UNAVOIDABLE AESTHETIC JUDGMENTS IN COPYRIGHT LAW

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Aesthetic judgments are "dangerous undertakings" for courts, but they are unavoidable in copyright law. In theory, copyright does not distinguish between works on the basis of aesthetic values or merit (or lack thereof), and courts often go to great lengths to putatively avoid making artistic judgments. In practice, however, implicit aesthetic criteria are deeply embedded throughout copyright case law. The questions "what is art" and "how should it be interpreted?" are inextricably linked to the questions "what does copyright protect?" and "what is misappropriation?"

Though courts rarely (if ever) claim an explicit aesthetic viewpoint in their decisions, the judicial logic used in copyright cases closely mirrors three major aesthetic theories: formalism, intentionalism, and institutionalism. Formalism assesses the physical configuration of a work irrespective of artistic intent. Conversely, intentionalism de-emphasizes physical similarities between works and instead looks for interpretative guidance in an artist's behavior and professed objectives. Finally, institutionalist theory appraises artwork not on the basis of how they look or even what an artist intends, but on how a work is understood in the context of a specific cultural tradition—i.e., how it is treated by members of an "artworld."

Unfortunately for courts, these theories are largely incompatible. Furthermore, none are sufficiently expansive to cover the variety of artistic practices contained within a single tradition, let alone the panoply of expressive mediums protected by copyright law. As a result, doctrinal inconsistencies abound (both inter- and intra-circuit), and the case law largely fails to provide clear guidance as to the scope of protection—and risk of liability— associated with different artistic practices.

This Article examines how courts have applied aesthetic theories to resolve doctrinal issues concerning joint authorship, conceptual separability, substantial similarity, and statutory fair use. Based on this

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analysis, this Article argues that courts should adopt a uniform approach to aesthetic judgments based upon the perspective of a hypothetical "sophisticated viewer" (roughly analogous to a "person having ordinary skill in the art" in patent law) capable of situating an expressive work in a specific artistic context and theoretical discourse.