work changes in five-second intervals with the lights going on and off. In contrast to the sand art in *Komesaroff* where the work was continually changing, *The Lights* is on display for a prolonged period and only alternates between two predictable and discernible states: where the light is switched on, and where the light is switched off. As such, Creed’s work may be said to exhibit two ‘static’ forms, and it persuasively establishes a stronger case for satisfaction of the reduction requirement than the sand art in *Komesaroff*. Regrettably however, given the dearth of judicial clarification on the actual threshold of permanence required, it is impossible to say with certainty that *The Lights* will satisfy the reduction requirement.

It is important to note that the fixation, reduction or permanence requirement will potentially exclude certain installations from copyright protection due to their transient nature, particularly works that are created to dissipate over time. An example is Damien Hirst’s *A Thousand Years*, which consists of a vitrine split in half by a glass wall and a hole in this partition, which allows newly hatched flies from a box in one half to fly into the other where a fly killer hangs above a decaying cow’s head. As such, the remains of the dead flies inside the vitrine accumulate and the cow’s

---

<sup>165</sup> *Metix*, *supra* note 64 at 721.

<sup>166</sup> Ng-Loy, *supra* note 17, at para. 6.3.20.

<sup>167</sup> *Merchandising Corporation of America*, *supra* note 156 at 45-47.

<sup>168</sup> *Komesaroff*, *supra* note 158 at 245.

head slowly decays and dissipates whilst the work is on exhibition. For dissipating and constantly changing works like *A Thousand Years*, as highlighted by King J. in *Komesaroff*, it is difficult to ascertain any “static aspect” of the work despite it being reduced to material form.<sup>169</sup> As such, these works run directly contrary to the reduction requirement that seeks to provide evidentiary certainty and certainty to third parties. In this light, it will prove a monumental task for the artist to argue that his or her dissipating work exhibits the degree of permanence sufficient to satisfy this threshold requirement.

B. *The Originality Requirement and the Problem with the Use of Ready-Mades and Natural Objects in Installation Art*

As copyright subsists only in original works, installations that include the usage of ready-mades or natural objects would *prima facie* fail the requirement of originality.<sup>170</sup> The U.S. courts have long grappled with the problem of determining when a pictorial, graphic, or sculptural feature “can be identified separately from, and (is) capable of existing independently of, the utilitarian aspects of the article”.<sup>171</sup> If the aesthetic element is *conceptually severable* from the utilitarian aspect of the article, then the work may be classified as an ‘artistic work’ capable of attracting copyright protection; if the aesthetic element is *inextricably interwoven* with the utilitarian aspect of the article, then the work is not an artistic one. In *Kieselstein-Cord v. Accessories By Pearl, Inc.*, Oakes J., delivering the majority opinion for the Second Circuit Court of Appeals, referred to world-renowned artist Christo’s work *Running Fence* as an example of today’s ‘conceptual art’ that would satisfy the originality requirement: it “did not contain sculptural features that were physically separable from the utilitarian aspects of the fence, but the whole point of the work was that the artistic aspects of the work were conceptually separable”.<sup>172</sup>

The Singapore *Copyright Act* does not expressly prescribe any definition of “originality”, but the case law suggests that the requirement of originality refers to the form in which the work is expressed and not the ideas or thoughts behind the work.<sup>173</sup> Moreover, the threshold for originality is a low one and does not mean novelty or uniqueness.<sup>174</sup> The U.S. Supreme Court has declared that “the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be”.<sup>175</sup> Finally, where an author has made use of an existing subject matter in creating his work, the work is deemed original if the author had expended sufficient skill, labour or judgment in creating the work and there is some element of “material alteration or embellishment which suffices to

<sup>169</sup> *Ibid.*

<sup>170</sup> See *Copyright Act*, *supra* note 16, s. 27. See also George Wei, *The Law of Copyright in Singapore*, 2nd ed. (Singapore: SNP Editions, 2000) at 1331; *Asia Pacific Publishing*, *supra* note 29.

<sup>171</sup> E.g., *Kieselstein-Cord*, *supra* note 48 at 993, citing 17 U.S.C. §101. See also *Norris Industries, Inc v. International Telephone & Telegraph Corporation*, 696 F.2d 918 at 923 (11th Cir. 1983).

<sup>172</sup> *Kieselstein-Cord*, *ibid.* at 993 [internal citations omitted].

<sup>173</sup> *Flamelite*, *supra* note 21 at paras. 22, 23.

<sup>174</sup> *Asia Pacific Publishing*, *supra* note 29 at para. 38; *Auvi*, *supra* note 21 at paras. 32, 33.

<sup>175</sup> *Feist Publications, Inc v. Rural Telephone Service Company, Inc*, 499 U.S. 340 at 345 (1991) [*Feist*].

make the totality of the work an original work”.<sup>176</sup> An interesting point to note is that the word “original” does not bear its usual dictionary meaning of “first or earliest, fresh and unusual, able to think of or carry out new ideas or concepts”,<sup>177</sup> instead, “original” bears closer meaning to the word “origin”, meaning the “point, source or event from which something develops”.<sup>178</sup> Consequently, the law considers a work sufficiently “original” if it “originates from the author”.<sup>179</sup>

Creed’s *The Lights* consists of ready-made lights and a pre-built room. Although admittedly, Creed did not expend significant labour in the creation of his work, he had minimally exerted notable skill and judgment in production of his work. The lights were deliberately programmed to turn on and off in five-second intervals and the lights were specifically arranged to provide full vision of the room walls when on, but to significantly impair the visibility of the walls when turned off. Furthermore, as Stokes argues, in view of the low threshold of originality, it is likely that most artistic works will satisfy the requirement of originality as they originate from an author who would have expended some effort in the creation of those works.<sup>180</sup> Such a conclusion coheres with the Singapore Court of Appeal’s observations in *Asia Pacific Publishing*.<sup>181</sup>

[W]here someone has expended effort in creating something that has some literary value, it is worthy of protection, irrespective of the precise quantum of intellectual input involved in producing it or the literary merits or novelty of the work product.

The usage of natural objects in installation art, like Hirst’s *Shark*, provides a further policy concern that granting copyright protection over such artistic works confers on the copyright owner a monopoly over an expression that occurs naturally and should not be attributed to an artist. In *Satava v. Lowry*, the U.S. Ninth Circuit held that a lifelike glass-in-glass jellyfish sculpture did not satisfy the requirement of originality as artistic expressions of a jellyfish are “first expressed by nature” and “are the common heritage of humankind”; thus no artist may use copyright law to prevent others from depicting them.<sup>182</sup> Although the U.S. provision on originality is substantially different from that in Singapore, the policy concern of monopolising the expression of natural objects through copyright law is undeniably similarly applicable in Singapore. Significantly, the court in *Satava* clarified that an “artist may, however, protect the original expression he or she contributes to these ideas”.<sup>183</sup> The court recognised that an artist may vary its expression with regard to “the pose, attitude, gesture, muscle structure, facial expression, coat, or texture of animal... the background, lighting, or perspective” and “[s]uch variations, if original, may earn copyright protection”.<sup>184</sup> This proposition is consistent with the position in Singapore whereby if an author uses an existing subject matter in creating his work, his

<sup>176</sup> *Interlego A.G. v. Tyco Industries Inc* [1989] A.C. 217 at 263 (P.C.) [*Interlego*]; *Virtual Map*, *supra* note 21 at para. 13.

<sup>177</sup> *Collins English Dictionary*, 5th ed., s.v. “original”.

<sup>178</sup> *Ibid.*, s.v. “origin”.

<sup>179</sup> Susanna Leong, *Intellectual Property Law of Singapore* (Singapore: Academy Publishing, 2013) at 57.

<sup>180</sup> Stokes, *Art and Copyright*, *supra* note 72 at 52.

<sup>181</sup> *Asia Pacific Publishing*, *supra* note 29 at para. 36.

<sup>182</sup> *Satava v. Lowry*, 323 F.3d 805 at 813 (9th Cir. 2003) [*Satava*].

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*



work is nevertheless original if he had expended sufficient skill, labour or judgment, and there is some element of “material alteration or embellishment which suffices to make the totality of the work an original work”.<sup>185</sup> Despite Hirst’s use of a real shark in his installation, he preserves the shark with formaldehyde to prevent decay and this materially alters the shark. He also removes the shark from its natural environment and places it into a customised container in a gallery setting. These embellishments, together with the material alteration of the shark, make the totality of the work an original one. As such, Hirst’s *Shark* and other natural installations in which the artist expends significant skill, labour or judgement (or intellectual effort) and materially alters or embellishes the work will satisfy the requirement of originality.

Notably, some contemporary installation works utilise both ready-mades and natural objects. Emin’s *My Bed* is one such example in her use of both bedroom furniture and accessories, natural blood and semen in her work. The principles that apply in the use of natural objects will similarly be relevant here. Emin’s *My Bed* satisfies the requirement of originality as there is some element of “material alteration or embellishment which suffices to make the totality of the work an original work”.<sup>186</sup> *My Bed* is particularly representative of a substantial body of installation works that involve the selective arrangement and compilation of a large number of three-dimensional objects. In particular, *My Bed* was deliberately fashioned to present a “dirty physicality” through the arrangement of the bed, its accompanying accessories and a myriad of carefully selected detritus and sexual paraphernalia.<sup>187</sup> Drawing on the HD theory, the resultant assemblage in *My Bed* shares expressive qualities with the works of other prominent artists like Mat Collishaw.<sup>188</sup> From a combined AD and IT theoretical perspective, a commentator argues that with the immense detail in *My Bed*, it is better described as a “well-observed representational painting with overtones of death” in contrast to a “readymade”.<sup>189</sup>

### VIII. CONCLUSION

It is evident that the copyright protection of installation art is consistent with the rationales of Singapore’s copyright regime and its international obligations. For copyright to subsist in an installation, it must be capable of qualifying as an ‘artistic work’ under the *Copyright Act*, and also satisfy the requirements of reduction to material form and originality. An examination of Hirst’s *Shark*, Creed’s *The Lights* and Emin’s *My Bed* has illustrated how some installations will easily satisfy all the above subsistence requirements, and a *per se* rule against recognition of copyright subsistence in installation works that use ready-made or natural objects should be eschewed. As Cheng argues:<sup>190</sup>

Readymade art possesses a singular ability to call our attention to the sublimity of ordinary objects. Accordingly, the philosopher Arthur Danto calls such

---

<sup>185</sup> See above text accompanying note 176.

<sup>186</sup> *Interlego*, *supra* note 176 at 262; *Virtual Map*, *supra* note 21 at para. 13.

<sup>187</sup> Brown, *supra* note 14 at 100, 101.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> Cheng, *supra* note 30 at 134, 135 [internal citations omitted].

art “transfigurations of the commonplace.” By elevating to art-status neglected objects, these works satisfy the “noble instinct for giving the right touch of beauty to common and necessary things.” Equity demands that Duchamp, who originated the class of readymade artworks, and other postmodern artists, should not be denied the benefit of copyright protection.

Significantly, the case law has shown that the artistic purpose of a work is likely to have a more prominent role in the evaluative criteria used by courts for the classification of ‘artistic works’. Nonetheless, non-propositional installations are not prejudiced in the inquiry for artistic purpose as courts are likely to recognise that the artistic purpose of a non-propositional installation is to solicit a personal interpretation from its viewer. Moreover, the willingness of courts, particularly in the U.S., to admit expert evidence from museum curators, art critics and other agents of the art world, would inform judges of the prevailing dominant theories of art—*e.g.*, the AD, IT and HD theories—and greatly assist copyright adjudication.<sup>191</sup>

While this article has focused on the threshold issue of copyright subsistence, it is acknowledged that further studies regarding copyright infringement and the fair dealing defence is necessary to more comprehensively ascertain the scope of protection that copyright law provides for installation artists in Singapore. Courts, when evaluating substantial similarity in the shadow of the idea-expression dichotomy doctrine in copyright infringement claims, will have to more carefully delineate what the copyright in the installation effectively protects and whether certain installation works deserve only “thin copyright protection”.<sup>192</sup> Furthermore, the application of the fair dealing defence to installations with its attendant notion of transformative use would have pivotal implications on the artist’s ability to prevent others from copying his or her work.<sup>193</sup>

---

<sup>191</sup> See Part II above.

<sup>192</sup> *Feist*, *supra* note 175 at 349. See also *George S. Chen Corp v. Cadona International Inc*, 266 Fed. Appx. 523 at 524 (9th Cir. 2008):

Although a combination of unprotectable elements may qualify, [the plaintiff] points to no elements that, considered together, have a sufficient quantum of originality for copyright protection... Accordingly, [the plaintiff] has failed to show the quantum of originality that is required under *Satava* and *Aliotti* for even thin protection.

<sup>193</sup> See *e.g.*, David Tan, “The Transformative Use Doctrine and Fair Dealing in Singapore: Understanding the ‘Purpose and Character’ of Appropriation Art” (2012) 24 Sing. Ac. L.J. 832.