REPUBLIC OF TURKEY

ANKARA UNIVERSITY

GRADUATE SCHOOL OF SOCIAL SCIENCES

DEPARTMENT OF INTELLECTUAL PROPERTY RIGHTS, TECHNOLOGY POLICIES AND INNOVATION MANAGEMENT

CONTEMPORARY ART AND ITS PROTECTION IN THE SCOPE OF COPYRIGHT LAW

Master's Thesis

Berra AKTAN

Ankara, 2022

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Thesis Jury Members

1. Assist. Prof. Dr. Zehra ÖZKAN ÜNER
2. Assist. Prof. Dr. Selin ÖZDEN MERHACI
3. Assist. Prof. Dr. Özge ÖZSOY

Date of the Thesis Examination

30.05.2022

DECLARATION

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To the Directorate of Graduate School of Social Sciences,

I hereby declare that all information in my master's thesis titled "Contemporary Art and Its Protection in the Scope of Copyright Law" (Ankara, 2022)" which has been prepared under the supervision of Assist. Prof. Dr. Zehra ÖZKAN ÜNER has been gathered and submitted in compliance with academic rules and ethical conduct principles and the data obtained from other sources have been duly indicated both in the text and references. I also declare that I have acted according to scientific research and ethical rules during the study process and if it is proven otherwise, I will accept all legal consequences.

Date: …/…/……

Berra AKTAN

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LIST OF ABBREVIATIONS

3D : Three-Dimensional

AI : Artificial Intelligence

BATIDER : Journal of Banking and Commercial Law

CJEU : The Court of Justice of the European Union

ed. : editor, edition

EU : The European Union

GRUR : Journal of European and International IP Law

H.R. : House Report

InfoSoc : Directive 2001/29/EC of the European Parliament and of the Council

IP : Intellectual Property

IPC : French Intellectual Property Code

no. : number, issue

p. : page

pp. : pages

Rep. : Report

RIDA : Revue Internationale Du Droit D'auteur

SSRN : Social Science Research Network

TRIPS : Agreement on Trade-Related Aspects of Intellectual Property Rights

U.S. : The United States

UCC : Universal Copyright Convention

UDHR : Universal Declaration of Human Rights

USPTO : United States Patent and Trademark Office

UNCTAD : United Nations Conference on Trade and Development

VARA : Visual Artists Rights Act of 1990

vol. : volume

WIPO **:** World Intellectual Property Organization

WTO **:** World Trade Organization

WWI **:** World War I

WWII **:** World War II

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INTRODUCTION

Art is as old as humanity itself. Cave paintings from prehistoric times might be considered as the first instances of art. The earliest cave art[1] is at least 45.000 years old and this shows us that art itself is indispensable for humanity and has always been an essential part of living. However, when we compare Neanderthals[2] with modern humans, we see a whale of a difference, but we see that the love of art is continuous. Of course, art itself has changed too and has evolved parallelly with humanity. As time passes, both people and the world in which they live have changed. Certainly, art has followed these changes, and one might say 'art even leads these changes' in the world with its unique, impressive, and sometimes rebellious nature.

However, the law is one of the evolving areas which is related to humanities and one can see that as civilizations developed, they establish their laws to reach the needs of the newly developed and then evolved society. Ancient Egyptian laws are dating as far back as 3000 BC[3] and the oldest written law code known to us is over 4000 years old[4]. When comparing the ancient laws with today's laws, one can see that some articles might look familiar but still they there are lots of differences and additions. As civilizations developed, the need for new laws arose and because of that, some law areas such as

[1] Agence France-Presse, "World's 'oldest Known Cave Painting' Found in Indonesia," The Guardian, January 13, 2021, accessed November 23, 2021, https://www.theguardian.com/science/2021/jan/13/worlds-oldest-known-cave-painting-found-in-indonesia

[2] *"a type of human being who used stone tools and lived in Europe during the early period of human history"*, Neanderthal Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com, accessed November 23, 2021, https://www.oxfordlearnersdictionaries.com/definition/english/neanderthal_1)

[3] Khushi Paliwal, *Juris Prudentia: An Anthology On Human Rights, Law And Society In India* (Where India Writes Publication, 2021), p. 86.

[4] Samuel Noah Kramer. "The Oldest Laws." *Scientific American* 188, no.1, (1953), p. 27.

corporate law, competition law, and information technology law ensued to secure these needs.

Apart from those, art always has a unique place in life and its first instances are even older than the first written law known to us. But, just like every other law area, art law must also evolve to secure today's needs. Especially, when we think about contemporary art 'the art of today, we see that today's artworks are whole another thing from the ancient animal paintings, and the workplace is not a cave as the art material is not 'only' a cave wall. Of course, as time passes, new laws are established and with the help of international organizations such as World Intellectual Property Organization (hereinafter "WIPO"), the protection of intellectual property rights has become much more important. As art becomes more popular day by day, the need for protection of the art and the artist became crucial. For this reason, bundle of international and national conventions established to protect artists rights.

But, in this contemporary age that we live in, it is like time passes even faster than before. Due to globalization with the digital era, the contemporary age and its artworks are moving faster than expected. Contemporary artworks have a huge range of forms with a variety of definitions. As I mentioned, laws subsist and evolve with society, and in this 'contemporary' era, today's art society is a far cry from yesterday's.

As far as I am concerned, post-modernism subverts both the traditional definition of art and norms that define copyright protection, it is getting harder to apply copyright law to the protection of contemporary artworks. Copyrights protect the expression, not the idea itself but, artistic expression is no longer 'the essence of the art'; moreover, now it is serving the 'artistic idea' considering contemporary artworks. Therefore, many forms of

contemporary art are endangered as copyright law does not provide sufficient protection for them.[5] Over and above, the definition for 'contemporary art' is even not certain, hence; it cannot be easy to provide 'legal certainty[6]. Even more, "like our contemporary world, today's art is not fixed but always shifting and growing. Contemporary art articulates our present"[7]

So, the question that will be examined in this thesis, is that "are today's copyright laws sufficient to protect the today's art, or do they still live in the past?" I will discuss problems of copyright protection for contemporary art with the help of examples of contemporary artworks that agitate the classical copyright protection principles in the scope of U.S., EU and Turkish Laws. Firstly, in the first part, I will try to explain "what contemporary art is" and for this purpose, I will briefly mention its forms, principles, and philosophy. After this, in the second part, I will explain the copyright law and the work protected with its relationship with artistic creativity. Lastly, in the third part, I will try to explain the protection of contemporary artworks in the scope of copyright protection and the problems related to it. Finally, I will try to find an answer to a question: Well, is the fixed copyright law of the contemporary world, sufficient to protect the art of today? Does the law catch with the speed of non-stop shifting contemporary art and competent to articulate our present? It appears not to be.

[5] Steven Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art," *Loyola of Los Angeles Entertainment Law Review* 14, no. 2 (1994), p. 281.
[6] *"As a general principle of European legal systems, legal certainty "requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail……. A legal system without a modicum of legal certainty is scarcely worthy of the name."* James R. Maxeiner, "Some Realism About Legal Certainty in the Globalization of the Rule of Law*" Houston Journal of International Law* 31, no. 1 (2008), p. 30-32.
[7] Kyung An and Jessica Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World* (NY, NY: Thames and Hudson, 2020), p. 11.

CHAPTER I

CONTEMPORARY ART AND LEGAL PROTECTION

"The idea is not to live forever; it is to create something that will."
Andy Warhol

I. CONCEPT AND HISTORY OF CONTEMPORARY ART

A. CONTEMPORARY ART: A BRIEF INTRODUCTION

Contemporary art can be defined as "the art of today" as it is produced by the artists who live today. It is described as "The term contemporary art is loosely used to refer to art of the present day and of the relatively recent past, of an innovatory or avant-garde nature"[8] by one of the world's most famous contemporary art museums, Tate Modern. But what is it exactly? The answer might be assorted and complex which is why contemporary art is controversial. It is streets ahead of the art which we called "art" traditionally and it has multiple forms that are sometimes hard to define and maybe that's why there are many debates about contemporary art.[9] Actually, there are seven classical forms of art that meet the 'traditionally expected' definition of "the art": Painting, sculpture,

[8] Tate, "Contemporary Art – Art Term," Tate, January 01, 1970, accessed November 24, 2021, https://www.tate.org.uk/art/art-terms/c/contemporary-art.
[9] Graham Whitham and Grant Pooke, *Çağdaş Sanatı Anlamak*, trans. Tufan Göbekçin (İstanbul: Hayalperest Yayınevi, 2018), p. 9

literature, architecture, cinema, music, and theater.[10] One can simply say that "art in any form is an expression or application of human creativity, skill, and imagination."[11] But, the debates that are lasting through the years show that defining art is not that simple. According to George Dickie, "A work of art in the classificatory sense is (1) an arti-fact (2) a set of the aspects of which has had conferred upon it the status of candidate for appreciation by some person or persons acting on behalf of a social institution (the artworld)".[12] But, to me, even this complex definition is felicitous in many aspects, defining the art might not be the right pursuit. Because "everything is art"[13] and as Ad Reinhardt says, "Art is art and everything else is everything else."[14] Actually, the existence of contemporary art might prove this as today, contemporary art has so many forms and even a washing machine can be "artwork". For example, as seen in Figure 1, in artist Fırat Engin's 'Purification',[15] "the washing machine, which indicates prosperity in most of the world as well as the automation of labor, projects a video of the Earth rotating through its window; with the help of the machine's spin cycle, we see a world being cleansed."[16] Also, a red painting which applied with a slight gradient in the mirror is considered a contemporary artwork.[17]

[10] "What Are The 7 Different Forms Of Art?". 2021. *Eden Gallery*. https://www.eden-gallery.com/news/7-different-forms-of-art.
[11] "What Are The 7 Different Forms Of Art?".
[12] George Dickie, *Art And The Aesthetic: An Institutional Analysis* (Ithaca: Cornell University Press, 1974), p. 34.
[13] Noël Carroll, *Theories Of Art Today* (Madison, Wisconsin: University of Wisconsin Press, 2000), p.11
[14] Maria Toledo and Del Junco Manuel Fontan, *Ad Reinhardt: Art Is Art and Everything Else Is Everything Else* (Madrid: Fundacion Juan March, 2021) cover page.
[15] Fırat Engin, Purification, 2011, Banu - Hakan Çarmıklı Collection, OMM, Eskişehir)
[16] From the blurb of the artwork 'Purification (2011)' from the exhibition "At the End of the Day" on 'Odunpazarı Modern Museum'. See further information: https://omm.art/en/exhibition/at-the-end-of-the-day
[17] *"Featured in Western painting since the Renaissance and approached by modernists as a literal self-reflexive device, the mirror was used in American Minimalist sculpture of the 1960s to trigger a new sort of perceptual self-presence. For Richter, making reverse-pigmented mirrors became a way to quietly challenge the avant-garde monochrome as well as to explore a counterpoint to the gestural, vivid exuberance of his own painting.".* Artist himself declares: *"In the case of the colored mirrors, the result was a kind of cross between a monochrome painting and a mirror, a 'Neither/Nor'—which is what I like about it."* Gerhard Richter, *Mirror, Blood Red,* 1991, Private Collection, The MET, in *Metmuseum.org*, accessed November 25, 2021, https://www.metmuseum.org/art/collection/search/816065)

Figure 1 (Left) 'Purification', 2011, Fırat Engin, Photo taken by Berra Aktan on 23.09.2021.

Figure 2 (Right) 'Mirror, Blood Red' 1991, Gerard Richter, © Gerhard Richter.

I must mention that "contemporary art is often about ideas and concerns, rather than solely the aesthetic (the look of the work)"[18] and "contemporary artists use whatever they think illustrates their idea most appropriately"[19]. Hence, contemporary art is not limited to the classical seven forms of art. Painting, sculpture, digital materials; pixels, video, live performance, light, sound, installation, and literature can be cited as examples.

So, coming back to the question: What is contemporary art? Maybe, one can consider that the question itself is unnecessary/wrong. Aesthetician Nelson Goodman indicates that asking "When is art?" might be the right question and asking the question "What is art?" should be replaced.[20] When considering the variety of the forms of contemporary art and its 'hard to define' nature; contemporary art "it seems, can literally be, as one recent commentator suggests, anything, anywhere."[21]

[18] *What Is Contemporary Art?* (Gateshead, UK: Baltic) p. 2, accessed November 25, 2021, https://baltic.art/uploads/Question_Kit_Cards.pdf
[19] *What Is Contemporary Art?*, p. 2.
[20] Nelson Goodman, *Ways of Worldmaking* (Hassocks: Harvester Press, 1978), p. 66-67.
[21] Jonathan Harris, *The Global Contemporary Art World*, 1st edition (Wiley Blackwell, 2017) p. 8.

But how can we distinguish contemporary art from an ordinary object? Contemporary artworks are that controversial that artist Joan Geary once heard someone saying, "My five-year-old could do that."[22] Maybe that is because of the rebellious nature of contemporary art. Some people still expect art in the traditional forms although the art that they are used to might be dead and now we are living in the new contemporary era of art. People might not understand these artworks because "the art of the ideas can be more difficult to appraise than art that directly imitates the world, it is often easily dismissed as nothing more than the equivalent of the untutored efforts of children. For so long, appreciating art was simple: the viewer looked at it, recognized and understood it, and marveled at the skill of the hand that created it."[23] Yet, contemporary artworks sometimes contain no obvious skills, sometimes it might be an 'a slash of a knife across a canvas' or 'a big black bin bag' and even more, 'an unmade bed'. Still, they have multilayered motives and in deep down, complex philosophies. "Each entry discusses artistic approaches and implications thus drawing attention to the sophistication and often complex endeavors behind the work."[24]

For instance, even though 'a slash of a knife across a canvas'[25] looks easy and childish, because with one decisive slash, the artist aims "to explore underlying notions of space and infinity"[26] and 'a black bin bag'[27] actually is not a bag full of trash, the artist "intended to remind viewers of their wasteful, consumerist lives, as well as highlighting concept of

[22]"*During a recent visit to the Modern Wing of the Art Institute of Chicago, I once again witnessed a person viewing an abstract painting who exclaimed with derision, 'My five year old could do that.'*" Joan Geary Studio, "Abstraction: My Five Year Old Could Do That....," Joan Geary, September 05, 2016, accessed November 25, 2021, http://www.joangearystudio.com/journal/abstraction-five-year-old/
[23] Susie Hodge, *Why Your Five Year Old Could Not Have Done That: Modern Art Explained* (London: Thames & Hudson, 2012), p. 8.
[24] Hodge, *Why Your Five Year Old Could Not Have Done That: Modern Art Explained*, p. 9.
[25] Lucio Fontana, *Spatial Concept 'Waiting'*. 1960. Tate, TATE, Tate Museum. In *Tate.org*. Accessed November 25, 2021. https://www.tate.org.uk/art/artworks/fontana-spatial-concept-waiting-t00694.
[26] Hodge, *Why Your Five Year Old Could Not Have Done That: Modern Art Explained*, p. 115.
[27] Gavin Turk, TRASH, 2000, in Gavin Turk, accessed November 25, 2021, http://gavinturk.com/artworks/image/1407/)

ownership, creativity, and worth."[28] Also, an 'unmade bed'[29] aims to "express personal trauma as well as anxiety and powerlessness."[30] That is why a five-year-old could not have done these precious artworks.

Figure 3 (Left) "Spatial Concept 'Waiting', 1960, Lucio Fontana, ©Fondazione Lucio Fontana, Milan.

Figure 4 (Middle) "Bag", 2000, Gavin Turk, © Gavin Turk.

Figure 5 (Right) 'My Bed' Tracey Emin, 1998, Photo taken by © Shannon Connellan on 29.05.2014.

Art is not about just creating something. It shouldn't be confused with craft. The craft requires skilled workers to produce a functioning item to trade it and has no emotion involved whereas art is a form of work that expresses emotions and expressions. Even though crafts have aesthetic and creative value, these are not enough to consider crafts as artworks. "An artwork is a proposition. It is an invitation to view something as art, as more than the sum of its parts."[31] Even more, as E. H. Gombrich expresses "there really is no such thing as art, there are only artists."[32]

[28] Hodge, *Why Your Five Year Old Could Not Have Done That: Modern Art Explained*, p. 132.
[29] Tracey Emin, My Bed, 1998, The Duerckheim Collection 2015, Munch Museum, in TATE, accessed November 25, 2021, https://www.tate.org.uk/art/artworks/emin-my-bed-l03662
[30] Hodge, *Why Your Five Year Old Could Not Have Done That: Modern Art Explained*, p. 130.
[31] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 27.
[32] Metropolitan Museum of Art, "E. H. Gombrich, Press Statement on The Story of Art, Metropolitan Museum of Art, New York, 22nd September, 1995.," news release, accessed November 25, 2021, https://gombricharchive.files.wordpress.com/2011/04/showdoc68.pdf

However, as explained above, contemporary artworks are hard to 'define' hence; understanding them are not easy considering their definition. Still, mentioning their history and improvement are worthwhile to comprehend contemporary artworks completely.

B. HISTORY AND IMPROVEMENT OF CONTEMPORARY ART

From ancient art to contemporary art, art has always been evolving as time passes and society changes. After such important phases of art such as medieval art, renaissance, baroque and modern art; finally, the time of 'contemporary art' has come. It contains artworks that has been produced in the late 20th and early 21st centuries. Yet, the exact beginning time of contemporary art is not certain, but most people consider the '70s as the beginning of that era[33] whereas some consider the late '60s.[34] and even '50s.

Actually, it is commonly associated with a started point which is the end of World War II. After World War II, the Cold War, and globalization - thanks to the spread of the World Wide Web- everything has changed. Nations, borders, the point of view towards human rights – especially women and children rights-, political regimes, the importance of embracing diversity, and the importance level of equality were changed dramatically and these effects art as well as art breaths among humans. One can argue that "artists of all eras are products of their time and culture; the changing conditions of their surroundings have been instrumental in pushing art to become what it is today"[35] Accordingly, even though, contemporary art era is considered to begin in the '70s; to

[33] Esaak, Shelley. "An Art History Timeline From Ancient to Contemporary Art." ThoughtCo. accessed November 25, 2021. https://www.thoughtco.com/art-history-timeline-183476
[34] Kelly Richman-Abdou et al., "What Is Contemporary Art? An In-Depth Look at the Modern-Day Movement," My Modern Met, May 18, 2021, accessed November 29, 2021, https://mymodernmet.com/what-is-contemporary-art-definition/
[35] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 15.

understand its history one might first understand its forerunner'; 'the modern art movement's effects on contemporary art as contemporary art has highly influenced by it. Difference between the two art eras will be briefly explained later; but now I want to mention the historical timeline that prepared the conditions for the improvement of contemporary art.

The 1930s might the first time that the notion of 'contemporary' appeared with the beginning of 'modern art'[36] Modern art has many different movements and most knowns of these might considered as futurism, cubism, abstract expressionism, pop art. After WWII., world was in a deep trauma and very first reflections of this were Lucio Fontana's 'Manifesto Blanco' in 1946 and Japanese Gutai artist's radical performances and installations artworks using everyday objects and simple actions such as "rolling naked in a pile of mud" in the 1950s.[37] Modern art was born when artists start to revolt against traditional art norms of the society that they left behind with the past. After this revolt and the debates arised from that, there had been 'style' burst in 1960s which shows that 'artworks' do not have to look special, different and different from real objects thanks to nouveaux realists and pop art.[38] After that, this meant that the meaning of the art can not been taught by examples; after this time, everything has been able to be an artwork visually and in order to explore the art, one must back to the philosophy.[39]

In 1964, when Andy Warhol introduced 'Brillo Boxes', Warhol's artwork leads confusion and heated ongoing debates more than ever. The artwork was nothing more than "the Brillo Boxes in the supermarket" for many people and it leads the question about

[36] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 18.
[37] Terry Smith, "The State of Art History: Contemporary Art." *The Art Bulletin* 92, no. 4 (2010),, p. 372.
[38] Arthur C. Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, trans. Zeynep C. Demirsü, 3rd edition (İstanbul: Ayrıntı, 2010), p. 36.
[39] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 37.

identifying art[40] and distinguishing the artwork from regular objects. On the other hand, Brillo Boxes also "fulfill the idea that art should imitate life" and as the artist made the boxes more than one "his can also be considered mass-produced consumer goods."[41]As Warhol Museum expresses, Warhol explained that:

> "he 'wanted something ordinary,' and it was this mundane, commercial subject matter that infuriated the critics. The perfectly blank 'machine-made' look of Warhol's boxes contrasted sharply with the gestural brushstrokes of abstract expressionist paintings."[42]

Figure 6 *Brillo Soap Pads Box, Andy Warhol, 1964.*

The Andy Warhol Museum, Pittsburgh; Founding Collection, Contribution The Andy Warhol Foundation for the Visual Arts, Inc.© The Andy Warhol Foundation for the Visual Arts, Inc. 1998.1.706-1998.1.711.

After Warhol's artwork, problems arose such as the determination of Brillo Box's value, how to identify the difference between it and an ordinary brillo box in the store, and how to interpret it. After these debates, art critic and philosopher Arthur C. Danto published his essay "the End of Art"[43] where argued that nature mimesis in art had been shuttered

[40] "Brillo Boxes" Philadelphia Museum of Art, accessed November 27, 2021, https://philamuseum.org/collection/object/89204)
[41] "Brillo Boxes"
[42] "Brillo: Is It Art?" The Andy Warhol Museum, accessed November 28, 2021, https://www.warhol.org/lessons/brillo-is-it-art/
[43] "The End of Art," published in "The Death of Art" in 1984 and republished in The Philosophical Disenfranchisement of Art in 1986; "Approaching the End of Art," a conference Danto gave in 1985 at the Whitney Museum of American Art and included in The State of the Art in 1987; and "Narratives of

as usage of photography and video rise in the 19th century and after these two technologies, contemporary artists "began to explore the question of art's own identity".[44] In his much-debated argument, he stated that, "All there is at the end."[45] and now, art is living in a "post-historical state." But, this statement should not be misperceived. His words do not imply an example of an inexact forecasting such as Duell's apocryphal "Everything that can be invented has been invented." quote.[46] As far as that goes, he explained his bold statement in detail in his book named 'After the End of Art'. He frankly remarked that he was not referring to the "death" of the art, he was referring a specific narrative that an objectively recognized in art history. So, a story had ended but this does not mean that there will not be art anymore. However, he also indicated that, whichever kind of art will be produced afterward; none of the artworks could be a "next" and "appropriate" stage of 'that' narrative. He concluded his explanation by emphasizing that the thing which had ended was the narrative 'itself', not the 'subject' of the narrative.[47]

As agreed by historians, there had been a "significant break point" in 1960s and 1970s[48] While "the twentieth century oversaw a rapid succession of different movements and

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the End of Art," a "Lionel Trilling" lecture he gave at Columbia University and published in Grand Street in 1989 and republished in 1991 in Encounters and Reflections: Art in the Historical Present.

[44] Tiernan Morgan and Lauren Purjeje, "An Illustrated Guide to Arthur Danto's "The End of Art"," *Hyperallergic* (blog), March 31, 2015, accessed November 28, 2021, https://hyperallergic.com/191329/an-illustrated-guide-to-arthur-dantos-the-end-of-art/

[45] Danto, "The End of Art,"; Morgan and Purjeje, "An Illustrated Guide to Arthur Danto's "The End of Art".

[46] Charles Holland Duell (April 13, 1850 – January 29, 1920) was the Commissioner of the United States Patent Office from 1898 to 1901 and was later an Associate Judge of the Court of Appeals of the District of Columbia. Professor Dennis Crouch indicates that *"Mr. Deull's most famous attributed utterance is that 'everything that can be invented has been invented.' In his 1989 article, Samuel Sass traced the quote back to 1981 book titled "The Book of Facts and Fallacies" by Chris Morgan and David Langford."* in his patent blog article named 'Tracing the Quote: Everything that can be Invented has been Invented'; accordingly, in the *"The Book of Facts and Fallacies*", writers conclude that this is quote is apocryphal. Moreover, Dennis Crouch suspected that this quote might be originated from a joke from an 1899 edition of Punch magazine. *"In that edition, the comedy magazine offered a look at the "coming century." In colloquy, a genius asked "isn't there a clerk who can examine patents?" A boy replied "Quite unnecessary, Sir. Everything that can be invented has been invented."* accessed November 28, 2021, https://patentlyo.com/patent/2011/01/tracing-the-quote-everything-that-can-be-invented-has-been-invented.html

[47] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 26.

[48] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 18.

'isms,' all with their own notions of what art could be."[49] Yet, after that breakpoint, the story of the art which the world know well have ended and by this, something big, bold and nonpareil was born. As Danto wrote, we were "entering a more stable, happier period of artistic endeavor where the basic needs to which art has always been responsive may again be met,"[50] Apart from 'isms' and labels that indicate belongings, I agree with Danto when he said the feeling of being does not belong to a great narrative helps to define the distinction between modern art and contemporary art.[51] Instead of following a strict yet temporal movement, the newborn baby of the art world was thematically "always moving forward and leaving history in its wake"[52]

Along with everything discussed above, the internet has some special place for contemporary art. The very first artwork that uses telecommunications technologies was created in 1974 by Vera Frenkel with the contributions of Bell Canada Teleconferencing Studios.[53] This was the beginning of a new era in contemporary art. In the 2000s and 2010s, the post-Internet era had begun, and artists even start to use Google Street View images.[54] Come to that, at the present time, contemporary art lives through a bunch of different styles and genres which is following its independent character, and maybe this is the reason why it is hard to emborder it. Nowadays, today's artists such as Jeff Koons, Takashi Murakami and Banksy continue to move the flag that they receive from their forerunner' forward and "pick apart contemporary culture and create a new means of storytelling."[55]

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[49] Morgan and Purjeje, "An Illustrated Guide to Arthur Danto's "The End of Art".
[50] Morgan and Purjeje, "An Illustrated Guide to Arthur Danto's "The End of Art".
[51] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 27.
[52] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 18.
[53] Caroline Langill, "Shifting Polarities, Electronic Media in 1974," p. 3, accessed November 29, 2021, https://www.fondation-langlois.org/html/e/page.php?NumPage=1974
[54] Jon Rafman, "Nine Eyes of Google Street View," Net Art Anthology: Nine Eyes of Google Street View, accessed November 29, 2021, https://anthology.rhizome.org/9-eyes) At 2008, artist *Jon* Rafman collected images from Google Street View in order to use his project.
[55] Tatty Martin, "What Is Contemporary Art?" Rise Art, November 06, 2020, accessed November 29, 2021, https://www.riseart.com/guide/2400/what-is-contemporary-art

C. THEMES AND ISSUES OF CONTEMPORARY ART: A VERY SHORT INTRODUCTION

Just like nearly all eras of art, contemporary art mirrors the conditions of the time as well. As I mentioned above, after WWI and especially WWII, the world has changed rapidly. The invention and spread of the world wide web are also making time faster than ever and leading to lightning-speed globalization. These new world conditions lead to a new era for the art world. After the rebellion of modern art, artworks left imitating nature and start to mirror real life and society. Contemporary art is much more daring than its predecessor. Gender, globalization, time, body, migration, language, identity, memory, place, spirituality, human rights are indicating the major themes of contemporary art. As artists are free to create whatever they want in a form that whichever they choose, forms of contemporary art are not numerus clausus just as themes of contemporary art. Still, before explaining the major movements of contemporary art, mentioning some of the major themes of contemporary art seems favorable.

While considering artists, the first artists that spring to mind can be Raphael, Da Vinci, Van Gogh, Warhol etc. Have you ever thought about their common spot? They are all male artists. Especially, when we consider the art world before the contemporary era, we see that there were no woman artists in sight. Finally, contemporary art embraces all genders, cultures, civilizations. "Attempts to re-write the history of art have exposed the existing story to be a 'straight white boys' club"[56]. The first professional woman artist which was equal among the men[57], considered as Renaissance painter Lavinia Fontana.[58]

[56] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 38.
[57] Delia Gaze, *Concise Dictionary of Women Artists* (New York: Routledge, 2011), p. 299.
[58] See Diana Robin, Carole Levin, and Anne R. Larsen, *Encyclopedia of Women in the Renaissance: Italy, France, and England* (Santa Barbara, CA: ABC-CLIO, 2007), p. 147; Babette Bohn and James M. Saslow, *A Companion to Renaissance and Baroque Art* (John Wiley & Sons, 2013); Margaret R. Miles and Richard Valantasis, *The Subjective Eye: Essays in Culture, Religion, and Gender in Honor of Margaret R. Miles* (Eugene (Or.): Pickwick, 2006), p. 290.

Yet, there is no female Rembrandt or Michelangelo in art history. The reason behind this was the role of women in society. Even though women are as talented as men, society did not allow them to shine with their art for many years. Women were not allowed to attend art schools and they could not draw freely as so many things were considered 'improper' for women in back then. The role of women was 'caregiver', 'mother', 'wife'; not an 'artist'. As art historian Linda Nochlin states: "The fault lies not in our stars, our hormones, our menstrual cycles, or our empty internal spaces, but in our institutions and our education."[59]

Thanks to the improvement of human rights, women rights were also gained importance.[60] On the late 1960s, protests for women's rights increased and these lead to the feminist art movement. Feminist artists rebel against the sexism and they "helped to forge the transition from modernist to postmodernist cultural strategies"[61] by their artworks. Furthermore, women rebel against the role of the women, which is being as a "nude model" instead of an "artist", in the art as well.[62] Even if the progress is really slow, when we ask that "Do Women Still Have To Be Naked To Get Into The Met. Museum?",

[59] Linda Nochlin, "Why Have There Been No Great Women Artists?", *Art and Sexual Politics*, ed. Thomas B. Hess and Elizabeth C. Baker (New York: Macmillan Publishing Co., Collier Books, 1973), p. 25.

[60] In the early 1920s, women in U.S. acquired the right to vote with the 19th Amendment to the U.S. Constitution; By the Act no. 1580 on 3 April 1930 (Official Gazette of the Republic of Turkey (1471, on April 14, 1930), Turkish women acquired the right to vote in local elections and acquired full suffrage on 5 December 1934; see *"The amendment on December 5, 1934, gave women the right to vote and to be elected."* See "The Grand National Assembly of Turkey: History," TBMM Yabancı Dillerde Tanıtım Sitesi, accessed December 30, 2021, https://global.tbmm.gov.tr/index.php/EN/yd/icerik/12);

[61] Jacqueline Millner, Catriona Moore and Georgina Cole. "Art and Feminism: Twenty-First Century Perspectives." *Australian and New Zealand Journal of Art* 15 (2015), p. 143.

[62] In 1989, a group of female artists which was called 'Guerrilla Girls' did research about women's place in the museum. "The quest was expose 'the overlooked, and the downright unfair' brought to light just how deeply rooted gender inequalities ran (and continue to run) in the (art) world." The result which they found was dramatic: Less than 5% of the artists of artworks on the display of Met Museum was female whereas 85% of the nudes was female. The research was repeated in 2005 and 2012 and, the results was improved yet still disappointing for the role of the women: In 2005, less than 3% of the artists was female whereas 83% of the nudes was female. In 2012, less than 4% of the artists was female whereas 76% of the nudes was female. So, according to Guerilla Girls' researches, there is an improvement though time yet this progression is really slow.; see "Naked Through The Ages," Guerrilla Girls, accessed January 01, 2022, https://www.guerrillagirls.com/naked-through-the-ages; An and Cerasi, *Who's afraid of Contemporary Art?*, p. 42.

one cannot deny there is an improvement though time that was boosted in the "contemporary" art era, thanks to the struggle of women artists.

Nevertheless, feminism is just a little part of the contemporary art. It has much more themes than every other art era that has been existed. One of them is racial segregation. In 1991 Fred Wilson introduced his installation artworks "black headless mannequins dressed as guards" in a leading museum in New York. Wilson explained that his artwork was about African American people's place in the museums. He further indicates that:

> "This work was really about having been to museums, going to museums for years, and nothing that besides myself and the guards, and perhaps, the people in the food service or the maintenance, you know, we were only African-Americans or people of color in museum. And no one in the professional staff, who decides what gets put on display, how those thigs get described and discussed, what's acquired by museum."[63]

With Wilson's artwork and many other artworks which fought with the "white boys'" club, art finally embraced all the colors in the world in the contemporary era. As the human rights gain importance, the elitist art world of yesterday could not resist the changing conditions of the day.

However, just like the identity of the artists, the purpose and symbolization of art display has changed dramatically in time as well. Louvre Museum was firstly named as "Museum of Napoleon" in a political context. The establishment purpose of the museum was to display the trophies of French Emperor Napoleon's victories' and let ordinary people see

[63] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 39.

them to feel the joy of the victory and possession of the land by seeing the paintings of the defeated kings' palaces.[64] The purposes of other museums in the Europe were not so different from the Louvre Museum. So, one can argue that the reason behind the need of display and establishment of the museums was not the appreciation of the artworks. It was about honoring the leaders by appreciating their trophies. On the contrary, the purpose of the contemporary art is not appreciating the victories of the leaders, it is appreciating the 'art' itself. Contemporary art has a rebellious theme that denies being a tool for regimen.

Additionally, with globalization and the increase of human rights' importance, also the monopoly of the high class and the dominant culture has been demolished. The artists were from the elite class back then and as will be mentioned in the chapter related to modern art, the strict academic rules restricted the artists. In order to be considered as a good artist, one must from the lucky gentility, attend the Academy and follow its rules. After modern art and finally, with contemporary art, artists chose the leave the dominance of the upper class, politicians, and academic rules behind to gain their independent artistic power. With this rebellion, the dominance of the European culture also was left behind. Jean-Hubert Martin enlightened the 'primitivism'[65] and showed that the "one hundred per cent of exhibitions ignoring 80 per cent of the earth"[66] on his exhibition[67] in 1989. With

[64] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 181.
[65] *"A term that has been used to refer to the art of various historical European periods and of non-Western societies. In the mid-19th century, it was primarily applied to 14th and 15th century Italian and Flemish art, which modern artists prized for what they saw as its simplicity, sincerity, and expressive power. Use of the term then broadened to encompass a range of non-Western art, sweeping from South America to Southeast Asia. At the beginning of the 20th century, European artists embraced African and Oceanic masks and statuary and the term came to be associated with work from these regions. Such work deeply impacted these artists, who perceived in it a physical directness and emotional charge that they found exciting and distinct. By the late 20th century the term, with its derogatory connotations, fell out of favor."*see, "Primitive Art: MoMA," The Museum of Modern Art, accessed January 02, 2022, https://www.moma.org/collection/terms/primitive-art
[66] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 41.
[67] (Fr) *Magiciens de la Terre*, "Magicians of the Earth" was a contemporary art exhibit which was held at the Centre Georges Pompidou and the Grande halle de la Villette from 18 May to 14 August 1989.

contemporary art, the art world might be able to write a history of art globally. Maybe, a global art history which embraces all communities, nationalities, genders, classes, colours might be possible. "New perspectives are not only possible; they are imperative. We must continue to probe, question and recalibrate art history can only be richer for it."[68]

Contemporary art continuous to rewrite art history by its exultant nature. While fighting with the "elite white men" dominance in the art world; all genders, social classes, and cultures has been fighting for gaining a place as well with the help of a bunch of movements and forms of contemporary art on this history is incontrovertible. Therefore, after the chapter related to modern art in the next chapter of this paper, I will try to explain some major movements of contemporary art. But first, in order to understand the "contemporary art" completely, one need to analyze the modern art at the outset.

II. MODERN ART AND ITS RELATIONSHIP WITH CONTEMPORARY ART

Even thought there was a "significant break point" in 1960s and 1970s between modern art and contemporary art, discerning between modern art and contemporary art is not that easy. As contemporary art is highly influenced by modern art, understanding modern art and the relationship and differences between them is efficacious to understand the art of today.

A. MODERN ART IN BRIEF

[68] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 41.

Modern art contains artworks which was produced between 1860s and 1970s. According to Arnason and Prather, the beginning time of the modern art is 1863, the year that Manet's painting "*Le déjeuner sur l'herbe"*[69] had been launched in Paris.[70] This painting is considered as a 'touchstone' for modern art as it changed the painting while daring to traditional norms with its taboo-breaking revolution. Calling it taboo-breaking because in an age that Academy "valued classical technique and great paintings of great people and events, such as heroic scenes from history and mythological stories.", Manet chose to paint modern and even absurd life instead of painting the acceptable "good" art which Academy had been dictating to artists over years.[71] Because of this contrariness, his painting was rejected by prestigious art saloon. Despite the ignorance of the French Academy, this was the beginning of a new era in art world. He composed both Realism and Impressionism with a special touch that makes his paintings 'modern' comparing the other artists of his time. As Manet stated: "I paint what I see, and not what others like to see."[72]

[69] (Fr) In English: "The Luncheon on the Grass."; in artwork, *"viewer tries to understand the visual clues represented in this painting, the more they become lost in this constructed scene of modern life. Viewers look at the figures and their poses, but the painted figures' eyes look elsewhere…The nude stares at the viewer. These disturbing eye contacts between viewer and painted figures inside and outside the painting communicate a strong sense of 'non-communication'. Although the viewer can still identify the objects, such as trees, bushes, and still life, what the viewer reads from this painting is still "inexplicably blank, opaque... without psychological interiority of any kind". Making the viewer feel blank and strange does not mean that this painting is a failure; on the contrary, its richness in material depiction (such as the still life and the lush greenery) overwhelms the psychological weight and indeed warns clearly that materiality has overgrown the spiritual development, not only here in this bourgeois luncheon in open space, but also in the viewer's own modern life."* Lin Chang, "Nature and Modernity in Édouard Manet's Le Déjeuner Sur L'Herbe and William Holman Hunt's The Awakening Conscience: A Comparative and Critical Reading," *Journal of Visual Art and Design* 11, no. 2 (2019), p. 124.

[70]H. Harvard Arnason and Marla Prather. *History of modern art: painting, sculpture, architecture, photography.* (New York: Harry N. Abrams, Inc., 1998), p.17. https://archive.org/details/historyofmoderna00arna_0.

[71] Keri Rowe, "Art History 101: Édouard Manet: The Father of Modern Art," SaatchiArt, January 23, 2017, accessed December 15, 2021, https://canvas.saatchiart.com/art/art-history-101/edouard-manet-the-father-of-modern-art

[72] Accessed December 15, 2021. https://ashmolean.web.ox.ac.uk/files/learnpdfresourceshistoryofartmanettheartist.pdf.

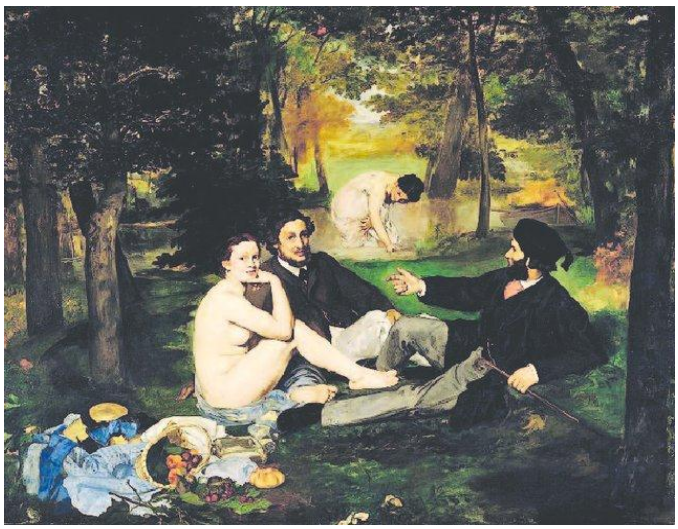

Figure 7 **'**Le déjeuner sur l'herbe', (The Luncheon on the Grass), Édouard Manet (1862–1863) Musee d'Orsay, Paris.

With Manet's *'Le déjeuner sur l'herbe',* "the modernist reinvention of pictorial space had begun."[73] that leads the modern art era. After Manet, artists revolt against wealthy aristocrats and institutions such as the church that urged them to make "good art". Before 19th century, one cannot say that there was an ambiance of freedom of arts.

In the ages between 14th and 17th century, artists including masters like Da Vinci and Michelangelo, produce their artworks to order of Maecenas.[74] In this era, even though it was the beginning of a journey that led to modern fine arts; aesthetics and taste were related to function.[75] Artworks of painters were not a medium of expression since artworks produce in order by royals or the Church.[76] So, one can say that medieval and renaissance artworks do not consist fully artistic expression as artists were not independent, also artists have lack of freedom of expression due to conditions of the period. In 1648, French *Académie des Beaux-Arts* established and after that, artists educated there in order to represent the power of monarchs and government. Furthermore,

[73] "The Luncheon on the Grass, 1862 by Edouard Manet," Manet.org, accessed December 15, 2021, https://www.manet.org/luncheon-on-the-grass.jsp
[74] Deniz Polat Akgün, *Sanat Özgürlüğü* (İstanbul: Oniki Levha Yayınları, 2020), p.27.
[75] Polat Akgün, *Sanat Özgürlüğü,* p. 26-27.
[76] Polat Akgün, *Sanat Özgürlüğü,* p. 28.

artists were considered as government officers, so this leads them to even more consistent freedom than before. Yet, when the 17th century came, it brought individualistic mentality and secular judicial systems. In the 18th century, art understanding that based on functionality was replaced by the modern art system. In 1789, the revolution was not against to French monarchy, it was also for the strong position of the monarchs and royals in the art world. As culture and art became a part of modern politics, the understanding that art was not related to society and politics was also replaced. In 19th century, finally the art had become an independent occupation.[77] Ultimately, in 1863 with launch of Manet's *'Le déjeuner sur l'herbe';* era of modern art had been started and with modern art, the art had severed its bonds with nature imitation and embraced the freedom of creativity.[78] Strict Academy standards was started to fade away as art was no more monopolized by aristocrats. The artists were gaining their freedom, and, in my opinion, this was art world's own French Revolution.

However, as art always reflects its time, one must comprehend the events which carry onward this courageous rebellion in order to cognize modern art. Firstly, the impact of the invention of the photograph on this revolution is incontrovertible. As the world gets 'modern' day by day, art changed as well, and the speed of technological improvements expedited 'modern' arts evolution. After the invention of photograph, the need of paint realistically, just like a photograph, started to become useless. Also, WWI has an important impact on modern art. After WWI artists object and indicate that society and art are inseparable. With his, number of anti-art movements such as Dada, Bauhaus and Surrealism introduced. After WWII, the borders between art forms and art movements disappeared. Modern art did not get enough with the classical forms of the art and it

[77] Polat Akgün, *Sanat Özgürlüğü,* p. 35.
[78] Nazan İpşiroğlu and Mazhar İpşiroğlu, *Sanatta Devrim: Yansıtmacılıktan Oluşturmaya Doğru,* 6th edition, (İstanbul: Hayalperest, 2017), p. 22.

created new forms with original movements as a reflection of this hard-earned artistic freedom. Some of these movements are Neo-Impressionism, Symbolism, Expressionism, Art Nouveau, Cubism, Dadaism, and Abstract Expressionism with Pop-Art and Minimalism. Now that, in the industrial era, art undertake the function of producing the style of living for great societies, it blends with life and furthermore even shapes the life itself[79]

B. MODERN ART AND ITS SUCCESSOR: CONTEMPORARY ART

Despite their common spots, contemporary art and modern art are not the same. However, understanding the difference between them is not easy and maybe starting from the exact definitions might be assisting.

Firstly, defining the 'modern' in the 'modern art' is important. Modern means that "existing in the present or a recent time, or using or based on recently developed ideas, methods, or styles"[80] Modern does not only indicate a specific time nor the most recent one. In philosophy and art, modern is mostly about a style, strategy and agendum.[81] If it was only about time, so that all of the artists that had lived in the same time with Manet would be considered as 'modern artists' but they were not modern. Also, one can argue that being 'modern' is timeless and anyone can be modern in any time as it means that bringing innovation to the 'era' whereas being contemporary means that occurring in the same time.[82] For instance, Giotto Di Bondone – the father of Renaissance- can be considered as a modern artists for the medieval era. So, the modern art era is something

[79] İpşiroğlu and İpşiroğlu, *Sanatta Devrim: Yansıtmacılıktan Oluşturmaya Doğru,* p. 22.
[80] "Modern,", Definition in the Cambridge English Dictionary, accessed December 27, 2021, https://dictionary.cambridge.org/us/dictionary/english/modern
[81] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 31.
[82] Özkan Eroğlu, *Çağdaş ve Modern* (İstanbul: Tekhne Yayınları, 2018), p. 27.

other than just a time, as mentioned above, it indicates a powerful rebellion to the 'good art'. After modern artists, nothing stayed the same. Even thought, some artists in the modern era followed the old rules, they were out of the frame and the modern artists which was in the frame, was drawing a whole new piece of art. With this, the art had started to end, and finally with the contemporary art era, the art that we know died and the newborn phoenix has risen with unprecedented creativeness. Modern art demolished the walls between artists and artistic freedom so that contemporary artists are now enjoying the real 'artistic freedom'.

Contemporary means that "happening or beginning now or in recent times"[83] and just like 'modern', contemporary does not only indicate a time period. Furthermore, according to Danto, contemporary art is not a genre of producing art, it is more like a style of using the genres.[84] The break point between modern and contemporary art was between 1960s and 1970s[85] Apart from all the -ism of the modern art, contemporary art consists of a feeling of "do not belong to a great narrative." Even though contemporary art was also rebellious and mix art forms and movements just like modern art; contemporary had just begun its life without a slogan nor a logo befittingly to its 'contemporary' nature. According to Danto, born of this independent attitude without getting noticed by no one, is fits to nature of contemporary, not the nature of modern.[86]

So, as I tried to explain in previous chapters, modern and contemporary art indicate different eras of art as their core philosophies are the thing that constituted the difference.

[83] "Contemporary", Definition in the Merriam-Webster English Dictionary, accessed December 27, 2021, https://www.merriam-webster.com/dictionary/contemporary
[84] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 33.
[85] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 18.
[86] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 27.

Even though, for a long time, contemporary art called 'the modern art that had been produced by contemporaries'; after 1980s, the very new, very modern era was recognized. Besides, modern art was revolting against the past 'art'. For example, Dada was appreciating machines and wished death to old art whereas contemporary art embraces the past. For contemporary art, contemporary artists are free to use the art of the past as they wished. The thing that they are restricted to use from past was not its forms nor some other characteristics, it was the 'soul' of the past.[87]

One of the keys to the breakpoint between two was leaving the aesthetic beauty. For contemporary artists, the end work's beauty was not important, the main importance for them is the process of the work.[88] As will be explained below, in performance art and conceptual art, the 'art' is mostly about the idea behind the work. With contemporary art, art does not have to belong a special form anymore. The contemporary artwork can even be only the 'experience of the audience'. From now on, "everything is an artwork" and even as Beuys said, "everyone is an artist."[89] In this era, you can create anything, and there is no such a thing as 'the correct, appropriate way' of art. Artists are totally free in all aspects: mind, soul, form. In modern art, artworks always consist of a necessary aesthetical experience and this experience could not respond political and social traumas and challenges of today's living,[90] whereas, contemporary art left this aesthetical experience in order to show that the real project is how to differ the art from the reality. Marcel Duchamp showed the world that aesthetics is not main and identifying instrument of the art with his successful artworks that do not consist of any concerns related to

[87] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 27.
[88] Naomi Blumberg, "What's the Difference Between Modern and Contemporary Art?." Encyclopedia Britannica, accessed December 27, 2021, https://www.britannica.com/story/whats-the-difference-between-modern-and-contemporary-art.
[89] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 159.
[90] Michael Brenson, "Healing in Time", Mary Jane Jacob, Comp., *Culture in Action: A Public Art Program of Sculpture Chicago* (Seattle: Bay Press, 1995) p. 28-29.

aesthetics and admiration.[91] According to Danto, this has ended to the absolute modernism era.[92]

III. THE MAJOR MOVEMENTS OF CONTEMPORARY ART

As mentioned in the previous parts, even if it does not follow a temporal movement and does not have an organized '-ism' to define its identity; contemporary art still contains art movements. Some of the movements are mutual with modern art era such as Pop Art, Post-Modernism and Abstract Expressionism[93]; whereas others are uniquely born in the contemporary art era. There are many different movements and forms of contemporary art by its diverse, varied and globalized characteristics. In this part of this paper, I will try to explain only some of the major movements of contemporary art shortly.

A. POP ART

Pop Art is both modern and contemporary art movement. It appeared in the late '50 and early '60s with a cultural, rebellious revolution after WWII and Vietnam War[94] and lasted until the late '70s.[95] It is called 'pop art' because it has arisen from popular culture[96] in a "postwar socio-political climate where artists turned toward celebrating commonplace objects and elevating the everyday to the level of fine art."[97] Its main issues were war,

[91] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 145.
[92] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 145.
[93] Martin, "What Is Contemporary Art?".
[94] "Pop Art Explore How Pop Artists Were Inspired By—and Made Art Directly From—consumer Goods, Mass Media, and Popular Culture." MoMA, accessed November 30, 2021, https://www.moma.org/learn/moma_learning/themes/pop-art/
[95] Pop Art Movement Overview," The Art Story, accessed November 30, 2021, https://www.theartstory.org/movement/pop-art/
[96] "Pop Art Explore How Pop Artists Were Inspired By—and Made Art Directly From—consumer Goods, Mass Media, and Popular Culture."
[97] "Pop Art Movement Overview"

peace, politics, feminism, mass production, and consumerism. Andy Warhol, Eduardo Paolozzi, and Roy Lichtenstein might consider as most famous artists of this movement. Pop art artists turn everyday objects in life such as advertising, comic books, movies, packaging into art.[98] With this, pop art demolishes the unicum of the art and makes it duplicable as a reflection of serial production logic.[99] While doing it, "artists were uniquely placed to satirise and deride politicians, film stars – and even other artists, using humour, sex, and innovative techniques to provoke, parody and reflect."[100]

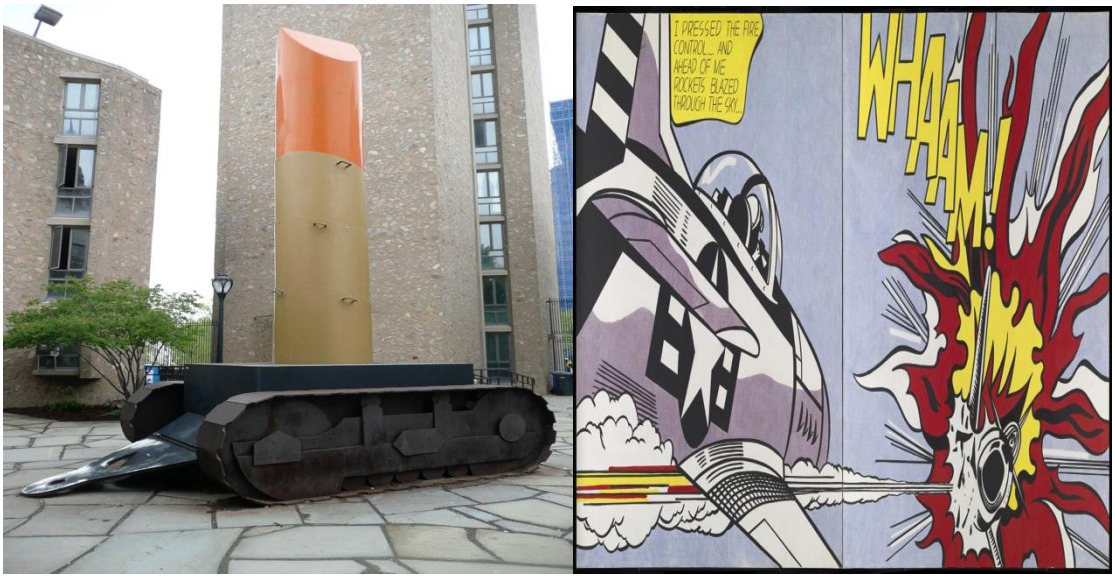

Figure 8 (Left) Claes Oldenburg, Lipstick (Ascending) on Caterpillar Tracks, 1969, reworked 1974. Photo by vige, via Flickr.

Figure 9 (Right) Whaam!, Roy Lichtenstein, 1963, © Estate of Roy Lichtenstein.

B. INSTALLATION ART

Installation art has begun in the late '70s and is still popular in our time. Many people start this art form with the works of Marcel Duchamp the creator of readymade art

[98] "Pop Art – Art Term," Tate, accessed November 30, 2021, https://www.tate.org.uk/art/art-terms/p/pop-art
[99] Rıfat Şahiner, *Sanatta Postmodern Kırılmalar* (Ankara: Ütopya Yayınevi, 2013), p. 135.
[100] "Think You Know Pop Art? – Look Closer," Tate, accessed November 30, 2021, https://www.tate.org.uk/art/art-terms/p/pop-art/think-you-know-pop-art

movement and Kurt Schwitters's artworks.[101] It is "a term generally used to describe artwork located in three-dimensional interior space as the word "install" means putting something inside of something else."[102] It can be site-specific, and application of this art can be applied to both interior and exterior places. Installation art has four characteristics: non-collectability, large in scale, temporary and sensory rich.[103] It is non-collectible because mostly it is impossible to collect them and move them in a different place such as a house "due to the works' size, scope, and uniqueness or significance. It is large in scale because often they occupy a whole gallery room of a museum and sometimes some exterior displayed artworks are as big as a statute. It can be considered temporary, yet it is possible to see permanent instances of this genre as well. Still, most of the artworks are temporary. Lastly, it is sensory-rich because due to its all-encompassing environment, viewers of the artwork have a chance to be a part of the scene and be embraced by the artwork. [104] In this form, artworks are visitor activated and participation of the viewers are crucial to reveal the intention under the artwork. Also, installation artworks should be considered as an entire ensemble, not individually.[105] With these unique characteristics, this genre also choose multiplexed every day and natural materials and the media mediums to call some inner feeling in the audiences.

[101] "Installation Art Movement Overview," The Art Story, accessed December 04, 2021, https://www.theartstory.org/movement/installation-art/
[102] "Installation Art Movement Overview"
[103] MasterClass, "Installation Art Guide: 4 Key Characteristics of Installation Art - 2021," MasterClass, June 28, 2021, accessed December 04, 2021, https://www.masterclass.com/articles/installation-art-guide#4-characteristics-of-installation-art
[104] "Installation Art Guide: 4 Key Characteristics of Installation Art – 2021"
[105] An and Cerasi, *Whos Afraid of Contemporary Art? An A to Z Guide to the Art World,* p. 105-106.

Figure 10 (Left) Embankment, Rachel Whiteread, 2005, © Tate 2005 Photograph by Marcus Leith.

Figure 11 (Right) Pharmacy, Damien Hirst, 1992, via Damien Hirst's site.

C. MINIMALISM

According to Tate Modern, "minimalism is an extreme form of abstract art[106] developed in the USA in the 1960s and typified by artworks composed of simple geometric shapes based on the square and the rectangle". Classically 'art' is imitation of something, and contemporary art demolish it with its rebellious nature. Pursuant thereto, minimalism has its own reality and there is nothing implicated other than what we see when we look to an artwork. As minimalist artist Frank Stella expresses, in a minimalist artwork "what you see is what you see".[107]

"Minimalist art offers a highly purified form of beauty" while challenging the meaning of the artworks with an argument of that "art object is misplaced and leads to a rigid and elitist art world which only the privileged few can afford to enjoy".[108]

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[106] *"Abstract art is art that does not attempt to represent an accurate depiction of a visual reality but instead use shapes, colours, forms and gestural marks to achieve its effect."* accessed December 04, 2021, https://www.tate.org.uk/art/art-terms/a/abstract-art

[107] " 'What You See Is What You See': Frank Stella And The Anderson Collection At SFMOMA Gifts Of Stella Masterworks Shown Together For The First Time," SFMOMA, accessed December 05, 2021, https://www.sfmoma.org/press/release/what-you-see-is-what-you-see-frank-stella-and-the/

[108] "Minimalism – Art Term," Tate, accessed December 04, 2021, https://www.tate.org.uk/art/art-terms/m/minimalism

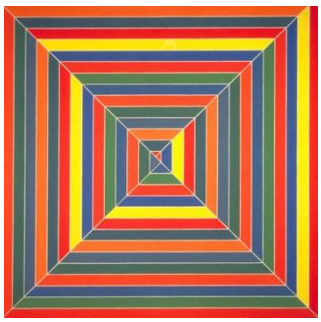

Figure 12 Hyena Stomp, Frank Stella, 1962, Tate © ARS, NY and DACS, London 2021.

D. CONCEPTUAL ART

Conceptual art movement has started at mid '60s. According to conceptual artist Joseph Kosuth, "the 'purest' definition of conceptual art would be that it is an enquiry into the foundations of the concept 'art'. In conceptual artworks, the important thing is concept and idea and that's why it can be seen in any form and material. The movement acquired its name after the writing called "Paragraphs on Conceptual Art"[109] In 1967, Sol LeWitt wrote that "when an artist uses a conceptual form of art, it means that all of the planning and decisions are made beforehand, and the execution is a perfunctory affair. The idea becomes a machine that makes the art…. The idea itself, even if it is not made visual, is as much of a work of art as any finished product."[110] In this movement, one can see that even a chair can be an artwork as conceptual artists think different than artists of traditional forms and intent to express their 'idea's and 'concept's with any product. With this notion, one can argue that conceptual art changed the entire meaning of art and from now on, anything could be 'art'. Thanks to conceptual art, nowadays, artists feel free to select the most appropriate form and material for their artwork in order to represent the idea that they want to convey[111] as the idea is the main thing in conceptualism.

[109] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 44.
[110] Sol LeWitt "Paragraphs on Conceptual Art", *Artforum*, (June 1967). p. 79.
[111] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 45.

The idea itself is such important that sometimes there is no need of an object to display the idea. In 2016, Maria Eichhorn closed an art gallery and give a paid leave to all of the gallery staff. So, the gallery was completely closed for the exhibition. After, the artist explained her artwork[112] to Artforum Magazine with these words:

> "My Chisenhale piece has been conceived in a similar spirit—again, underscoring that "time" belongs to no one and should somehow be reevaluated, or even extricated from contemporary economies. That the exhibition space and gallery offices are closed is just a spatial consequence of this gesture—these are, after all, the areas where the staff pursues its labor. The institution itself and the exhibition was not closed, but rather displaced into the public sphere and society"[113]

According to An and Cerasi, "the exhibition questions how we ascribe value to time in an age when work and leisure time are ever more intertwined and rarely get the change to pause and reflect"[114] So, according to conceptual art, anything can be art as long as it represents an 'idea' and even "ideas alone can be works of art" as Sol LeWitt said.

Figure 13 One and Three Chairs, Joseph Kosuth, 1965. © 2021 Joseph Kosuth / Artists Rights Society (ARS), New York.

[112] 5 weeks, 25 days, 175 hours, Maria Eichhorn, 2016, Chisenhale Gallery, London
[113] "Maria Eichhorn Talks about Her Solo Exhibition at Chisenhale Gallery", As Told to Himali Singh Soin, *The Online Edition of Artforum International Magazine*, April 14, 2016, accessed December 05, 2021, https://www.artforum.com/interviews/maria-eichhorn-talks-about-her-solo-exhibition-at-chisenhale-gallery-59479
[114] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 47.

E. EARTH ART

Earth art or Landart, started at late ‘60s. Earth art movement can be considered as an outgrowth of Conceptualism and Minimalism movements. [115] In this movement, artworks are directly made in the landscape. Artists sculpt land to get it in a shape of an artwork while using natural materials. Earth artists also use natural scenery and make it a part of their artwork. That is the reason why earth artworks cannot be exhibited in galleries and cannot be owned. Because of the weather conditions of natural the exhibit area and potential human intervention, earth artworks are not permanent mostly. In addition to these, artists use photograph to provide the artwork a perdurability.[116] The intention and motivation of this movement is that a criticism to the common understanding of the ‘60s and ‘70s; earth artworks are against the understanding that see the nature as the ‘medium’ instead of the ‘purpose’.[117]

F. PERFORMANCE ART

Even though its first instances date back to 1910s; performance art became more famous in ‘70s. According to Tate Museum: “Artworks that are created through actions performed by the artist or other participants, which may be live or recorded, spontaneous or scripted”.[118] In performance art, the human body and acts are the ‘artwork’ itself. These make performance art different from traditional art forms as traditionally artworks are considered static, independent from the artist and they have exhibited in a distinguishing

[115] "Earth Art Movement Overview," The Art Story, accessed December 07, 2021, https://www.theartstory.org/movement/earth-art/
[116] Whitham and Pooke, *Çağdaş Sanatı Anlamak,* p. 193.
[117] Whitham and Pooke, *Çağdaş Sanatı Anlamak,* p. 193.
[118] Tate, "Performance Art – Art Term," Tate, accessed December 08, 2021, https://www.tate.org.uk/art/art-terms/p/performance-art

atmosphere in an art gallery.[119] It is a special art form which cannot be restricted with a specific methodology. With each show, the definition of the performance art changes as there is too many ways to exhibit performance art and maybe this is the reason why "it produces some of the most challenging and impactful works out there".[120] Also, there is no encore in performance art, it only happens in that precious 'moment'. For this reason, sometimes this art movement is called 'happening'.

Performance art has a multidisciplinary nature fittingly to its unsortable part; it can involve other forms of art such as dance, poetry, music. It is crucial to state that, this art form can be considered related to conceptual art as performance art is content-based with an idea, message instead of a purpose of entertainment.

As I mentioned above, instances of performance art contain most challenging artworks. In 1974, performance artist Marina Abramović declared that she is the object and the audiences are free to choose whichever they wanted among the seventy two items on the table at the gallery to use on the object, on 'her'. Some of the objects was malignant objects such as gun, bullet, whip, chains, saw, kitchen knife and box of razor blades whereas some was benign objects such as band aid, coat, soap, bandage, rose and water.[121]

Duration of the performance was 6 hours and performance started with gentle moves such as a kiss or a rose offer but after, someone touched her improperly, audiences cut up all her clothes, someone slashed her throat and suck her blood and finally "a loaded gun was thrust to Marina's head and her own finger was being worked around the trigger a fight

[119] Whitham and Pooke, *Çağdaş Sanatı Anlamak,* p. 147.
[120] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 95.
[121] "Performance Art – Art Term," Tate, accessed December 08, 2021, https://www.tate.org.uk/art/art-terms/p/performance-art

broke out between the audience factions"[122] Abramović expressed: "the experience I drew from this work was that in your own performances you can go very far, but if you leave decisions to the public, you can be killed"[123] Also, in 2014, artist stated that ""I had a pistol with bullets in it, my dear. I was ready to die." At the end of six hours, she walked away, dripping with blood and tears, but alive. "How lucky I am,"[124] Abramović's body was used as a canvas during the performance and audiences act like they had forgotten she is a living human not a canvas nor a statute. Yet, some audiences try to whip her tears, bind up her wounds and try to end the performance because of her safety conditions. After all, she found out that what would people do when they find someone immobile with instructions on a table that states: "There are 72 objects on the table that one can use on me as desired. Performance. I am the object. During this period, I take full responsibility." She faced with the aggression of the society as well as the victory of the mind and mercy over aggressive cruel violence.[125]

G. STREET ART

In '80s, this genre of contemporary art became popular and still one of the most popular movements of contemporary art. With the rise of hip-hop culture, street art -also known as "graffiti art", "spraycan art" and "aerosol art"- started as a cultural movement among the urban minorities. They had expressed themselves with creating a non-commercial,

[122] Frazer Ward, *No Innocent Bystanders: Performance Art and Audience,* (University Press of New England, 2012), p. 120.
[123] Frazer Ward, "Marina Abramovic: Approaching Zero", in Anna Dezeuze (ed.), *The 'Do-it-Yourself' Artwork: Participation from Fluxus to New Media*, (Manchester 2009), p. 132.
[124] Marina Abramović, "Performance Artist Marina Abramović: 'I Was Ready to Die'," interview by Emma Brockes, Theguardian, May 12, 2014, accessed December 10, 2021, https://www.theguardian.com/artanddesign/2014/may/12/marina-abramovic-ready-to-die-serpentine-gallery-512-hours
[125] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World,* p. 96.

rebellious -sometimes illegal as they use public spaces such as subway stations, walls, billboards, roads as their canvas- form of art.[126]

Firstly, it was considered as an illegal sub-culture movement that harms the properties but eventually, it spread all over the world, and in the 90's, artworks were exhibited in prestigious galleries with the expectation as an art form. Graffiti artist Jean-Michel Basquiat is considered as one of the top contemporary artists. Keith Haring, Banksy and David Wojnarowicz are also outstanding names of this movement.[127] Today, street artworks have high value. They are not considered as "must deleted" vandalism instances, instead; now they are precious artworks and even some street artworks have high touristic value such as Germany's Berlin Wall.

Figure 14 (Left) Graffiti Is a Crime, Banksy, 2013, NYC.

photo by www.banksy.com.

Figure 15 (Right) Germany's Berlin Wall (shown 1986), photograph was taken in 1986 by Thierry Noir at Bethaniendamm in Berlin-Kreuzberg.

H. HYPERREALISM

This movement appeared in the early '70s. In this genre, artists produce artworks that resembles photographs. A hyperrealist artwork can be a painting or a sculpture and

[126] "Contemporary Art Movements Chronological List of Postmodernist Styles and Artforms," Contemporary Art Movements (1970-present), accessed December 10, 2021, http://www.visual-arts-cork.com/contemporary-art-movements.htm#pop)
[127] "Contemporary Art Movements Chronological List of Postmodernist Styles and Artforms,"

while creating their artwork, artists use photographs "solely a reference", they do not imitate it.[128]

> "They aim to create a new, simulated reality, rendered with details that don't exist in the original image. Textures, surfaces, lighting effects, and shadows are painted, resulting in art that appears as though it's three-dimensional and tangible."[129]

Figure 16 (Left) Alive Without Breath Series, Keng Lye.

Figure 17 (Right) Spooning Couple, Ron Mueck, ARTIST ROOMS Tate and National Galleries of Scotland © Ron Mueck.

However, as they derived from a photograph, hyperrealist artworks are controversial as an art. Some say that it is a skill instead of art and even they implied that this movement is 'pointless'[130] But, as explained previously; in contemporary art, anything can be art and we are living in a world that the art's identity has been questioning. As mentioned before, crafts which created by skilled workers are not considered as art because artworks are more than an aesthetic object, they constitute "an invitation to view something as art, as more than the sum of its parts." [131] As hyperrealist artists

[128] Niaski et al., "The Evolution of Hyperrealism: From Religious Paintings to Simulated Reality," My Modern Met, April 10, 2018, accessed December 11, 2021, https://mymodernmet.com/hyperrealism-history/
[129] Niaski et al., "The Evolution of Hyperrealism: From Religious Paintings to Simulated Reality,"
[130] Bob Lansroth, "Hyperrealism in Art - Ultimately, Is It Art or Skill?" Miami Contemporary Art A to Z, September 12, 2021, accessed December 11, 2021, https://artmiamimagazine.com/hyperrealism-in-art-ultimately-is-it-art-or-skill/
[131] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 27.

"rendered with details that don't exist in the original image", one can see that they are not only a painted or sculpted photograph, but they also uncover the special details in the photograph with an artistic touch. And as Lansroth expresses: "Imperfections are what constitutes beauty, Hyperrealism thrives on that, it does not erase the blemishes, it does not straighten out faults and optimize the image to become flawless, it incorporates these elements to produce a layer of vision that would otherwise remain unseen."[132]

İ. APPROPRIATION ART

Definition of 'appropriate' is "to take something for your own use, usually without permission".[133] So, appropriation art movement can be defined "as an artistic strategy, the intentional borrowing, copying, and alteration of preexisting images, objects, and ideas"[134] In this genre, artists use the pre-existing works such as images, paintings, ordinary objects as their artwork with making little transformation on them.[135] It dates back to 1910s but extensive use of this movement are mostly after 1980s. Some popular contributors of this art movement are Richard Prince, Jeff Koons, Cindy Sherman and Andy Warhol.

Appropriation art aims to develop a new meaning of an already existed object with creating a new situation.[136] However, this 'new image of an existing object' raised some questions regarding originality and authorship which will be examined in detailed on

[132] Bob Lansroth, "Hyperrealism in Art - Ultimately, Is It Art or Skill?" Miami Contemporary Art A to Z.
[133] "Appropriate,", Cambridge English Dictionary, accessed December 11, 2021, https://dictionary.cambridge.org/tr/sözlük/ingilizce/appropriate
[134] accessed December 11, 2021, https://www.moma.org/learn/moma_learning/glossary/
[135] "Appropriation – Art Term," Tate, accessed December 11, 2021, https://www.tate.org.uk/art/art-terms/a/appropriation
[136] "Appropriation – Art Term".

chapter II. In short, artists claim that they do not steal other artworks nor other artists's any other intellectual property; "they are re-contextualising or appropriating the original imagery, allowing the viewer to renegotiate the meaning of the original in a different, more relevant, or more current context."[137] Nevertheless, as will be discussed later, this genre of contemporary art might be the most controversial movement in the legal context.

Figure 18 (Left) Hope, Shepard Fairey, 2008, and a photograph of Obama taken by Mannie Garcia.

(Fairey based the artwork from the photograph taken by Associated Press photographer Mannie Garcia)

Figure 19 (Right) L.H.O.O.Q., Marcel Duchamp, 1919.

(Subject: The Mona Lisa, painted in the 16th century by Leonardo da Vinci (1452-1519), and the most celebrated portrait in the world.)

As seemed from the artwork of Shepard Fairey, appropriation artists "lifts images from others, sometimes in their entirety"[138]. This leads a lack of originality, questions and discrepancies arising from authorship and even infringements of intellectual property rights of others.

These topics and further copyright disputes among contemporary artworks will be examined in the third chapter of this paper.

[137] Hayley A. Rowe, "Appropriation in Contemporary Art". *Inquiries Journal/Student Pulse* 3, no. 06, (2011), p.1.
[138] Lori Petruzzelli, "Copyright Problems in Post-Modern Art", *DePaul Journal of Art, Technology and Intellectual Property Law* 5, no. 1, (1995), p. 138.

IV. CONTEMPORARY ART AND INTELLECTUAL PROPERTY PROTECTION

As a very "creative" creation of the human mind, art is protected by intellectual property rights and specifically by copyrights traditionally. As copyrights protect literary and artistic works, copyright protection is the most appropriate and common protection for contemporary artworks as they fall under the scope of "artistic works". However, contemporary artworks' rebellion with using mixed mediums gives rise to other ways of intellectual property protection. Sometimes, in order to protect an extraordinary artwork, one needs to go out of the ordinary copyright line and must choose to consider the protection from another perspective. Therefore, in this part, I will mention intellectual property rights and their relationship with contemporary artworks as alternatives to copyrights before examining the copyright protection for contemporary artworks in detail. Copyright protection will be examined in the following chapter.

A. PATENTS

> "Only art and science make us suspect the existence of life to a higher level, and maybe also instill hope thereof"[139]
> **– Ludwig van Beethoven**

A patent is a way to protect intellectual property. It grants an exclusive right for the invention if the invention is novel, surpasses the inventive step and applicable to the industry.[140] However, since 1960s, it has had a close relationship with artworks. Even though it is extraordinary, patents are also "available to protect artworks, art techniques, and artists' requisites."[141] For example, French artist Yves Klein has color patent called "International Klein Blue" and used his patent in his artworks including monochromatic

[139] "What Is Bio Art?" ARTDEX, May 3, 2021, https://www.artdex.com/what-is-bio-art
[140] Ünal Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd edition, (İstanbul: Beta, 2004) p. 494; Cahit Suluk, and Temel Nal, (Rauf Karasu) *Fikri mülkiyet Hukuku* (Ankara: Seçkin, 2017), p. 47.
[141] Michael Blakeney, "Contemporary Art and Patents," *Queen Mary Journal of Intellectual Property* 9, no. 3, (2019), p. 244.

works. When we consider that monochromatic works might be problematic for copyright protection, patents might be an alternative. Furthermore, Yves Klein has also a patent for a "technique of using naked models covered with paint as 'living brushes' to imprint the images of their bodies upon a white canvas." [142] This patent could be considered as an alternative for copyrights as copyright law does not protect copyright protects the "work", not the style, technique or manner.

Moreover, bio art is one of the contemporary art forms that can be protected by patents. In this form, artists use DNA's, living organisms, bacteria. The term was first mentioned by Eduardo Kac in 1997 in the performance called "Time Capsule".[143] In 2000, Eduardo Kac "commissioned the 'creation' of a transgenic bunny named Alba and his publicity campaign included a picture of him holding a white rabbit and an image of a rabbit photographically enhanced to appear green." This rabbit called "GFP (green fluorescent protein) Bunny" and when someone searched for green fluorescent protein in the USPTO database, it can be seen that more than 30.000 patents exist.[144] This makes one consider patents as an alternative way of protection for contemporary art.

B. INDUSTRIAL DESIGNS

Industrial design protects the visual of the design if it is novel and has an individual character. However, industrial design rights can be considered as an alternative way. Especially for applied artworks, industrial designs can be considered as an effective way of protection. Useful articles are problematic for copyrights. However, as designs are the

[142] Blakeney, "Contemporary Art and Patents,", p. 244.
[143] What Is Bio Art?"
[144] "PATFT," accessed June 21, 2022, https://patft.uspto.gov; Blakeney, "Contemporary Art and Patents,", p. 255-257.

marriage of the aesthetic and the function, the useful function of an object would not constitute a problem for design law. [145] According to the modern design perspective, aesthetics and functionality are two inseparable features. Moreover, some legislations need an "aesthetic" criterion for copyright protection; yet, for the design law, aesthetic is not a requirement for protection. So, non-aesthetic designs can also be protected under design law.[146] These features of the design law might make design protection a good alternative for contemporary artworks.

Figure 20 *Ada Blecher, Copula Seat.*

https://www.iloboyou.com/sit-on-art-modern-chairs-that-are-absolutely-gallery-worthy/ Accessed 21.06.2022.

It must be stated that copyrights and designs are often in an intersecting road. If the requirements have been met, an object can enjoy both copyright and design protection. So, cumulative protection exists if the national law permits.[147]

C. TRADEMARKS

[145] Suluk (Karasu/Nal), *Fikri Mülkiyet Hukuku,* p. 309.
[146] Suluk (Karasu/Nal), *Fikri Mülkiyet Hukuku,* p. 312.; Tekinalp, *Fikri Mülkiyet Hukuku*, 3rd edition, p. 610.
[147] Suluk (Karasu/Nal), *Fikri Mülkiyet Hukuku,* p. 310; Turkish Industrial Property Code, Article 58/3; Law no 5846, Article 4, CDR, Article 96/2; DDir Article 17;

Trademarks are intellectual property rights that "serves to distinguish he goods or services of one supplier from those supplied by others." Its role can be stated as a "badge of origin".[148] By renewal, infinite trademark protection is possible; so, some contemporary artists choose trademark protection for their artworks. But, to do so, artists should "show judges stronger evidence of his brands being used in the market" because there is a "risk of them being canceled for lack of use".[149] Apart from infinite protection, anonymous contemporary artist also choose trademark protection in order to avoid disclosure. For example, famous street artist Banksy has a "handling service that authenticates Banksy's artworks" that called "Pest Control". "Pest Control" has trademark registrations and in 2018 the company sued a trademark infringement case against "Mudec Museum" in Milan. The company chose to enforce trademark protection instead of copyright protection. Enrico Bonadio states that:

> "Such a decision doesn't come as a surprise though, as it would require Pest Control to show judges that it has acquired the copyright from the artist. But this would entail the disclosure of Banksy's real name, which the artist obviously doesn't want to reveal as it would remove the aura of mystery surrounding him, and consequently reduce the value of his art."[150]

To conclude, sometimes trademark protection can be considered as an alternative for copyright protection. Especially for anonymous artists such as Banksy. Because, as

[148] Peter Groves, *Sourcebook on Intellectual Property* (London: Cavendish, 2003)., p. 511.
[149] Enrico Bonadio, "Banksy finally goes to court to stop unauthorised merchandising, despite saying copyright is for losers" (blog) (City University of London, February 25, 2019), https://www.city.ac.uk/news-and-events/news/2019/02/banksy-finally-goes-to-court-to-stop-unauthorised-merchandising-despite-saying-copyright-is-for-losers#.
[150] Bonadio, "Banksy finally goes to court to stop unauthorised merchandising, despite saying copyright is for losers"

Bonadio states “keeping anonymity is more important to Banksy than winning copyright cases.”[151]

D. COPYRIGHTS

Copyright protection for contemporary artworks will be examined in detail in the following parts as the focus on this study.

[151] Enrico Bonadio, “To Banksy, Keeping His Identity a Secret Is More Important than Winning Copyright Cases,” The Fashion Law, December 28, 2021, https://www.thefashionlaw.com/to-banksy-keeping-his-identity-a-secret-is-more-important-than-winning-copyright-cases/.

CHAPTER II

COPYRIGHT LAW AND ITS RELATIONSHIP WITH ARTISTIC CREATIVITY IN GENERAL ASPECT

Even though there are ongoing discussions about whether contemporary artworks can be patented[152] or protected via trademark[153] or industrial design[154]; the most common and suitable way to protect artworks is copyright protection. Therefore, in this thesis, I will dwell on the protection of the contemporary artworks in scope of the copyright. However, before dwelling on the issues, first of all, I will try to explain the notion of copyright and notion of work. I believe that in order to understand the issues related to copyright protection of contemporary artworks, one should need to understand the notion copyright in advance. Therefore, in this chapter, the copyright law and the "work" protected by the copyright law will be discussed from the United States Law, European Union Law and the Turkish Law aspects with its relationship with artistic creativity.

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[152] *"In the case of fine art, the dominant feature is its aesthetic appeal, whereas with some contemporary art, as the above examples indicate, there is also a substantial ingredient of utility, as well as the exploration of the transactional relationship between art and society….[A]s Branson J pointed out in the Full Federal Court decision in Grant v Commissioner of Patents, 'an invention should only enjoy protection of a patent if the social cost of resulting restrictions upon the use of an invention is counterbalanced by resulting social benefits' The educational, entertainment and edification benefits of contemporary art, as well as an understanding of the philosophical underpinnings of art, could be urged as examples of these social benefits."* Blakeney, "Contemporary Art and Patents," p. 259-261.

[153] For instance, see; EUIPO, Full Colour Black Limited v Pest Control Office Limited, Cansellation Division, Decision on Cancellation No 33 843 C

[154] See, Barbara Pasa,."Industrial Design and Artistic Expression", *Brill Research Perspectives in Art and Law,* 3, no. 2 (2020), p. 1.

I. OBJECT AND THE FEATURES OF THE COPYRIGHT IN GENERAL

Intellectual property rights divide into two: Industrial property rights such as patents, industrial designs, trademarks, trade secrets, geographical indications, and copyrights.[155] Copyrights are one of the intellectual property rights and they are the rights on the products created by human beings as a result of literary, intellectual and artistic activities.[156] Just like every other property, intellectual creations of the human intellect are protected as well.[157] These intellectual creations of mind can be defined as the "intellectual products" of the mind[158] and they are protected by "intellectual property rights".

Common features of intellectual property rights including copyrights are territoriality, anti-competitiveness, tradability, divisibility, independence and volatility. They are "confined to the territory where they are created". They have a nature that restricts competition. It is possible for them to be a subject of trade. Generally, they "exist quite independently from each other", and the rights that granted with an intellectual property right can be "sliced" via a sale or a license[159]. Also, they change and evolve thorough time.

As one of the intellectual property rights, copyright provides legal protection for the "intellectual products", specifically defined as works of authorship that constitutes "the

[155] WIPO, *Understanding Industrial Property*, 2nd edition, p.5
[156] Savaş Bozbel, *Fikir Ve Sanat Eserleri Hukuku* (Şişli, İstanbul: On İki Levha Yayıncılık, 2015), p. 17.
[157] "Intellectual, industrial and commercial property | Fact Sheets on the European Union". European Parliament. accessed January 02, 2022 https://www.europarl.europa.eu/factsheets/en/sheet/36/intellectual-industrial-and-commercial-property; WIPO, *Understanding Industrial Property*, p. 5.
[158] Ünal Tekinalp, *Fikri Mülkiyet Hukuku*, 4th ed. (İstanbul: Arıkan, 2006), p. 6.
[159] Groves, *Sourcebook on Intellectual Property*, p. 20-21; Bozbel, *Fikir ve Sanat Eserleri Hukuku*, p. 18.

original expression of ideas"[160] It gives exclusive and assignable legal rights to the copyright holder for a specific time period. These rights are exclusive rights on intangible goods and a "bargain between society and the author of the rights."[161] In following chapters, the notion of "work" and that "bargain" will be examined in detail.

However, "intellectual products" are intangible and independent from the "good" which they are embodied.[162] Even though some legislations consider them under "property right" and some identify them as "incorporeal property", according to Tekinalp, they cannot be considered as actual "properties" as only tangible things can be considered as "property".[163] Lawrence Lessig also states that "IP is not P, but this truth is lost on us".[164] Also Siva Vaidhyanathan asserts that "copyright should be about policy, not property."[165] According to Tekinalp, this is why intellectual properties cannot be the object of "possession" in a classical way and cannot be protected by possessory actions. He indicates that in intellectual property law, the possession replaced by the "usage". According to Tekinalp, intellectual products are not "goods" and the reason behind the choice of the term "property" is to indicate the exclusive nature of the exclusive rights on intellectual property.[166] However, Turkish Constitutional Court accepted the intellectual property rights among the "property rights" while stating that they are "intangible goods"

[160] Farok J. Contractor, *Valuation of Intangible Assets in Global Operations* (Westport, CT: Quorum, 2001), p. 246.
[161] Groves, *Sourcebook on Intellectual Property Law*, p. 6.
[162] Tekinalp, *Fikri Mülkiyet Hukuku*, 4th ed., p. 5-6.; Cahit Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* (İstanbul: Hayat Yayıncılık, 2004), p. 23.;"[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied…." 17 U.S.C. § 202.
[163] Tekinalp, *Fikri Mülkiyet Hukuku*, 4th ed., p. 5. Also, Cahit Suluk states that intellectual property is not a "good" and has a different existence from the thing in which it is embodied. See; Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 24.
[164] "IP" stands for "intellectual property" and "P" stands for "property". Lawrence Lessig, "The Architecture of Innovation," *Duke Law Journal* 51, no. 6, (2002), p. 1798.
[165] Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York: New York University Press, 2003), p. 15.
[166] Tekinalp, *Fikri Mülkiyet Hukuku*, 4th ed., p.6.

and both tangible and intangible goods are in the scope of property rights.[167] Also, Groves indicates that intellectual property rights are exclusive rights on "intangible goods"[168]

Nevertheless, there is also a human rights perspective. Article 27/2, Universal Declaration of Human Rights (hereinafter UDHR) states that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Furthermore, Article 27/1 of UDHR states that everyone has "the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Even thought, the article does not mention the term "intellectual property", it can be stated that, intellectual property rights and hereby copyrights are considered as one of the fundamental human rights.[169]

II. HISTORICAL DEVELOPMENT OF COPYRIGHT LAW

> *"Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball."*[170]
>
> ***-Zechariah Chafee Jr***

[167] Turkish Constitutional Court, Case No: 2004/81, Decision No: 2008/48, 31.01.2008.; Turkish Constitutional Court, Case No: 2010/73, Decision No: 2011/176, 29.12.2011.
[168] Groves, *Sourcebook on Intellectual Property Law*, p. 6.
[169] Peter Drahos, "The Universality Of Intellectual Property Rights: Origins And Development" p.13 accessed April 29, 2022; Bozbel, *Fikri Mülkiyet Hukuku,* p.17.; Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 41.
[170] Zechariah Chafee. "Reflections on the Law of Copyright: I." *Columbia Law Review* 45, no. 4 (1945), p. 503.

Even though the intellectual products of mind have been existed since the prehistoric times, after the invention of printing press, copyright had become a necessity.[171] Moreover, with the innovation of the transistor, the world entered a new age called "information age" and by global dissemination of knowledge; the need of copyright became much more crucial.[172] Hence, before explaining the notion of work and the requirements for the work, I will briefly mention the history of copyright in order to understand its essential aim and increasing significance.

A. HISTORICAL STAGES OF COPYRIGHT LAW

1. *BEFORE THE PRINTING PRESS: STAGE OF FIRST AND MIDDLE AGES*

Before the invention of the printing press, copying handwritten books and other artworks such as playbooks were not easy and common; hence, the need for protection was not essential and ad hoc instruments of intellectual creations were not established in any of the legal systems.[173] In this stage, even in Roman law, there is no separate right for the intellectual product.[174] Back then, the one who owns something, also owns the intellectual product on it as well.[175] For example, the owner of a paper also own the "painting" on the paper whether she/he painted or not. Even if there were debates about the "ownership" of the painting between Roman law schools *"Sabinians"* and the "*Proculians";* the

[171] Ernst Hirsch, *Fikir Ve Sınai Haklar* (İstanbul, 1948), p. 1.
[172] Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 42.
[173] Caterina *Sganga*, "The Role of Copyright History in Casting out the Demons of Copyright Propertization," Accessed March 13, 2021, https://www.researchgate.net/profile/Caterina-Sganga/publication/350042899, p. 6.; Tekinalp, *Fikri Mülkiyet Hukuku,* p.80.
[174] Salathiel Masterson, "Copyright: History and Development", *California Law Review* 28, (1940), p. 620; Nadide Güher Erer, "A Short History of Copyright in the West, in the Ottoman Empire and in Turkey" *Türk Kütüphaneciliği* 28, no. 4 (2014), p. 638.
[175] Hirsch, *Fikir Ve Sınai Haklar*, p. 17.

debate was about who owns the property, in a scenario that the paint was belong to a person other than the owner of the paper and no one considered the right of the painter.[176]

It can be said that this ignorance of the author leads a dereliction and makes plenty of "anonymous" works and plagiarism as well.[177] When perusing ancient works, one can see poets themselves complained about this position. Roman minstrel Martialis expressed in the last line of his poem "*Epigrammata"*:

> "Fame has it that you, Fidentinus, recite my books to the crowd as if none other than your own. If you're willing that they be called mine, I'll send you the poems for free. If you want them to be called yours, buy this one, so that they won't be mine"[178]

This line above shows the vulnerability and the discontentedness of the authors in absence of copyrights in crystal clear.

Besides, this situation continued in the Middle Ages too. In this area, right of reproduction belonged to the church and royals. The author of the work was still could not claim rights on her/his work. Furthermore, in this era, it was believed that the art is "godly" and the artist is just an intermediary person; hence, the church was the "real owner" of the work and the artists to be called as "an unknown master".[179] Based on this, one can state that, literally, artist had no name in these era.

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[176] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 80.
[177] Ernst Hirsch, *Hukuki Bakımdan Fikri Say*, vol:1, p. 19.; Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 80.
[178] Peter Anderson, "Martial 1.29: Appearance And Authorship." *Rheinisches Museum Für Philologie* 149, no. 1 (2006), p. 119.
[179] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 81; Gökçen Karasioğlu Gürbüz, *Türk Hukukunda Telif Eserlerin Korunması* (Ankara: Yetkin Yayınları, 2021), p.24.

2. *AFTER THE PRINTING PRESS: STAGE OF PRIVILEGES*

Copyright comes to rise after the invention of the printing press in the 15th and 16th centuries.[180] Even the name "copyright" comes from the word "copy". Therefore, one can say that "[c]opyright law is a creation of the print era."[181]

After Gutenberg's revolutionary invention in 1476, producing books became much easier, and oral transmission transformed to written transmission. While the popularity of written works expands, new works are copied by rival printers, and this constitutes a substantive need for protection of the copies. Preparing the first copy of the book was a burdensome endeavor but republishing the first copy was easy with a little time and work. Some publishers use the first copy of a book that was prepared for printing by a rival publisher, and this constitute an instance of "unfair competition". Therefore, the first instances of copyrights aimed to protect the publishers from the unfair practices of other publishers[182] while ignoring the "authors". Thereby, in this era, the authors could not enjoy the protection of copyrights; instead, the publishers enjoyed it.[183]

Nevertheless, the governments gave privileges to the publishers and these publishers got stronger day by day and eventually, the authors were disposed by the publishers. In 1469, the first publisher privilege was to be given to a publisher in Venice whose name is Giovanni Spira.[184]. In 1556, Stationers' Company was established as a guild and held the

[180] Güher Erer, "A Short History of Copyright in the West, in the Ottoman Empire and in Turkey", p. 638-639.
[181] M. Ethan Katsh, The Electronic Media And The Transformation Of Law 10-16 (1989), quoted, Douglas J. Masson, "Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work," *Indiana Law Journal* 71, no. 1049 (1996), p. 1052.
[182] Mustafa Ateş, *Fikir Ve Sanat Eserleri Üzerindeki Hakların Kapsamı Ve Sınırlandırılması, (*Ankara: Seçkin Yayıncılık, 2003), p. 34; Hirsch, *Fikir Ve Sınai Haklar*, p. 23; Nuşin Ayiter, *Hukukta Fikir ve Sanat Ürünleri*, (Ankara: Sevinç Matbaası,1981) p.18.
[183] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 82.
[184] Ateş, *Fikir Ve Sanat Eserleri Üzerindeki Hakların Kapsamı Ve Sınırlandırılması,* p. 34.

first privilege in England. The guild had a monopoly and "that means, in order to be able to press a book, one has to be a member of the said organisation." In 1662, "The Licensing of the Press Act" was established and the guild acquired "the power to control the printing presses" and this monopoly continued until 1694. It can be said that this privileged status of publishing companies endured until "Statute of Anne" came into force in 1710.[185]

In the era of privileges, when a publisher had the right to publish the work, she/he also acquired the property of the work.[186] In this era, publishers had a "very strong financial and social position." The governments considered the rights of the publisher instead of the authors and even the agreement between author and the publisher considered as the "personal matter" of the author[187] and even the little payment which the author had received was seen as a "favour".[188] Furthermore, until the "Statute of Anne" some publishers "owned the rights of books they published forever."[189] Despite the fact that authors did not want to be in this situation, and some publish their works by themselves; publishing was expensive and most of them could not afford it and became constrained to leave the publishing to the publishing companies.[190]

However, this privilege of publishers against the authors might also have a censorship-based reason. "Since the late Renaissance, the royals regulated the publishing industry; publishing monopolies were an offshoot of royal censorship."[191] When considering that

[185] Güher Erer, "A Short History of Copyright in the West, in the Ottoman Empire and in Turkey", p. 639.
[186] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 82.
[187] Ayiter, *Hukukta Fikir ve Sanat Ürünleri*, p.17; Karasioğlu Gürbüz, *Türk Hukukunda Telif Eserlerin Korunması,* p. 25.
[188] Sam Ricketson, "The copyright term", *International Review of Intellectual Property and Competition Law*, 23, no. 6. (1997), p. 756.
[189] Güher Erer, "A Short History of Copyright in the West, in the Ottoman Empire and in Turkey", p. 639.
[190] Masterson, "Copyright: History and Development", p. 626; Karasioğlu Gürbüz, *Türk Hukukunda Telif Eserlerin Korunması,* p. 25.
[191] Jane C. Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", *Tulane Law Review,* 64, no. 991 (1990), p. 997.

in that era, the freedom of expression and the artistic freedom were not in a strong position against monarchies; it is not so difficult to make an inference that the monarchs were not embraced the printing press with affection. Namely, royals gave copyright privileges and monopolies to their own printers[192] and the owner of the privilege has also the right to inspect. This means that books that is against the queen, king and the church could not be published. Nominally, these privileges bring along the notion of censorship.[193] In this era, the need for protection was fulfilled with the help of licensing acts. Yet, these "licensing acts served as a form of political censorship and trade regulation."[194] Furthermore, "It is notable that the monarchy used a guild, a medieval economic institution as an instrument, to censor the heresy and sedition made possible by the printing press."[195] Accordingly, censorship be considered as one of the reasons that governments did not consider the rights of the author itself and tend to establish the copyrights in favor of the publishers.

The French Revolution in 1781 also changed so many things. It was not only against to French monarchy, as I mentioned previously, it was also for the strong position of the monarchs and royals in the art world, and this leads to another domino effect that reaches to artist' rights. The evolution of the rights generally relied on authors' rights on literary works and the 'copyrights' which indicated the right of reproduction were the center of this evolution in keeping with the fact that "copyright is the creation of the print era" which comes up with the printing press. With the help of the revolution, the "theory of

[192] *"For instance, in 1518 a copyright privilege was given to the King's Printer, Richard Pynson who was the successor to William Caxton. The privilege meant a two years monopoly."* Güher Erer, "A Short History of Copyright in the West, in the Ottoman Empire and in Turkey", p. 639.
[193] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 82.
[194] Masson, "Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work," p. 1052.
[195] Masson, "Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work," p. 1052-1053.

intellectual property" was established and herewith, finally in 1791, the protection for the "authors" has begun.[196]

B. NATIONAL DEVELOPMENTS AND THE STAGE OF MODERN TIMES

The very first modern copyright act of the world, the British "Statute of Anne" finally came into force in 1710.[197] After the Statute of Anne, copyright law became a tool for authors instead of the state itself.[198] The "Statute"s first article reveals its aim to protect the authors:

> "Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books…"[199]

Yet, modern copyright protection which is anticipated by the laws mostly established after French Revolution.[200] In 1791 and 1793 the first regulations related to copyrights

[196] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 83; Karasioğlu Gürbüz, *Türk Hukukunda Telif Eserlerin Korunması,* p. 25.
[197] John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710, "Publishing History"* (1980), p. 39.
[198] Masson, "Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work," p. 1053.
[199] The British Statute of Anne; April 10, 1710.
[200] Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, *Tulane Law Review,* 64, no. 991 (1990), p. 997.

was established and these acts constituted an example for acts in Germany which was established in 1837 and Switzerland that was established in 1884.[201] In United States of America, the first "federal copyright act" was the "Copyright Act of 1790." The federal copyright act was copied from the "British Statute of Anne" with fidelity except provisions related to "maps and charts".[202]

Hence, the French *droit d'auteur*[203] and the British copyright law can be considered as the main models for the protection of the authors' rights in the two legal systems: common law and civil law.[204] Even though, Anglo-American copyright law can be considered as society-oriented; whereas the civil copyright laws usually considered as author-oriented[205], both law systems do not protect the censorship of the governments and this encouragement of the intellectual creation with an economic opportunity that comes with the exclusive rights, lead development in the authors' creations.

In Turkish law[206], the printing press came to Ottoman Empire after 30 years of its invention; yet, the first Turkish printing house established in 1727 by İbrahim Müteferrika and the very first publication was made in 1729.[207] After the establishment of the printing house, İbrahim Müteferrika got permission before every publication of books. Tekinalp states that, establishment of this printing house is an exception based on the trust arising

[201] Şafak Nuri Erel, *Türk Fikir ve Sanat Hukuku*, 3rd ed. (Ankara: Yetkin Yayınları, 2009), p. 34-35.
[202] Tylet T Ochoa, "Copyright Duration: Theories and Practice," in *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age*, ed. Peter K. Yu, 4th ed., vol. 1 (Westport, CT: Praeger Publishers, 2007), p. 143.
[203] (Fr) right of the author.
[204] Sganga, "The Role of Copyright History in Casting out the Demons of Copyright Propertization," p. 5.
[205] Ginsburg, "A Tale of Two Copyrights: Literary Property in Revolutionary France and America", p. 993.
[206] In this part, the term "Turkish Law" refers both laws of Ottoman Empire and The Republic of Turkey.
[207] Ateş, *Fikir Ve Sanat Eserleri Üzerindeki Hakların Kapsamı Ve Sınırlandırılması,* p. 38; Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 83.

from İbrahim Müteferrika's personality instead of a privilege and the getting permission before every single publication supports his argument.[208]

However, first important regulation for the authors rights was *"Encümen-i Daniş Nizamnamesi"* which was established in 1850. With this regulation, copyright has been granted to the authors and finally, the "theory of intellectual property" which emerging after the French revolution, showed its effects on Turkish law.[209] In 1857, "*Telif Nizamnamesi"* and in 1870, "*Telif ve Tercüme Nizamnamesi"* were established and the improvement of authors rights continued unabated.[210] Finally, in 1910 the first copyright act of Turkish law "*Hakk-ı Te'lif Kanunu"* was established and the notion of copyright and the works that had been protected under law were defined for the first time. This act continued to be in force after the proclamation of the "Republic of Turkey" on 29 October 1923 until "Law No. 5846 on Intellectual and Artistic Works"[211] which was drafted by Ernst E. Hirsch, came into force on 1 January 1952. Over the years, "Law No. 5846" has amended and, amendments in 1983[212], 1995[213], 2001[214] and 2004[215] can be considered as important amendments in order to catch the spirit of the time.

C. INTERNATIONAL AND REGIONAL DEVELOPMENTS

[208] *"…the printing press had already been introduced to Ottoman Empire by Spanish immigrants David and Samuel İbn Nahmias in 1493, 234 years before İbrahim Müteferrika. Novelties such as italics, page design, using capitals were introduced by an Italian family, Sonsino, who settled in Istanbul in 1530. Yet, the latter two probably referred to minorities, whereas since Müteferrika published a book in Turkish, it might be more convenient to assume that he introduced the printing press into the empire as his publications addressed to the Turkish-speaking majority."* Güher Erer, "A Short History of Copyright in the West, in the Ottoman Empire and in Turkey", p. 642; Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 83.
[209] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 83.
[210] Karasioğlu Gürbüz, *Türk Hukukunda Telif Eserlerin Korunması,* p. 34.; Bozbel, *Fikri Mülkiyet Hukuku,* p.25.
[211] Official Gazette No 7981, dated 13.12.1951.
[212] Official Gazette No 18210, dated 03.11.1983. Law No. 2936.
[213] Official Gazette No 22306, dated 07.06.1995. Law No. 4110.
[214] Official Gazette No 24335, dated 03.03.2001. Law No. 4630.
[215] Official Gazette No 25400, dated 12.03.2004. Law No. 5101.

After the French revolution, the globalization of the ideologies and need to spread them via literary works, made the international "copying" problem more common. One of the reasons behind this is that copyright protection's territoriality. Accordingly, reprinting in a country other than the country in which copyright protection was granted, do not fall under the scope of the protection. However, the copyright protection had become more and more important with the help of evolving freedom of expression in the world. Hence, the need for international regulations had arisen.

1. *BERNE CONVENTION*

In 1886, under the leadership of French author Victor Hugo, "The Berne Convention for the Protection of Literary and Artistic Works" (hereinafter "Berne Convention), was first established as a "pre-eminent multinational copyright treaty"[216] in Berne, Switzerland. It is the first international treaty in the copyright law.[217] "Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom" are the first members of the convention and it has reached 181 members by today[218] including Turkey.[219]

[216] Alexandra George, *Globalization and Intellectual Property* (London, UK: Routledge, 2017); Arnold Lutzker, *Content Rights for Creative Professionals Copyrights & Trademarks in a Digital Age* (Saint Louis: Taylor and Francis, 2013), p. 158.
[217] Masouyé Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (Geneva, Switzerland: World Intellectual Property Organization (WIPO), 1978), p. 5.
[218] Total 181 Contracting parties by the date of 01.05.2022. See, https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=15
[219] Official Gazette No 22341, dated 12.07.1995.; Official Gazette No 25266, dated 21.10.2003.

"The Berne Convention" set the minimum standards of protection for member states. It is now administrated by the "WIPO" and by the time it was completed, amended and revised multiple times in order to adapt to the needs of the time.[220]

2. *UNIVERSAL COPYRIGHT CONVENTION*

"Universal Copyright Convention" (hereinafter "UCC"), established by the "UNESCO", in 1952 for the purpose of constitute a bridge between European and American continent states. Even though there are international agreements in American continent on the intellectual property aspect; European countries do not attend these agreements. "As an attempt to devise a legal common denominator which would foster respect for the rights of creators and also encourage the international circulation of literary, scientific and artistic works, the UCC had a dual thrust." [221] I must remark that Turkey is not a party to the "UCC".

3. *THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS*

In 1995, "The Agreement on Trade-Related Aspects of Intellectual Property Rights" (hereinafter "TRIPS"), which was signed in Marrakesh between all the member nations of the World Trade Organization ("WTO")[222] Turkey is one of the members as well.[223] As an international organization, "WTO" set rules and negotiate agreements between

[220] "Berne Convention For The Protection Of Literary And Artistic Works Of September 9, 1886, Completed At Paris On May 4, 1896, Revised At Berlin On November 13, 1908, Completed At Berne On March 20, 1914, Revised At Rome On June 2, 1928, At Brussels On June 26, 1948, At Stockholm On July 14, 1967, And At Paris On July 24, 1971, And Amended On September 28, 1979" accessed May 1, 2022. https://wipolex.wipo.int/en/text/283698

[221] André Kéréver, "The Universal Copyright Convention", UNESCO, accessed May 2, 2022, https://en.unesco.org/courier/news-views-online/universal-copyright-convention

[222] The WTO has 164 members and 25 observer governments by the date 21.02.2022. https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

[223] Official Gazette No 22213, dated 25.02.1995.

governments for the purpose of "promoting transparency, predictability and non-discrimination in trading relations." The "TRIPS" is a part of "Marrakesh Agreement Establishing the World Trade Organization". It is settled at the end of the "Uruguay Round of trade negotiations" and it can be said that it is a "multilateral trade agreement" as "TRIPS" is not "negotiated as a stand-alone treaty.".[224]

Nevertheless, "TRIPS" constituted incorporation between the "Berne Convention" and itself[225] and by this way, it gave the "Berne Convention" near-global application[226] as it is signed by all the members of the "WTO". The remarkable reform of the "TRIPS" for the intellectual property law is that "with twenty-one provisions on obligations that range from border measures to criminal sanctions, the "TRIPS Agreement", for the first time, provides comprehensive international minimum standards on the enforcement of intellectual property rights."[227]

4. *WIPO COPYRIGHT TREATY*

"WIPO Copyright Treaty" was concluded in 1996 and entered into force in 2002 and administrated by "WIPO". The treaty built on the "Berne Convention" and aimed to solved to imperfections.[228] According to "WIPO Copyright Treaty", Contracting Parties must comply with the "substantive provisions of the 1971 (Paris) Act of the Berne

[224] Antony Taubman, Hannu Wager, and Jayashree Watal, *A Handbook on the WTO Trips Agreement* (Cambridge, United Kingdom: Cambridge University Press, 2020), p. xix.
[225] Article 9/1 of the TRIPS Agreement which is titled "Relation to the Berne Convention" states: *"Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."*
[226] Hector L. MacQueen; Charlotte Waelde; Graeme T Laurie, *Contemporary Intellectual Property: Law and Policy.* (Oxford: Oxford University Press, 2007) p. 39.
[227] Peter K. Yu, "TRIPS and Its Achilles' Heel", *Journal of Intellectual Property Law* 18, no. 2 (2011), p. 479.
[228] WIPO Copyright Treaty, Geneva, 1996, article 1.

Convention for the Protection of Literary and Artistic Works (1886)" whether they are bound by the "Berne Convention" or not. Number of contracting parties including Turkey[229], is 112 by today.[230] By this treaty, there had been stated that computer programs and databases are protected as literary works.[231] By this way, emerging needs in time after the establishment of "Berne Convention" have been tried to be met.

5. *FURTHER REMARKS*

Copyright' history is not limited with history which I tried to explain above. It is rich with agreements, acts, amendments, regulations, directives, provisions such as "Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations"[232] and European Union directives such as the "Information Society Directive"[233], "Copyright Term Directive"[234], and the "Directive on Copyright in the Digital Single Market."[235] As this study is based on the United States Law, European Union Law and the Turkish Law aspects, the European Union Law directives that are related with the subject will be discussed in forthcoming parts.

[229] Official Gazette No 26516, dated 08.05.2007.; Official Gazette No 26876, dated 14.05.2008.
[230] accessed May 1, 2022. https://wipolex.wipo.int/en/treaties/ShowResults?search_what=B&bo_id=17
[231] WIPO Copyright Treaty, Geneva, 1996, article 4-5.
[232] *"The Convention was drawn up by the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations convened jointly by the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization and the International Union for the Protection of Literary and Artistic Works. The Conference was held at Rome at the invitation of the Government of Italy from 10 to 26 October 1961."* accessed May 2, 2022, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XIV-3&chapter=14&clang=_en
[233] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[234] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
[235] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Nevertheless, in the 19th century, art became an important occupation in all over the world. After the revolution, art got out of control of the church, royals, and academy and became autonomous. For example, Russian avant-garde contemporary artists they began to teach the workers science and art in the studios, workshops and theaters.[236] In the 19th century, photograph became an art form and at the beginning of the 20th century, cinema art came into our lives. After the technological improvements, nearly all art forms have revolutionized[237] and thanks to the artists introducing art to the public, art became known for large masses of people. However, as people loved art, a market emerged in this area. People wanted to "have" the artwork, but some artworks were one of a kind and the only way to "have" the artwork was to have a "copy" of it. So, although these developments throughout history are pleasing, they also lead a vulnerability against violations.

Thereby, the need of art protection has increased more and more. In our days, we live in a world that "copying" sound recordings, written works, and artistic works such are very easy and difficult to track. Back then, copying a painting was nearly impossible and even the original painter herself/himself cannot paint the artwork again. This is why "copying" was not a serious problem for artists before the information era. Nevertheless, in today's world, paintings, drawings, photographs, and writings can be copied via photocopy machines and sculptures, 3D designs can be copied the same via 3D printers. With the help of technology, most works can be copied and even the software which is created in this copying system can be copied. Moreover, in today's global world, with the help of world wide web, infringements now occur globally. Therefore, regional and global protection is a need for today's artists. As we are not living in the world of yesterday, the laws of yesterday are not enough to protect the artworks of today. So that, as time passes,

[236] Polat Akgün, *Sanat Özgürlüğü,* p. 44.
[237] Polat Akgün, *Sanat Özgürlüğü,* p. 49.

copyright laws evolve to meet the need. Even though the international protection for copyright cannot be possible, this endeavor for some sort of uniformity provides predictability, and "international dissemination of works of authorship".[238]

[238] Jane C. Ginsburg, "International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?",, *Journal Of The Copyright Society Of The USA* 47, (2000), p. 265.

III. NOTION OF WORK

A. IN GENERAL

After explaining the notion and history of copyright, finally, in this part, I will try to explain the subject matter of the copyright. The notion of the work is the subject of the copyright protection. First of all, there must be a "work" to be protected. The definition of work varies from legislation to legislation, so, there is not an international uniformity for the definition of work. However, in general "literary works such as novels, poems, plays, reference works, newspaper articles, computer programs, databases, films, musical compositions, and choreography, artistic works such as paintings, drawings, photographs, and sculpture, architecture, advertisements, maps, and technical drawings enjoy copyright protection."[239] Furthermore, derivative works can also be protected by copyrights such as translations into other languages, arrangements, compilations, and adaptations related to literary and artistic works.

In general, there are "originality" and "expression" requirements for eligible to be a copyrighted "work" in the European Union Law and Turkish Law approaches while United States copyright law needs an also "fixation" requirement in addition to these.

Nevertheless, "The Berne Convention" does not define the term "work" or "artistic work", yet it gives examples related to the terms. So, I must mention that the list[240] in the

[239] Copyright, WIPO.

[240] *"The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography;*

"Berne Convention" is not exhaustive.[241] wording of the Convention is intended to cover them all. As the "Guide" clarifies, "the expression 'literary and artistic works' must be taken as including all works capable of being protected." and it "permits of no limitation by reason of the mode or form of their expression."[242]

According to the Article 2/1 of the Convention: "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". Accordingly, the Berne Convention interpreted the notion of work and artistic work broadly. With this reference, "every production in the artistic domain, whatever may be the mode or form of its expression" can be the subject of the protection. In Article 2/5, it had been indicated that "Collections of literary or artistic works such as encyclopedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections." Yet, some categories of work, such as works of applied art[243], might be excluded from protection by the choice of Member States.

works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." Article 2/1 of the Berne Convention.

[241] *"The expression "literary and artistic works" must be taken as including all works capable of being protected. In order to illustrate this, paragraph (1) of Article 2 [of the Berne Convention] gives an enumeration of the works. The use of the words "such as" shows that the list is purely one of examples and not limitative: it is a matter of providing a number of guides for the national law¬ makers; in fact all the main categories of works are set out."* Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 13.

[242] Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 12-13.

[243] Article 2/7 *"Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works."*

So that, with a broad interpretation of Berne Convention, contemporary artworks in every form can be protected with copyright. The main requirements of the "work" do not contain a specific form of work. Moreover, "the content of the work is never a condition of protection."[244] The requirements of the work are originality and expression with "fixation" if a Member State decides to consider it as a requirement. One can say that, according to Article 2/3 of the Convention, "[c]reativity and originality are the two faces of the single requirement of protection."[245] It would be adequate for the protection if a "work" "reflects the personality of its maker", even if the work is not novel.[246] This is because copyright law does not need a "novelty" criterion unlike patent law. As Goldstein states, "as a general rule, novelty has no substantive role in copyright"[247] "Basically, copyrights provide legal protection regarding the original expression of ideas".[248]

However, as well as the "Berne Convention", "UCC", did not identify the notion of the "work" or "artistic work".[249] It provides a list of "works" and "artistic works" but the list is not exhaustive, so, Article 1 is suitable for protection of contemporary artworks in every form. Furthermore, according to Article 4/3 of the "UCC"[250] the Member States are not

[244] *." Claude, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 12.
[245] Caterina Sganga, "The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead". *European Intellectual Property Review*, (December 15, 2018) Available at SSRN: https://ssrn.com/abstract=3323011, p.3.
[246] As in Silke von Lewinski, International copyright law and policy (OUP 2008), para 5.66, 121; Daniel Gervais, La notion de l'oeuvre dans la Convention de Berne et en droit comparé (Librairie Drox 1998), p. 51- 55; quoted in Sganga, "The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead", p.3.
[247] Paul Goldstein, *Goldstein On Copyright*, 3rd ed., vol. 1 (Austin: Wolters Kluwer Law and Business, 2005), p. 13.
[248] Contractor, *Valuation of Intangible Assets in Global Operations*, p. 246.
[249] According to Article 1 of the Convention: *"Each Contracting State undertakes to provide for the adequate and effective, protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture."*
[250] *"The provisions of paragraph 2 of this article shall not apply to photographic works or to works of applied art; provided, however, that the term of protection in those Contracting States which protect photographic works, or works of applied art in so far as they are protected as artistic works, shall not be less than ten years for each of said classes of works."*

obligated to protect the applied artworks, yet, it is possible for the States to protect them under one condition which is about the duration of the protection.[251]

When one scrutinizes the "TRIPS" Agreement, for the notion of the "work", we see that it did not identify the notion while referring to Berne Convention. Thus, the notion of the work that has been indicated in the Article 2/1 of the Berne Convention has been applicable as well. However, it extends copyright protection to software and database with the Article 10.[252]

B. U.S. LAW APPROACH

United States of America (hereinafter "U.S.") Law also interprets the scope of work broadly. The Code states that "works of authorship include literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works."[253]

At the first glance, this provision might seem to narrow the scope of the "work" and "artistic work" by categorizing works briefly. However, when we consider the section

[251] Salih Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları* (Istanbul: Onikilevha Yayıncılık, 2021), p.10.
[252] Article 10 "Computer Programs and Compilations of Data" *"1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). 2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."*
[253] 17 U.S. Code § 102.

101[254], we see that the use of the word "includes" does not narrow the scope of the "work".

Furthermore, as the House Report no. 94–1476 explains:

> "The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative," and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories."[255]

It should be stated that U.S. Congress choose a "flexible" approach in order to "gave federal courts the flexibility to interpret the scope of the existing subject matter categories, but only Congress has the authority to create entirely new categories of authorship."[256]

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[254] "Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."

[255] 17 U.S. Code § 102 - Subject matter of copyright. House Report no. 94–1476. 17 U.S. Code § 102 - Subject matter of copyright. House Report no. 94–1476. "*Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) [section 5(k) of former title 17] as "prints or labels used for articles of merchandise"* accessed January 15, 2022. https://www.law.cornell.edu/uscode/text/17/101

[256] Compendium Of U.S. Copyright Office Practices § 101, 3rd ed., (2021) § 307.

So that, the scope of "work" and "artistic work" in the U.S. law are broad by all means and copyright protection granted all of the "original works of authorship fixed in any tangible medium of expression…"[257] In U.S. "to qualify for copyright protection, a work must be original to the author," which means that the work must be "independently created by the author" and it must possess "at least some minimal degree of creativity."[258] "Novelty or ingenuity", aesthetics, artistic value, intrinsic quality, author's purpose, impression, "look and feel", author's skill, time, effort, expenses, material composition, design alternatives, commercial appeal, commercial success do not be considered in the examination whether the work is eligible to copyright protection or not.[259]

Yet, one should bear in mind that, "an arrangement of listings in white pages"[260] and a wildflower display named "Wildflower Works" that was promoted as a "living art"[261] were not considered as a work by the U.S. Court. Therefore, the requirements of the work, which will be examined later, should be interpreted carefully.

C. EU LAW APPROACH

According to European Union (hereinafter "EU") Law, even though there are a bunch of directives in order to set the minimum standards and a desire of uniformity, there is not a certain notion of work.[262] Despite the aim of harmonization of EU law proceeds, it has been seen that EU legislator ignoring to "need to intervene on the notion of protected works and the requirements".[263]

[257] 17 U.S. Code § 102 - Subject matter of copyright: In general.
[258] Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 340, 347 (1991) U.S.
[259] Compendium Of U.S. Copyright Office Practices § 101, 3rd ed., (2021) § 310.
[260] Feist Publications, Inc. v Rural Telephone Service Co. Inc., 499 340 (1991) U.S.
[261] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 291.
[262] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.13.
[263] Sganga, "The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead" p. 2.

However, there are some directives that need to be mentioned when speaking of the work. According to Article 1 of the "Directive 91/250/EEC on the legal protection of computer programs": "Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works.". By this way, the directive revealed that EU law protects the computer programs under copyright law and this protection covers "the expression in any form of a computer program." Yet, it must be mentioned that the protection does not extend to ideas and principles in any way.[264] When considering the requirements of the protection we see that the requirements are the same as usual. No extra requirements such as "aesthetic" has been established in Article 1/3.

According to "Directive 96/9/EC"[265], two types of databases are protected under copyrights: databases that are qualify as "work" and are subject to copyright protection and databases that are not qualify as "work", yet; a "substantial investment has made in either the obtaining, verification or presentation of the contents" of it and has provided a *sui generis* protection.[266]

According to Article 3/1, the requirement for the protection of database is to be constituting "the author's own intellectual creation" and "no other criteria shall be applied to determine their eligibility for that protection" such as "aesthetic" and "quality". The protection does not extend to "content" of the database and as Article 1/3 states, protection

[264] Directive 2009/24/EC Of The European Parliament And Of The Council Of 23 April 2009 On The Legal Protection Of Computer Programs, Article 1/2.
[265] Directive 96/9/EC Of The European Parliament And Of The Council Of 11 March 1996 On The Legal Protection Of Databases.
[266] Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.16.

"shall not apply to computer programs used in the making or operation of databases accessible by electronic means.".

In 2006, "Directive 2006/116/EC" was established for the purpose of providing a uniformity. However, in this directive, there is an assessment about the protection of photographs can be found in Article 6. It has been stated that photographs can be protected if they are "the author's own intellectual creation". No extra criteria such as its value, aesthetics and purpose would be needed.[267]

To repeat, as can be seen from the directives above, the notion of work does not identify clearly by the EU legislator. However, it can be seen that, the "Court of Justice of the European Union" (hereinafter "CJEU") identify the notion of work and requirements of the work in some of its decision. In "*Infopaq"*[268] case, "CJEU" made a cornerstone decision. In the decision, the court examined that if the reproduction of newspaper articles's can be considered as a work. In the event, the court examined "whether the reproduction of an eleven words excerpt of a newspaper article could amount to a violation of Article 2 InfoSoc."[269] The court decided that "[i]n the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises eleven consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination."[270]

[267] Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.18.
[268] Infopaq International A/S v Danske Dagblades Forening, ECLI:EU:C:2009:465, 16 July 2009.
[269] Sganga, "The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead" p. 5.
[270] Infopaq International A/S v Danske Dagblades Forening, § 51

Furthermore, in *"Cofemel"* case, "CJEU" ruled that designs are capable of classification as "works", within the meaning of "Directive 2001/29", if they meet two requirements: "being the author's own intellectual creation" and "expression of such creation."[271]

Accordingly, even an eleven-word excerpt of a newspaper article can be considered as a work as long as "the author may express his creativity in an original manner and achieve a result which is an intellectual creation"[272] Moreover, portrait photographs of children[273] and even a military status report[274] can be protected as "work" under copyright law if they constitute an example for the "expression of the author's own intellectual creation".

On the other hand, the court decided that football matches cannot be protected by copyrights as "they cannot be classified as works".[275] Because of the fact that they leave

[271] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 48, 29.
[272] Infopaq International A/S v Danske Dagblades Forening, § 45
[273] Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG, and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, ECLI:EU:C:2011:239, 01.12.2011. § 132 "*In conclusion, it must be stated, first of all, that a portrait photo is afforded copyright protection under Article 6 of Directive 93/98 and of Directive 2006/116 if it is an original work resulting from the intellectual creation of the photographer, which is the case where the photographer leaves his mark by using the available formative freedom of portrait photography."*
[274] Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623, 29.08.2019, § 21, 25 *"In the present case, Funke Medien has contended that UdPs cannot be protected under copyright, since they are reports the structure of which consists of a standard form, drawn up by different authors, of a purely factual nature. As far as concerns the German Government, it claims that the very creation of such a standard form may be protected under copyright… It follows that it must be held that military status reports, such as those at issue in the main proceedings, can be protected by copyright only if those reports are an intellectual creation of their author which reflect the author's personality and are expressed by free and creative choices made by that author in drafting those reports, which must be ascertained by the national court in each case."*
[275] Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08), ECLI:EU:C:2011:631, 04.10.2011, § 96-99 *"FAPL cannot claim copyright in the Premier League matches themselves, as they cannot be classified as works. To be so classified, the subject-matter concerned would have to be original in the sense that it is its author's own intellectual creation (see, to this effect, Case C‑5/08 Infopaq International [2009] ECR I‑6569, paragraph 37). However, sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive. That applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright. Accordingly, those events cannot be protected under copyright. It is, moreover, undisputed that European Union law does not protect them on any other basis in the field of intellectual property."*

"no room for creative freedom". Furthermore, "taste of a food product cannot be classified as a work."[276]

Accordingly, even if the notion of work is interpreted broadly in EU, this does not mean that all "work"s can be protected by copyright law. The "CJEU" ruled that "any creation – can be protected by copyright only if it can be classified as a "work" under the InfoSoc Directive", and also if it is "original in the sense that it is the author's own intellectual creation"; with an "expression of the author's own intellectual creation".[277] So that, the scope of work must be interpreted carefully, and after the "*Levola"* decision, one can briefly conclude that "…every creative product, regardless of its nature, may qualify as work once it is original and identifiable precisely and objectively."[278]

D. TURKISH LAW APPROACH

Article 1/B-a of the Turkish Law on Intellectual and Artistic Works (hereinafter "Law No. 5846") defines work as "any intellectual or artistic product bearing the characteristics of its author, which is deemed a scientific and literary or musical or work of fine arts or cinematographic work."[279]

[276] Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899, 13.11.2018, § 44.
[277] Levola Hengelo BV v Smilde Foods BV § 34, 35, 36, 37, 39; Sganga, The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead" p. 11.
[278] Sganga, The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead" p. 13.
[279] Part 1/A, "Definition" Art. 1/B-a., Law No. 5846 of 5.12.1951. (amended by: Law No. 2936 of 1.11.1983; Law No. 4110 of 7.6.1995; Law No. 4630 of 21.2.2001; Law No. 5101 of 3.3.2004; Law No. 5217 of 14.7.2004; Law No. 5571 of 28.12.2006; Law No. 5728 of 23.01.2008 Law No. 6279 of 29.02.2012 Law No. 6552 of 10.09.2014) Transleted by Gül Okutan Nilsson and Feyzan Hayal Şehirali (I must remark that after this translation, the code amended again. Yet, the provisions which would be used in this study remained; hence, this translation will be used in this study. Furthermore, all quotations from the Law No. 5846 are quoted from this translation.) accessed November 25, 2021. https://en.unesco.org/sites/default/files/turkey_lawintellectualartisticwork_entof.pdf

The list of works was established in *numerus clausus* and creating a new sort of work other than "scientific and literary or musical or work of fine arts or cinematographic work" is not possible. Yet, works that is considered in Article 2-5, constitute examples of those four kinds of works while they are not established in *numerus clausus*. [280] Thusly, if one except the example approach, the notion of the work is broad in Turkish Law as well.

According to Turkish doctrine and judicial decisions, there are two elements of the work: objective element and the subjective element.[281] According to Turkish Court of Cassation: "The first is the objective element, which the law has specified as a product. Accordingly, the work must first exist as a material asset suitable for appropriation and disposition. The second is that it is a subjective element and is literary and artistic work must carry the characteristics of the author of the work."[282]

Generally, the objective element refers to that the work must be among the categories of the work that is listed in the "Law No. 5846"; whereas the subjective element refers that the work must "carry the characteristic of its author".[283] The subjective element refers to the work to be "a product of an intellectual effort" while "carrying the characteristic of

[280] Tekinalp, *Fikri Mülkiyet Hukuku*, 3rd ed., p. 106.; Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 49; Ayiter, *Hukukta Fikir ve Sanat Ürünleri*, p. 45; Nal/Suluk (Karasu), *Fikri Mülkiyet Hukuku,* p. 43.
[281] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2008/7336, Decision No: 2009/11814, 13.11.2009.; Turkish Court of Cassation, 11th Civil Chamber, Case No: 2007/4708, Decision No: 2008/640, 15.05.2008; Turkish Court of Cassation, General Assembly of Civil Chambers. Case No: 2003/4-260, Decision No: 2003/721, 02.04.2003.
[282] Turkish Court of Cassation, General Assembly of Civil Chambers. Case No: 2009/15-459, Desicion No: 2009/541, 18.11.2009.
[283] Hayri Bozgeyik, *Mimaride Telif Hakları, (*Ankara: Seçkin Yayıncılık, 2019), p. 42.; Artür Karademir, *Çalışanların Yarattığı Eserler Üzerinde Fikri Hakların Kullanılması, (*Ankara: Seçkin Yayıncılık, 2017); Pınar Kılıçoğlu Capadona, *Şehir Planlarının Eser Niteliği ve Eser Sahipliği,* (Ankara: Turhan Kitabevi, 2011), p. 9.; Hirsch, *Hukuki Bakımdan Fikri Say*, p. 11.; Halil Arslanlı, *Fikri Hukuk Dersleri*, (Sulhi Garan Matbaası: İstanbul, 1954) p. 4.

its author" and, the objective element identifies as "the work to be formed" with "being among the categories of the work that is listed in the "Law No. 5846"" [284]

Sometimes, subjective element that is related to "characteristic of its author" can be identified as "substantial element" whereas; the objective element related "categories of the work" identified as element related to "form"[285]

However, Nal and Suluk divide the elements of the work into three: element related to "form" that is "being among the categories of the work that is listed in the "Law No. 5846"", objective element that is to "be perceived by third parties" and subjective element that is to "carry the characteristics of the author".[286]

Tekinalp classifies these elements into four: "carrying the characteristics of the author", "formed in a way that reflects the characteristics of the author", "being among the categories of the work that is listed in the Article 1/B- of the "Law No. 5846"" and being a "product of an intellectual effort".[287] Differently from this, Öztan classifies the elements of work under six title. According to Öztan, a work must be made under human authorship, work should carry a literary/artistic content, work should "be perceived by third parties", work should bear the characteristics of "scientific and literary or musical or work of fine arts or cinematographic work" accordingly to the "Law No. 5846",

[284] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.30; Artür Karademir, *Çalışanların Yarattığı Eserler Üzerinde Fikri Hakların Kullanılması,* p. 16-17.
[285] Ramazan Uslu, *Türk Fikir ve Sanat Hukukunsa 'Eser' Kavramı"*, (Ankara: Seçkin Yayınları, 2003), p. 34, 51.; Karasioğlu Gürbüz, *Türk Hukukunda Telif Eserlerin Korunması,* p. 36.
[286] Suluk/ Nal, (Karasu) *Fikri mülkiyet Hukuku*, p. 42.
[287] Intellectual effort means that an intellectual property work must be a product of an intellectual effort and activity and this condition leads a necessity: a work must be created by human. As the term 'intellectual property' refers to *"creations of the mind",* one can say that considering a non-human being such as an animal, nature itself (natural events) and a machine as a creator of an intellectual property work is impossible. Intellectual property can be subject to protection only if it is an intellectual work of humans. Tekinalp, *Fikri Mülkiyet Hukuku,* 4th ed., p. 97.
Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 97.

furthermore work should "carry the characteristics of the author" and lastly work should "surpass a certain degree of creation".[288]

However, Artür Karademir indicates that in Turkish doctrine, some additional elements for the work have been expressed which can be categorized under objective and subjective elements.[289] I agree with him; hence, in this study, the elements of the work in Turkish law would be classified under objective and subjective elements.

Firstly, for meeting the objective element, the work should "be among the categories of the work that is listed in the "Law No. 5846"" and also the work should be "formed" and be "perceived by third parties".[290] An unformed "idea" cannot be protected hence, there should be an "expression". For the subjective requirement, the work should "carry the characteristics of the author" in other words work should be "original".

The first element that is "being among the categories of the work that is listed in the "Law No. 5846" has been identified in this chapter, and further, will be mentioned below in the part related to "artistic works". However, as this study examines the notion of work from U.S., EU, and Turkish law approaches, elements related to notions of "expression" and "originality", will be examined in detail under the part titled "requirements of work" in order to set a uniformity.

[288] Fırat Öztan, *Fikir ve Sanat Eserleri Hukuku*, (Turhan Yayınevi: Ankara, 2008). p. 82.
[289] Karademir, *Çalışanların Yarattığı Eserler Üzerinde Fikri Hakların Kullanılması,* p. 16.
[290] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.30.

However, registration, novelty, quality, quantity, public order and immorality, purpose, endeavor, and expenses related to the creation of the work do not consider while evaluating the qualification of the work.[291]

Hereby, even a lawsuit petition can be considered "work" if it meets the requirements. For this, a lawsuit petition must bear the characteristics of the author, yet this is really exceptional.[292] According to the Turkish Court of Cassation, a lawsuit petition of a lawyer must be being advocated for the first time, does not enter to public space, and reveal intellectual creativity in order to be a "work" under copyright law. Also, if the petition has a low level of expression and contains insufficient information; again, the conditions for being a "work" are not satisfied.[293]

Turkish Court of Cassation also ruled that television broadcasting of football matches cannot be considered as work[294] and also in a decision Court stated that a synchronicity method for the Qur'an cannot be considered as a "work" unless it bears the special esthetic and values of the calligraphy.[295]

[291] Mustafa Ateş, *Fikri Hukukta Eser*, (Turhan Kitabevi: Ankara, 2007), p. 102; Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku*, p. 48-50.
[292] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahiplerinin Hakları,* p.174.; Öztan, *Fikir ve Sanat Eserleri Hukuku,* p.109; Ayiter, *Hukukta Fikir ve Sanat Ürünleri*, p.48; İlhami Güneş, *Uygulamada Fikir Ve Sanat Eserleri Hukuku*, 2nd ed. (Ankara: Seçkin Yayıncılık, 2015), p. 59.
[293] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2015/12923, Decision No: 2017/2724, 09.05.2017.
[294] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2005/13440, Decision No: 2005/12765, 23.12.2005.
[295] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2008/7336, Decision No: 2009/11814, 13.11.2009.

So that, as seen from Court decisions, there are conditions needed to be met in order to be considered as "work". Also, the Turkish Law needed an additional requirement to these for "works of fine art": the aesthetic value.[296]

IV. REQUIREMENTS OF THE WORK

A. EXPRESSION

As indicated before, copyright law only protects expressions, not the ideas. According to Article 2/1 of "Berne Convention" "The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". The provision has been clarified in the "guide": as "…once that idea has been elaborated and expressed, copyright protection exists for the words, notes, drawings, etc., in which it is clothed. In other words, it is the form of expression which is capable of protection and not the idea itself."[297] After these, in the Article 2 of "WIPO Copyright Treaty", it has been clarified that: "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." Accordingly, Article 9 of the "TRIPS Agreement" adopts the Article 2 of the "WIPO Copyright Treaty".

According to U.S. law "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression…. In no case

[296] Law No. 5846 of 5.12.1951. *"Art. 4. (Amendment: 7.6.1995 - 4110/2) Works of fine arts are the following works, which have aesthetic value…"* Transleted by Gül Okutan Nilsson.
[297] Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*, p. 12.

does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[298] Furthermore, the House Report clarifies that "Copyright does not preclude others from using the ideas or information revealed by the author's work. It pertains to the literary, musical, graphic, or artistic form in which the author expressed intellectual concepts."[299] U.S. Supreme Court clearly remarked that "[t]he most fundamental axiom of copyright law is that 'no author may copyright his ideas or the facts he narrates."[300]

In "*Baker"* case, U.S. court ruled that an improved system of book-keeping which was explained in a book cannot give its author the right to exclude others to practice the "system" introduced in the book. The court clearly states that:

> "…as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it. The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell, and use account books prepared upon the plan set forth in such book."[301]

EU law embraces the same approach. "CJEU" ruled that one of the two cumulative requirements of the work is "expression".[302] Ideas cannot be protected in EU law under copyright law. As the "CJEU" indicated in another decision: "[p]rotecting ideas by copyright would amount to making it possible to monopolise ideas, to the detriment, in

[298] 17 U.S. Code § 102 - Subject matter of copyright: In general
[299] 17 U.S. Code, house report no. 94–1476
[300] Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)
[301] Baker v. Selden, 101 U.S. 99 (1879)
[302] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 48, 29.

particular, of technical progress and industrial development."[303] Accordingly, Article 1/2 of the directive 2009/24/EC clearly states that "Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."

"Turkish Law on Intellectual and Artistic Works" also adopts the same approach. An unformed idea cannot be protected by copyrights.[304] An idea which is a product of an "intellectual endeavor" should be expressed in a form.[305] Turkish copyright law gives protection to the "intellectual products", not the ideas themselves. [306]According to Article 1/B[307] of the "Law No. 5846", form of this expressions reveals itself in the style of the author.[308] Thus, one can say that, in Turkish Law, the idea cannot be protected itself, it is the "expression" style of the author which is protected by copyright.[309] Thoughts and comments that are presented to create a work cannot be protected as long as they remain in the "idea stage" because; if the creative idea remains in the "idea stage" objective element of the work cannot be met.[310] Tekinalp indicates that methods cannot be protected under Turkish copyright law and cites a decision from Switzerland which is similar to U.S.'s *"Baker"* case. In the decision, the Swiss court decided that a method for notation

[303] Brompton Bicycle Ltd v Chedech/Get2Get, 11 June 2020, ECLI:EU:C:2020:46.
[304] Uslu, *Türk Fikir ve Sanat Hukukunsa 'Eser' Kavramı,* p. 41; Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 101; Cahit Suluk, and Temel Nal, (Rauf Karasu) *Fikri mülkiyet Hukuku* (Ankara: Seçkin, 2017), p. 47.
[305] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 101.
[306] Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 51.
[307] *"Work: Any intellectual or artistic product 'bearing the characteristic of its author', which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work."* (Emphasize added)
[308] Başak Akgün, "Telif Hukuku'nda İntihal Kavramı, Anonim Kullanımlar Ve Tüm Bunların Karşısında Eser Sahiplerinin Fikri İmzası: "Üslup"," FMR Fikri Mülkiyet ve Rekabet Hukuku Dergisi 21, no. 1 (2019): 67.
[309] Akgün, "Telif Hukuku'nda İntihal Kavramı, Anonim Kullanımlar ve Tüm Bunların Karşısında Eser Sahiplerinin Fikri İmzası: "Üslup" p. 67.
[310] Suluk and Nal (Karasu) *Fikri mülkiyet Hukuku*, p.47.

system cannot be protected as the notion of work indicates the "formation of an idea" and methods cannot be considered as "work" to be protected by copyright law. [311]

Thus, the protection of expression and freedom of ideas from the copyright's exclusivity is not controversial. However, setting the line between the idea and expression is not easy. Because of this, there is an ongoing debate on the idea/expression dichotomy which is highly important for the protection of contemporary artworks. This dichotomy will be examined in the next part of this study.

Well, what is the meaning of expression exactly? It can be defined as "the act of making your thoughts, feelings, etc., known by speech, writing, or some other method: the act of expressing something"[312] Thus, one can say that to be protected under copyright law, a work must have a reflection on the outer world. This reflection might be in a direct way or in an indirect way.[313] The idea itself solely cannot be protected no whether they are original or not. The author must express her/his idea to the outer world with a method in order to enjoy copyright protection. This is because, "[u]nlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea - not the idea itself."[314] Considering that the copyrights are "double-edged swords"[315] which give authors exclusive rights whereas restricting others to use the work protected; one can state that a broad interpretation of the expression might lead a broad exclusivity that restricts the artistic creativity. Thus, copyright protection does not expand certain words as they are considered as the common property of humanity as they have "little

[311] BGE 70 11 57; Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 103.
[312] "Expression Definition & Meaning," Merriam-Webster, accessed January 17, 2022, https://www.merriam-webster.com/dictionary/expression)
[313] Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.84.
[314] Mazer v Stein, 347 U.S. 201 (1954) 217
[315] Nancy J. Troy, "Copyright as Monopoly." *Art Journal* 76, no. 1 (2017), p. 150.

susceptible of private appropriation as air or sun light"[316] and restricting the usage of them would be like restricting the usage of the alphabet. In compliance with this, ideas have meaning towards only the author unless they communicate with the outer world. As the U.S. Court stated clearly, "The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation."[317] So, this lack of "susceptible of private appropriation" is the reason why copyright protection do not cover ideas.

However, copyright protection did not cover every expression that has reflected on the outer world. In U.S., work must be ""fixed" in a tangible medium of expression…" This "fixation" requirement will be held later.

According to "CJEU", the form of this "expression" can be in any form and this form do not need to be permanent.[318] copyright protection does not cover tastes because of the fact that "subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity"[319] Hence, expressions of subjective subjects such as tastes cannot meet the requirements of copyright. One can say that copyright protection only extends to works that can be sensed with the mechanical senses of sight or hearing. In EU law, "taste of a food product cannot be classified as a

[316] Holmes, 174 U.S. at 86 (quoting Jefferys v. Boosey, 10 Eng. Rep. 681, 702 (H.L. 1854)), quated Richard H. Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law," *Pace L. Rev.* 551 no.3 (1990): 556.
[317] Holmes, 174 U.S. at 86 (quoting Jefferys v. Boosey, 10 Eng. Rep. 681, 702 (H.L. 1854)), quated Richard H. Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law," p. 556.
[318] Levola Hengelo BV v Smilde Foods BV § 40.
[319] Levola Hengelo BV v Smilde Foods BV § 40.

'work'"[320] This is because, the copyright law needs an "objectivity". The subject matter of the protection must be expressed in a "precise and objective manner" by the creator. As Court states "it is not possible in the current state of scientific development to achieve by technical means a precise and objective identification of the taste of a food product which enables it to be distinguished from the taste of other products of the same kind."[321]

Not only tastes but also scents face some problems related to "expression" which is should be "in a manner which makes it identifiable with sufficient precision and objectivity".[322] I must mention that before the "*Levola"* decision, the Supreme Court of the Netherlands decided that the scents can be protected under copyright law.[323] According Supreme Court of the Netherlands "the description given in Article 10 of the Copyright Act of what is to be understood as a 'work' within the meaning of that Act is general and does not rule out the inclusion of scents".[324] As one can see, the Dutch Supreme Court interpreted the notion of work broadly on the contrary to the French Court of Cassation's ruling about rejecting the copyrightability of the scents[325] just three days before the ruling of Dutch Supreme Court. According to French Court of Cassation "a perfume fragrance, which is the result of the simple application of know-how, does not constitute the creation of a

[320] Levola Hengelo BV v Smilde Foods BV § 44.
[321] Levola Hengelo BV v Smilde Foods BV § 43.
[322] İhsan Osman Yarsuvat, *Kokunun Hukuken Korunması,* (İstanbul: Platon Plus Yayıncılık, 2022), p. 57.
[323] Hoge Raad, Lancôme v Kecofa, 16 June 2006, NL:HR:2006:AU8940.
[324] English, French and Spanish translation and commentary by P.B. Hugenholtz, in: Chronicle of The Netherlands. Dutch Copyright Law, 2001-2010, RIDA no. 226, Oct. 2010, pp. 299-303; (in French:) detailed commentary by M. Foschi, in: Droit d'auteur et parfums: vers une protection des fragrances?, Auteurs & Media 2006, pp. 309-317; (in German:) GRUR Int 2006, pp. 951-955; (in English:) IIC 2006, pp. 997-1104. Quoted in Antoon Quaedvlieg, "Copyright and Perfume: Nose, Intellect and Industry ," klos.nl, accessed February 23, 2022, https://klos.nl/wp-content/uploads/2017/07/Quaedvlieg_Copyright_and_Perfume.pdf, 1.
[325] Cour de Cassation, Bsiri- Barnir v Haarmann & Reimer, RIDA, 2006, 349. quoted in Sganga, The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead" p. 7.

form of expression, within the meaning of the [IPC], able to benefit from the protection of works of the mind by authors' rights".[326]

However, now the CJEU has ruled that "for a uniform interpretation of the concept of a 'work' throughout the European Union, it must also be concluded that Directive 2001/29 prevents national legislation from being interpreted in such a way that it grants copyright protection to the taste of a food product."[327] In this respect, works that can only be sensed with senses other than sight or hearing are excluded from copyright protection.[328] "Otherwise, there would be a risk that culinary creations or wines could not be denied protection either."[329] Moreover, the need for "objectivity" for the expression excludes some sort of works such as tastes and scents. İhsan Osman Yarsuvat argues that Turkish Courts will probably have a same manner with French Courts and deny the copyright protection for scents. For this argument, he quotes a court decision which states that:

> "In accordance with the objective element, which is the second condition for being considered a work, it must be the concrete result of the intellectual effort of the owner. In other words, this intellectual effort must be visible, palpable, audible, in short perceptible. Ideas and thoughts are included in the scope of intellectual law only when they take a form, that is, in the form of a work. In other words, the subject protected within the framework of the Law on Intellectual and Artistic Works is not thoughts and ideas, but their expression." [330]

[326] Quaedvlieg, "Copyright and Perfume: Nose, Intellect and Industry" p. 3.
[327] Levola Hengelo BV v Smilde Foods BV § 45.
[328] Quaedvlieg, "Copyright and Perfume: Nose, Intellect and Industry." p. 4.
[329] F. Pollaud-Dullian, JCP 2006, p. 1599; H. Cohen Jehoram, Propriétés Intellectuelles 2007, p. 8. Quoted in Antoon Quaedvlieg, "Copyright and Perfume: Nose, Intellect and Industry," p. 4.
[330] İstanbul 2nd Specialised Court for Intellectual and Industrial Property Rights, Case No: 2017/776, Desicion No: 2020/66, 30.01.2020.

According to this part of the decision, Yarsuvat argues that even though the decision is about a “musical composition” that appealing to the “sense of hearing”, it can also be applied to fragrances by analogy, and by this; scents are not capable for to the determination of “how much” and “in what way” they carry “the characteristics of the author”. [331]

The problems related to “expression” does not only arise for the new creations, but also newly emerged art forms under the contemporary art which does not comply with the traditional “notion of the work”. Hence, this also constitutes a problem to copyright protection of the ‘typically atypical’ contemporary artworks and this potential problem will be examined in following parts of this study.

B. ORIGINALITY

Originality is one of the requirements in order to enjoy copyright protection. In “Berne Convention”, Article 2/3 states that: "Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work." Following to this, in Article 8, the Convention also states that "Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works". Based on these provisions[332], one might state that a copyrighted work must be “original”.

[331] Yarsuvat, *Kokunun Hukuken Korunması,* p. 60.

[332] Furthermore, Art.14bis/1 of the Berne Covention provides that: "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article." Then, Art.14ter/1: "The author, or after his death the persons or institutions authorized by national legislation, shall, with

Yet, the Convention's intention about the meaning of the originality is not crystal clear.[333] This is why, Art.14/2 of the Copyright Act 1911 of the "United Kingdom" revised as: "Cinematographic productions shall be protected as literary or artistic works if the author has given the work an original character"[334]. With this provision, one can state that the convention's intention might be the "bearing the characteristics of the author".

Furthermore, "[a]s far as the Berne Convention is concerned, originality is thus inextricably linked to creativity."[335] Yet, there is still not a certainly defined threshold in the Convention. The concept of originality varies from legislations.

In U.S. law, originality requirement is "constitutionally mandated" for all kind of works.[336] According to U.S. Law "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression."[337] The Code did not define the notion of originality on purpose. U.S. code makers aimed it to be a broad and flexible requirement to easily coordinate with the changing conditions of the time. As it has been indicated in house report no. 94–1476: "The phrase original works or authorship, which is purposely left undefined, is intended to incorporate without

respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work."

[333] Daniel J. Gervais, 'The compatibility of the skill and labour originality standard with the Berne Convention and TRIPS Agreement" *European Intellectual Property Review* 26, no. 2 (2004), p. 75-80.

[334] Gervais. 'The compatibility of the skill and labour originality standard with the Berne Convention and TRIPS Agreement."; The General Report of the Rome Conference also expressed that:
"A film which reproduces street scenes without any staging does not deserve any protection other that which is afforded by the law to photographs. The protection enjoyed by other works of art should be reserved for cinematographic works which meet the requirement of originality.... In order to show clearly that the only requirement concerned is that of the originality with which every work of the mind must be endowed, we propose deleting the words 'personal and ... '.

[335] Gervais. 'The compatibility of the skill and labour originality standard with the Berne Convention and TRIPS Agreement" p. 77.

[336] Joyce, Craig and L. Ray Patterson. "Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations." *UCLA Law Review* 36, (1989), p. 763.

[337] 17 U.S. Code § 102-a, - Subject matter of copyright: In general.

change the standard of originality established by the courts under the present copyright statute."

So that, examining the court cases is crucial to enlighten this notion. In "*Bleistein",* the U.S. Supreme Court ruled that "the personal reaction of an individual upon nature," or author's "unique" expression of the author's personality is the crucial part of originality requirement.[338]

In "*Feist",* the U.S. court stated that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity"[339] Following this statement, the court clarified that this creativity is "extremely low" and "even a slight amount will suffice" for the work to be considered as original. "*Feist"* is very important because it constitutes a "landmark" decision for the notion of originality in U.S. law. Before the *"Feist",* some circuits applied "sweat of the brow" doctrine which "allows copyright protection for an entire factual compilation based upon the cost, effort, and labor invested in its creation."[340] After the decision the Court had clarified:

> "(1) the creativity requirement for copyright protection is constitutionally mandated; (2) protection for a compilation extends only to the portion of the work original to the compiling author; and (3) the sweat of the brow doctrine is contrary to the letter and intent of copyright law.'"[341]

[338] Bleistein v Donaldson Lithographing Company (1903) U.S., 188 § 239.
[339] Feist Pubs., Inc. v Rural Tel. Svc. Co., Inc., § 340
[340] Tracy Lea Meade, "Ex-Post Feist: Application of a Landmark Copyright Decision", *Journal of Intellectual Property Law* 2, no. 2 (1994), p. 248.
[341] Feist Publications, Inc. v. Rural Tel. Serv. Co., § 353. Meade, "Ex-Post Feist: Application of a Landmark Copyright Decision", p. 245.

By this decision, the court choose the "creative selection theory" over the "sweat of the brow" doctrine. Furthermore, in *"Burrow-Giles"* case, The US. Supreme Court again emphasized the "originality as a requirement for protection.[342] The Court explained that in order to meet the originality requirement, there must be independent conception plus a minimal amount of creativity."[343]

According to EU law, the work must be the author's own intellectual creation in order to meet the originality requirement. In article 1/3 of the "Directive 2009/24/EC" it has been stated that "a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation." Furthermore, "whereas no criterion other than originality in the sense of the author's intellectual creation should be applied" according to the "Directive 2009/24/EC". Before this, originality was also mentioned in "Directive 2006/116/EC" "on the term protection of copyright and certain related rights"[344] that is about photographs and "Directive 96/9/EC" "on the legal protection of databases" [345]

However, there were no clear definition of "originality" in EU directives and this lead different interpretations. In 2004, "Commission Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights… highlighted that the understanding of originality is indeed not unique across the EU, as the legal systems of the various Member States interpret its meaning in different ways."[346]

[342] Burrow-Giles Lithographic Co. v. Sarony - 111 53, 4 S. Ct. 279 (1884) U.S.
[343] Meade, "Ex-Post Feist: Application of a Landmark Copyright Decision", p. 250, 251.
[344] Article 6, "[p]hotographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1.190 No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs."
[345] Article 1/3 "[i]n accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection."
[346] Eleonora Rosati, "Judge-Made EU Copyright Harmonisation The Case of Originality," 2012, p. 66-67.

Finally, the "CJEU" made a cornerstone decision about originality in the "*Infopaq"* case and "achieved the full harmonisation of the originality requirement at the EU level"[347]. According to "CJEU", "copyright within the meaning of article 2(a) of "Directive 2001/29" is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation."[348] The "CJEU" indicated that consequently, the protection that indicated in the Article 2 of "Directive 2001/29", must be interpreted broadly.[349] Furthermore, "[i]t is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."[350] Stamatoudi states that "*Infopaq"* is important because it broadened the "EU criterion" to all types of works "irrespective of their nature or particular characteristics". Also, the decision is important because it showed the feature is "qualitative rather than a quantitative" and "sole criterion for copyright protection is originality". Finally, it set a uniformity for originality by "preventing Member States from using their national legal systems for defining it."[351] According to Stamatoudi, in EU law, "Member States are not free to interpret originality and the 'author's own intellectual creation' criterion using their national law."[352]

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[347] Rosati, "Judge-Made EU Copyright Harmonisation The Case of Originality,", p. 112.
[348] Infopaq International A/S v Danske Dagblades Forening. § 37
[349] Infopaq International A/S v Danske Dagblades Forening, § 43
[350] "*As regards newspaper articles, their author's own intellectual creation, referred to in paragraph 37 of this judgment, is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29. Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation. Words as such do not, therefore, constitute elements covered by the protection. That being so, given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of that directive."* Infopaq International A/S v Danske Dagblades Forening, § 38-47
[351] Irini A. Stamatoudi, "Originality under EU Copyright Law" in *Research Handbook on Copyright Law*, 2nd ed. (Cheltenham, UK: Edward Elgar Publishing, 2017), p. 65-66.
[352] Stamatoudi, "Originality under EU Copyright Law", p. 63.

Thereby it can be stated that "*Infopaq"* decision is harmonized the threshold for originality in the EU and after "*BSA*, C-393/ 09; *FAPL*, C-403/08 and C-429/08; and *Painer*, C-145/10" decisions of the "CJEU", one can argue that, EU standard requirement for the originality needs the "free and creative choices" with the "personal touch" of the author of the work.[353]

If the author does not have the space to make "free and creative choices" the work cannot be protected by copyrights. In a situation that the information and the expression is indissociable, one can say that the work is "entirely characterized by their technical function" and this makes the work unoriginal.[354] If it was "impossible for the author to express his or her creativity in an original manner and to achieve a result which is that author's own intellectual creation", then, the work cannot be a "work" within the meaning of the copyright law.[355] As the "CJEU" remarked, if "…a subject matter has been dictated by technical considerations, rules or other constraints which have left no room for creative freedom or room so limited that the idea and its expression become indissociable….that product cannot be covered by copyright protection…"[356] For instance, in the part "the notion of work", it has been mentioned that the football matches cannot be subject to copyright protection. This is because they are subject to "rules of the game, leaving no room for creative freedom for the purposes of copyright."[357]

[353] Eleonora Rosati, "Why Originality in Copyright Is Not and Should Not Be a Meaningless Requirement," *Journal of Intellectual Property Law and Practice* 13, no. 8 (2018) p. 597.
[354] Funke Medien NRW GmbH v Bundesrepublik Deutschland, § 24.
[355] Funke Medien NRW GmbH v Bundesrepublik Deutschland, § 24.
[356] Brompton Bicycle Ltd v Chedech/Get2Get,. § 31, 33.
[357] Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen C-403/08 and Karen Murphy v Media Protection Services Ltd. § 98.

With these in mind, if the work is not original enough to reflect the authors own personal intellectual creation, the time, the endeavor which was consumed to create the work are not enough to work to be considered as the "work" to be protected in the scope of copyright law. So that, as CJEU indicates, "the author's own intellectual creation refers to the criterion of originality"[358] and nothing more. The skill and labor cannot justify copyright protection unless the work of the author represents any originality.[359]

In Turkish Law, Article 1/B-a of the Law No. 5846 indicates that a work must be "bearing the characteristic of its author." This article does not directly refer the term "originality". Over and above, the legislator explained the "concept of work" in general terms and has left the determination of the "work" to the judicial organs.[360]

To this extent, Turkish Court of Cassation states that the work must carry the characteristic of its author; in other words, the work must be "original", "creative".[361] According to Court, high level of creativeness and originality are necessary to be identified as a "work". But, the Court of Cassation have not explained the exact context of the wordings in the decisions yet.[362] So that, this has leaded a debate in Turkish doctrine about the interpretation of the "bearing the characteristic of its author.".

[358] Football Dataco Ltd, and Other v. Yahoo! UK Ltd., ECLI:EU:C:2012:115, C‑604/10, § 37
[359] *"the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains."* Football Dataco Ltd, and Other v. Yahoo! UK Ltd, § 53-1.; *"the mere intellectual effort and skill of creating those reports are not relevant in that regard"* Funke Medien NRW GmbH v Bundesrepublik Deutschland, § 23.
[360] Levent Yavuz, Türkay Alıca, and Fethi Merdivan, *Fikir ve Sanat Eserleri Kanunu Yorumu*, 2nd ed., vol. 1 (Ankara: Seçkin Yayıncılık, 2014), p. 48.
[361] Turkish Court of Cassation, General Assembly of Civil Chambers. Case No: 2003/4-260, Desicion No: 2003/721, 02.04.2003.
[362] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p. 172.

According to Hirsch, the distinguishing feature of the work is the feature that it takes from its author's characteristics. If a work can be created by anyone, then; the protection cannot be expanded to that work; in order to be protected by copyrights, the work should not be eligible to be created by anyone.[363] According to Arslanlı, this approach limits the protection area of the Code because; no work can bear absolute independence because of the fact that, every work needs to inspired by previous works.[364] He expressed that, intellectual labor which is comparatively independent enough to lead to the outcome is enough to satisfy the requirement.[365]

According to Erel, a work is bearing the characteristics of the author if it is a product of independent intellectual creation: Thence, the work is eligible to show the creative power of the author. According to him, independence and creativeness should not be considered as absolute terms as utilizing the previous works does not affect the creativeness.[366] Tüysüz has a similar approach with Erel. Tüysüz states that a work does not need to have "absolute originality" and the creativeness should be considered as "creation of something other than something existed before".[367] However, even though utilizing the previous works does not affect the creativeness, the difference between previous works and the new work should not be trivial.[368] So, the new work should be a result of an independent intellectual creation in order to be considered as an independent work.[369]

[363] Hirsch, *Hukuki Bakımdan Fikri Say*, *vol. 2*, p.12.
[364] Halil Arslanlı, *Fikri Hukuk Dersleri*, (Sulhi Garan Matbaası: İstanbul, 1954) p.7.
[365] Arslanlı, *Fikri Hukuk Dersleri*, p.7.
[366] Erel, *Türk Fikir ve Sanat Hukuku,* p. 34.
[367] Mustafa Tüysüz, *Fikir ve Sanat Eserleri Kanunu Çerçevesinde Fikri Haklar Üzerindeki Sözleşmeler,* (Yetkin Yayınları, Ankara: 2007) p. 35-36.
[368] Hayri Bozgeyik, "Fikir ve Sanat Eserlerinde Hususiyet". *BATIDER* 25, no. 3, (2009). p. 177.
[369] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.93.; Bozgeyik, *Mimaride Telif Hakları,* p. 47.

In Tekinalp's point of view, the approaches of Hirsch and Erel have resembled the "novelty" criteria in patent law. Tekinalp's approach is that expression reveals itself in the "style" as the style shows the creative personality of the author. The style is the "stamp of the author" hence it is personal and subjective. This does not need to be "novel" yet it shouldn't be habitual. He furtherly states that the "originality" of the expression cannot be a requirement for work consideration. If a work is original, one cannot hesitate that it is a work in scope of copyright law. Yet, seeking the originality and characteristics of the author narrows the notion of work while being original only can attributed to masters and masterpieces. Therefore, the characteristic should not be restricted to a narrow space. He also expressed that work should not be trivial and must be bar the "sweat of the mind".[370]

Nal and Suluk criticize Tekinalp's "style" approach. They state that every idea which constitutes a "style" cannot be protected under copyright law as the "characteristics of the author" and the "style" are not the same and "characteristics of the author" amounts more than "style". To them, "characteristics of the author" reveals itself in the composition, selection of material, in the use and arrangement, in its content and form. According to Nal and Suluk; for the notion of "originality", there should be a space for the author to make "free and creative choices", work must bear a feature above the plenary and work should has a feature above the "what is fit for purpose". The originality specifies the scope of the protection, and the higher originality gives higher protection. In order to enjoy copyrights, the work must differentiate itself from the previous works.[371]

Furthermore, Suluk indicates that there must be a "intellectual creation" that reflects the "creative soul" and "intellectual structure" of its author. Moreover, the level of the

[370] Tekinalp, *Fikri Mülkiyet Hukuku*,3rd ed., p. 101.
[371] Suluk and Nal (Karasu) *Fikri mülkiyet Hukuku*, p. 44-46.

"originality" depends on the type of the work. For example, this level becomes evident in "artistic works" whereas it fades in "literary and scientific works".[372] In accordance with this, Suluk and Nal also indicate that originality is examined by different features for every different kind of work. The important aspect is that the "overall impression" of the work. Even if every single feature of the work does not constitute an "originality" themselves, the overall impression of the work still can meet the originality criterion.[373]

According to Bozgeyik, one of the factors that affects the "originality" of the work is whether it is a product of an independent intellectual effort or not. To him, the independence required that, the "independent intellectual creation" should be belong to the author of the work herself/himself and it should not be directly attached to anyone other or another work. The characteristics that differentiate the work should not be taken from other sources because "independent intellectual effort" allows the owner of the work to reflect her/his own characteristics to the work. As long as the "intellectual effort" is independent, the work will be protected under copyright law, no matter how close it is to the protection threshold. It must be stated that "independent intellectual effort" should not be interpreted strictly in order to encourage the future creativity as utilizing previous works under certain rules paves the way for development.[374]

Bozgeyik's argument on that "the characteristics that differentiate the work should not be taken from other sources" and Nal/Suluk's statement that indicates the work must differentiate itself from the previous works in order to enjoy copyright protection[375]bring the questions related to "originality" of the "appropriation artworks" to mind. Problems related to this will be addressed in the next chapter.

[372] Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 50-51.
[373] Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku*, p. 46.
[374] Bozgeyik, *Mimaride Telif Hakları,* p. 47.
[375] Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku*, p. 45.

One must remark that in Turkish Law, determining the characteristics of work is made by the expert and as every type of work has a spin; the expert examination is needed for every different case. Therefore, one cannot determine a single standard for every kind of work[376] and interpretation of this requirement should be done very professionally in specific to work in every single case.

C. FIXATION

Fixation is one of the requirements for a work to enjoy copyright protection for some legislations. Article 2/2 of the Berne Convention states that: "It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form." The guide enlightens this provision as:

> "[B]ecause member countries, remain free to protect only what they consider embodies intellectual creativity, the Convention takes no sides, offers no interpretation and leaves member countries free to make protection conditional on the work being fixed in some material form. This provision, which was first written in in Stockholm (in 1967), offers all the latitude necessary: the countries are free to demand such fixation either generally or for one or more categories of works."[377]

[376] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 99-101.
[377] Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 18.

As understood from the provision above, the "Berne Convention" does not set a standard for fixation, and it leaves the Member States the choice to implement a fixation requirement. Hence, some countries such as Spain, Germany, Switzerland, France, Russia and Japan do not have a fixation requirement[378] whereas, some countries such as the U.S. and Canada do have.[379] According to Goldstein, civil law countries have a more flexible approach towards the copyright protection than common law nations and this might be the reason of different point of views.[380]

For instance, U.S. has fixation as a requirement for copyright protection and according to U.S. law, work can be in any form in order to meet the "fixation" requirement.[381] "A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission."[382] "House Report" indicates that the terms "copy" and "phonorecord" are very broad. "They cover "all of the material objects in which copyrightable works are capable of being fixed." [383]

[378] Elizabeth White, "The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content," *Chicago Journal of International Law* 13, no. 2, (2013). p. 696.
[379] J.A.L. Sterling, *World Copyright Law* 3rd ed., 4.11, (Sweet & Maxwell, 2008) p. 198-201; 7.03, p. 329-33.
[380] Paul Goldstein, *International Copyright: Principles, Law, and Practice*, (Oxford: Oxford University Press, 2001). p. 196-97.
[381] *"[l]t makes no difference what the form, manner, or medium of fixation may be-whether it is in words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia, whether embodied in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device."* H.R. REP. No.1476, 94th Cong., 2d Sess. 47, 52 (1976).
[382] 17 U.S. Code § 101 - Definitions
[383] H.R. REP. NO. 94-1476, at 53 (1976),

The way of the "fixation" is not important for U.S. law and "words, numbers, notes, sounds, pictures, or any other graphic or symbolic indicia" might be listed as examples. The material which the work is fixed on is not important as well as the way. Work can be fixed "in a physical object in written, printed, photographic, sculptural, punched, magnetic, or any other stable form. Actually, "there are countless ways that a work may be fixed in a copy or phonorecord and "it makes no difference what the form, manner, or medium of fixation may be." [384]

However, in U.S. law, the nature of the work should not be transitory. Hereby, "if the work or the medium of expression only exists for a transitory period of time, if the work or the medium is constantly changing, or if the medium does not allow the specific elements of the work to be perceived, reproduced, or otherwise communicated in a consistent and uniform manner", the application might be refused by the "U.S. Copyright Office." [385]

On the contrary, The French copyright code clearly states: "[t]he provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose."[386]

In any case, "fixation" is not a requirement for a work in Turkish law. Even though ideas that have not been reflected in the outside world yet cannot be protected, this idea should not necessarily be "fixed".[387] Art. 1/B-e of the "Law No. 5846" defines "fixation" as "[t]he act of recording sounds or representation of sounds or sounds and images in an

[384] Compendium, "The Fixation Requirement" § 305.
[385] Compendium, "The Fixation Requirement" § 305.
[386] Article L112-1 of the French Intellectual Property Code.
[387] Karademir, *Çalışanların Yarattığı Eserleri Üzerinde Fikri Hakların Kullanılması,* p. 22.; Suluk and Nal (Karasu) *Fikri mülkiyet Hukuku,* p. 47.

apprehensible, reproducible and transmittable manner" yet, sounds that is perceived by third parties can be protected by copyright law without a "fixation" and if they meet other requirements for protection.[388] Nal and Suluk stress that this need of "be perceived by third parties" should not be considered as "fixation."[389] However, Polater argues that even if "fixation" is not a requirement under Turkish law, some works such as cinematographic works must be "fixed" in order to qualify as a work due to their nature.[390]

Art. 4 of the "Law No. 5846" stated that "[w]orks of fine arts are the following works, which have aesthetic value: …Oil paintings or water colors, all types of drawings, patterns, pastels, engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar methods, calligraphy, silk screen printing..." According to this, one might say that a work of fine art which is "drawn" or "fixed" on any material is able to be considered as "work". According to an approach, "fixation" is a necessity for artistic works due to their nature.[391]

Yet, Art. 4 also states that "Sculptures, reliefs and carvings; Architectural works; Handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs; Photographic works and slides; Graphic works; Cartoons; All kinds of personifications." also constitutes works of fine art without mentioning "fixation". Therefore, it can be stated that fixation is not a requirement for copyright protection for the works of fine art in Turkey as well as most civil law countries[392].

[388] Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 48-49.
[389] Suluk and Nal (Karasu) *Fikri mülkiyet Hukuku,* p. 47.
[390] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.85.
[391] Ateş, *Fikri Hukukta Eser*, p. 217; Ozan Ali Yıldız, *Fikir ve Sanat Eserleri Kanunu Kapsamında Çizgi Roman,* (İstanbul: On İki Levha Yayıncılık, 2017), p. 26.
[392] Sterling, *World Copyright Law,* p.198-201, 329-333.

V. EXCLUSIVE RIGHTS CONFERRED BY COPYRIGHT AND THE BALANCE BETWEEN THEM AND ARTISTIC CREATIVITY

A. EXCLUSIVE RIGHTS

The work gives its author the exclusive rights which divide into two: positive rights and negative rights. Negative rights allow the owner to prohibit others from using copyrighted subject in specific ways without the owner's permission whereas positive rights give the author to right use the work itself.[393] These exclusive legal rights which copyright gives to its holder are two types: economic rights[394] and moral rights[395].

1. *ECONOMIC RIGHTS*

With economic rights, the owner of the copyright can have pecuniary gain from the work and the owner is protected from the potential economic infringements. The economic rights are transferrable; therefore, copyright holder can be some other person than its creator/author/originator. With economic rights, copyright owner can allow or prohibit the reproduction of the work; distribution of copies of the work; public performance of the work; broadcasting or other communication of the work to the public; translation of the work into other languages; and adaptation of the work. The authorization can occur with permission or through a license.

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[393] Ned Snow, *Intellectual Property and Immorality: Against Protecting Harmful Creations of the Mind* (New York: Oxford University Press, 2022), p. 137.

[394] *"Right owners can authorize or prohibit: reproduction of the work in various forms, such as printed publications or sound recordings; distribution of copies of the work; public performance of the work; broadcasting or other communication of the work to the public; translation of the work into other languages; and adaptation of the work such as turning a novel into a screenplay."* WIPO "Understanding Copyright and Related Rights", (2016). p. 10.

[395] The Berne Convention, in Article 6bis, requires its members to grant authors the following rights:
(i) the right to claim authorship of a work (sometimes called the right of paternity or the right of attribution); and
(ii) the right to object to any distortion or modification of a work, or other de- rogatory action in relation to a work, which would be prejudicial to the author's honor or reputation (sometimes called the right of integrity).

"Berne Convention" states some economic rights such as the right to translate, the right to make adaptations and arrangements of the work, the right to perform in public, the right to recite literary works in public, the right to communicate to the public the performance, the right to broadcast, the right to make reproductions in any manner or form and the right to use the work as a basis for an audiovisual work.[396]

WTO categorizes the economic rights under four titles that is mentioned in "TRIPS Agreement": reproduction right, rental right, right of public performance, broadcasting and communication to the public; and translation and adaptation right. It must be stated that as WTO emphasizes the list "is not an exhaustive review of all economic rights provided under the TRIPS Agreement."[397] Nevertheless, TRIPS Agreement seems to be in a harmony with the Berne Convention except for an additional rental right in Article 11 which states "[i]n respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works."

Additionally, Article 8 of WCT provides that "authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means…" WCT also grants the right of distribution; the right of rental in Article 6 and 7.

[396] Article 8-14.
[397] "Module II Copyright and Related Rights" (WTO), accessed June 23, 2022, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules2_e.pdf., p. 40-41.

Nevertheless, when we consider national laws, we can see that categories of economic rights are not so different. For example, in U.S. law, there are 6 categories that consist of:

"Reproduce the copyrighted work in copies or phonorecords; to prepare derivative works based upon the copyrighted work; to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; …to perform the copyrighted work publicly; …to display the copyrighted work publicly; and …to perform the copyrighted work publicly by means of a digital audio transmission."[398]

Furthermore, in Turkish Law, economic rights are also divided into 6 categories: right of adaptation, right of reproduction, right of distribution, right of performance, communication to the public and payment of a share of sale proceeds of works of fine arts.[399]

2. *MORAL RIGHTS*

Although economic rights are free to transfer by their holder, most countries do not allow to transfer the moral rights of the author.[400] The moral rights are non-economic rights of the author, and they are bounded to the original creator of the work. Because "these rights intend to protect the personality of the author in relation to his work based on the author's

[398] 17 U.S. Code § 106 - Exclusive rights in copyrighted works
[399] Law No. 5845 Articles 21-25, 45.
[400] "Understanding Copyright and Related Rights", p. 9.

ownership to his inner personality"[401] In short, they protect the "expression of an artist's personality through her/his work."[402]

Generally, there are four of them. The "right of integrity" is the first one, with this right the author prevents others to make alterations in his/her work. Secondly, with the "right of attribution or paternity", the author has a right to make a connection between her/his name and its work. Thirdly, the right of disclosure, this right gives the artist the right to disclose her/his work to public herself/himself whenever she/he wanted. Finally, the right of retraction or withdrawal that indicates the artists "always withdraw his work; even after it has left his hands".[403]

Article 6bis of the "Berne Convention" states that "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

Nonetheless, when we examine the TRIPS Agreement, it can be seen that in Article 9, it has been stated that "Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom" referring to the "Berne Convention."

[401] Hanan Mohamed Almawla. "Moral Rights in the Conflict-of-Laws: Alternatives to the Copyright Qualifications," (2012)., p. 27.
[402] Michael Rushton, "The Moral Rights of Artists: Droit Moral Ou Droit Pécuniaire?" *Journal of Cultural Economics* 22, no. 1 (1998), p. 15.
[403] Henry Hansmann and Marina Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis." *The Journal of Legal Studies* 26, no. 1 (1997), p. 96.

Therewithal, civil law and common law systems approached the notion of moral rights differently. Most civil law states, including "most of western Europe", recognized the moral rights and some have done this even before the "Berne Convention."[404] Moreover, one of the civil law states, France, is considered as the "birthplace of the moral rights."[405] On the other side, U.S., as a common law state, has a different approach toward the moral rights and it can be argued that this might be the reason why the "TRIPS Agreement" has "an explicit exclusion for members from the obligation under article 6bis of the "Berne Convention"[406] even though, WTO expresses that the reason behind this exclusion is that moral rights are not "trade-related."[407] When considering that the U.S. have signed the "Berne Convention" after more than a hundred years because of the objections related to "moral rights", arguments about the exclusion in the Article 9 of the "TRIPS Agreement" might be legit.

However, this difference between two approaches led a controversy between the U.S. and EU and they "have struggled to determine whose policies concerning intellectual property will dominate the international legal order".[408] Finally, in 1989, U.S. signed the "Berne Convention" and after the signature, in 1990, Congress enacted the "federal Visual Artists Rights Act" (VARA) which grants protection for moral rights. Still and all, "VARA" only grants protection for a limited category of visual works that includes "paintings, drawings, prints, sculptures, still photographic images"[409] and make some other difficulties for site-specific artists in particular. These difficulties will be examined in the third part of this study.

[404] Hansmann and Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis.", p. 95-96.
[405] Almawla. "Moral Rights in the Conflict-of-Laws: Alternatives to the Copyright Qualifications,", p. 32.
[406] Almawla. "Moral Rights in the Conflict-of-Laws: Alternatives to the Copyright Qualifications,", p. 39.
[407] "Module II Copyright and Related Rights" (WTO), p. 42.
[408] Hansmann and Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis.", p. 96.
[409] 17 U.S. Code § 106A - Rights of certain authors to attribution and integrity

Nevertheless, moral rights are important for not only artists but also for public as some masterpieces became a part of "community's culture". As Hansmann and Santilli argue, "other works of art are created in response to them, and they become common reference points or icons that are widely shared in social communication. The loss or alteration of such works would therefore be costly to the community at large, depriving that community, as it were, of a widely used part of its previously shared vocabulary"[410] As mentioned before, art leads to changes in the society and has an important sociological impact. With contemporary art, art is no longer an aristocratic pastime detached from the public and everyday life. As a consequence of this, an artwork might be an important impact on society and might become an important symbol, it might be "a uniquely persuasive statement of a social critique or ideal." However, despite this importance, the owner of the masterpiece might have a neglection towards the artwork and neglect to protect the work properly. Furthermore, the owner might even want to destroy it by intention. In a scenario like this the "right of integrity" of the artist also protects the society from losing its cultural heritage.[411]

Withal, this "community interest" also one of the differences between U.S. and EU legislations. Even this interest is "explicitly recognized in European statutes" such as Italian and French statues, the U.S. "does not have general legislation of this sort, although it does have specific legislation for particular types of art, including legislation governing colorization of movies and architectural landmark preservation laws."[412]

[410] Hansmann and Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis.", p. 106.
[411] Hansmann and Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis.", p. 106.
[412] Hansmann and Santilli. "Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis.", p. 106.

Last but not least, moral rights are important as economic rights for artists. Making financial gain is not the sole aim of the artists and a contemporary artist Tracey Emin once even said that "being an artist is about making art, not money".[413] So, although some legislations do not give the moral rights the attention they deserve, moral rights give "subjective sense of satisfaction" to the artists and by doing it they encourage the artists to "create" as much as economic rights.

B. MONOPOLISTIC NATURE AND RESTRICTIONS

1. *TENSION BETWEEN ARTISTIC CREATIVITY AND EXCLUSIVE RIGHTS*

Copyrights constitute a monopoly via the exclusive rights which was given to its owner.[414] To this end, the artists are enjoying the protection of their intellectual properties by exclusive rights but, on the other side, the same artists feel the restrictive pressure of those rights. Nancy J. Troy identifies copyrights as:

> "double-edged sword intended to encourage intellectual innovation by controlling its exploitation. Although the law requires that protection of intellectual property be limited in time, during the period it is in force a copyright puts its owner in a privileged position from which the potential for intellectual innovation on the part of the would-be exploiter can be compromised."[415]

[413] Mark Brown, "Tracey Emin 'Being an Artist Is about Making Art, Not Money,'" *The Guardian*, May 28, 2017, https://www.theguardian.com/artanddesign/2017/may/28/tracey-emin-being-artist-about-making-art-not-money-hay-festival.
[414] James G. Neal. "Copyright Is Dead... Long Live Copyright." *American Libraries* 33, no. 11 (2002), p. 48–51.
[415] Nancy J. Troy, "Copyright as Monopoly." *Art Journal* 76, no. 1 (2017), p. 150.

As copyrights cannot be infinite unlike trademarks or geographical indications, this monopoly cannot be last forever. It gives these exclusive rights for a specific time period. The reason behind the limited duration of the protection might be the original historical aim of the protection: protection of the free expression of the artists while preventing them from the censorship.[416] The French intellectuals of 19th century believed that "the individual author is being denied fair economic return on the fruits of his or her creativity."[417] Hence, the need for protection was crucial. The fear of the denial of the fair economic return of the creativity and need of "subjective sense of satisfaction" also lead artists to establish the exclusive rights; yet, these exclusive rights should not obstruct the further artistic creativity.

It is obvious that there is a tension between artistic creativity and the exclusive rights. Artists are get inspired by the previous artworks and even one can say that artists are fed from the works which has been produced before. Famous fashion designer Ralph Lauren indicated that he keeps reinventing by 'copying'.[418] According to Schubert "to deny artists the right to copy is to deny their right to be creative"[419]. As Stamatoudi indicates, "nothing is new or entirely new; it usually pre-exists in some form."[420] Therefore, even though artistic vision is not static and "breaks out of the mold", artists "explicitly refer to other works".[421] Especially, in contemporary art, we see ready-made objects as art, appropriation artworks and hyperrealist artworks that is a kind of a reflection of a "pre-

[416] Christophe Geiger, "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?" *UC Irvine Law Review* 8, no. 3 (2018), p. 424-425.
[417] Lutzker, *Content Rights for Creative Professionals Copyrights & Trademarks in a Digital Age*, p. 158.
[418] In an interview which was hosted by Oprah Winfrey, Ralph Lauren answered the question: *"How do you keep reinventing?"* He said: *"You copy,", "Forty-five years of copying, that's why I'm here."* see https://www.nytimes.com/2011/10/27/fashion/oprah-winfrey-interviews-ralph-lauren.html
[419] Karsten Schubert and Daniel McClean. *Dear Images: Art, Copyright and Culture.* (London: Ridinghouse, 2002) p. 372.
[420] Irini A. Stamatoudi, "Originality under EU Copyright Law," in Research Handbook on Copyright Law, 2nd ed. (Cheltenham, UK: Edward Elgar Publishing, 2017)., p. 57.
[421] Geri J. Yanover, "The Precarious Balance: Moral Rights, Parody and Fair Use," *Cardozo Arts and Entertainment* 14 (1996), p. 80.

existing" form. In today's art, contemporary artists "appropriate" the previous works "by adding humor, sarcasm or comment, send a parodic message to the viewer about what these earlier works now mean to contemporary society".[422]

Yanover indicates that society needs both the first artists and the parodist while referring them as "parent and children". Moreover, Yanover argues that "because art progresses on the shoulders of prior art, we want to protect the creator of the referent and the referrer."[423] With these in mind, applying exclusive rights strictly without exceptions and limitations would clearly restrict creativity by ignoring "inspiration" that is not forbidden in copyright law.

However, even though inspiration is not forbidden in intellectual property law, it has a limit and plagiarism constitutes infringement.[424] Therefore, law should move very carefully "so as not to diminish the sum of art which enriches our lives" while protecting the interests of the inspired artist via exclusive rights.[425]

For this reason, "a balance was conceived between exclusive control and freedom in order to enable future creativity." and in addition to limited time period, "some uses were kept outside the control of the right owner through limitations to the exclusive right"[426] These limitations will be discussed in following part.

[422] Yanover, "The Precarious Balance: Moral Rights, Parody and Fair Use,", p. 80.
[423] Yanover, "The Precarious Balance: Moral Rights, Parody and Fair Use,", p. 80.
[424] Özge Öncü, Fikir Ve Sanat Eserleri Hukukunda İktibas Serbestisi Ve Sınırları (Ankara: Yetkin Yayinlari, 2010), p. 85, 229.; Şafak N. Erel, *Türk Fikir ve Sanat Hukuku*, 3rd edition (Ankara: Yetkin Yayınları, 2009) p. 53.
[425] Yanover, "The Precarious Balance: Moral Rights, Parody and Fair Use,", p. 80.
[426] Geiger, "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?" p. 413.

2. *LIMITATIONS AND EXCEPTIONS ON THE EXCLUSIVE RIGHTS*

In order to balance the competing interests of rightsholders and users, some limitations and exceptions that can be stated as "user rights"[427] on exclusive rights are set. By these, people enjoy copyrighted works without a need for authorization. It can be stated that there are two types of limitations and exceptions: "free use" and "non-voluntary license" as implemented in "Berne Convention". [428]

Firstly, via licensing, a copyrighted work can be used by someone other than the copyright holder in the legal framework. Copyright licenses are granted by the copyright holder itself by consent; however, in some special cases, an obligation that called "compulsory license" imposed on the copyright holder. Generally, these compulsory licenses are granted by governments in order to provide further technological developments while preventing the potential abuses that is arisen from its monopolistic nature. "After signing of the TRIPS Agreement in 1995, compulsory licensing stipulation has become an obligation for nations to deal with non-working issue, consider public interest, and handle non-commercial use and unfair competition."[429] It must be stated that licensees are obligated to "pay equitable remuneration" to the licensers.[430]

Secondly, there are "free uses" that gives a freedom to use the copyrighted works without "ask for authorization" and without "to pay any remuneration"[431] For example, in article 10, the "Berne Convention" sets a freedom for "quotations and use of works by way of

[427] Tito Rendas, "Are Copyright-Permitted Uses 'Exceptions', 'Limitations' or 'User Rights'? the Special Case of Article 17 CDSM Directive," *Journal of Intellectual Property Law and Practice* 17, no. 1 (2022), p. 54.
[428] "Module II Copyright and Related Rights" (WTO), p. 43.
[429] Deli Yang. "Compulsory Licensing: For Better or For Worse, The Done Deal Lies in The Balance" *Journal of Intellectual Property Rights* 17, (2012), p. 81.
[430] "Module II Copyright and Related Rights" (WTO), p. 43.
[431] "Module II Copyright and Related Rights" (WTO), p. 43.

illustration and teaching purposes", and article 10bis mentions the "reproductions for news reporting". Finally, article 11bis/3 mentions a restriction on "ephemeral recording and broadcasting purposes".

In addition to these examples, the "Berne Convention" set a test called "three-step test" in article 9/2 while stating "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

A parallel provision was established in the "TRIPS Agreement" as well. Article 13 of the "TRIPS Agreement" states that "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

Similar provision also can be found in Article 5/5 of the InfoSoc Directive:

> "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

When examining the articles, it can be found that first step of the test that indicates "certain special cases" has two aspects: "Firstly, it seems to require that national legislators ensure that any exception is directed to a limited number of situations only,

i.e. a quantitative limit. Secondly, there is a qualitative aspect: the special purpose of an exception must be determined in advance."[432]

Second step of the test indicates that exception should "not conflict with a normal exploitation of the work." This wording contains an ambiguity for the interpretation of the "normal exploitation of the work". However, it can be stated that "Dispute Settlement Body" has a normative approach and put in as follows:

> "In our opinion, these definitions appear to reflect two connotations: the first one appears to be of an empirical nature, i.e., what is regular, usual, typical or ordinary. The other one reflects a some what more normative, if not dynamic, approach, i.e., conforming to a type or standard . . . [W]e will attempt to develop a harmonious interpretation which gives meaning and effect to both connotations of 'normal'."[433]

Lastly, as limitations should "not unreasonably prejudice the legitimate interests of the right holder", there should be a balance between competing interests. For this "we must consider three issues so that we may measure whether an exception is likely to satisfy this last step: firstly, whose interests are to be considered, secondly what interests are legitimate, and finally, how might these interests be prejudiced unreasonably?"[434]

However, as indicated in the "Guide to Berne Convention", "the legislator's task is not an easy one."[435] Articles that quoted above open to interpretation, so, legislators and courts interpret this notion differently. Moreover, as the terms of the articles are "vague" and

[432] Sabine Jacques. *The Parody Exception in Copyright Law* (Oxford University Press, 2019), p. 51.
[433] WTO Panel WT/DS160/5 of 16 April 1999, para VI.146. 1999.
[434] Jacques, *The Parody Exception in Copyright Law*, p. 53.
[435] Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 57.

"ambiguous", judges have a responsibility regarding the interpretation and the application of the limitation. Because of this, although common-law system judges are accustomed to doing, fair use "is alien to the civil law tradition as it gives too much power to judges to design the contours of copyright law on a case-by-case basis."[436]

However, since every legislation interprets the limitations and exceptions differently and there is not an exact uniform list of them. Yet, Ruth L. Okediji indicates that "[I]n a general survey of members of WIPO, a clear pattern of state practice is discernible with respect to limitations and exceptions recognized by the Berne Convention and TRIPS Agreement that have been implemented in most national laws…". Based on this, she puts forward an "initial list" that contains copyright limitations and exceptions. The list contains "personal use", "use for criticism or review", educational purposes", "reproduction by the press", "ephemeral recordings", "libraries", "limitations involving persons with disabilities" and "computer programs and interoperability".[437]

However, it can be seen that many members nation have detailed provisions regarding limitations and exceptions. As WTO indicates, many allow "free private or personal use of works."[438] For instance, U.S. legislator even established, a test consisting of four factors is applicable when determining whether the use of a copyrighted work is fair[439] or not:

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[436] Christophe Geiger, ""Fair Use" through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations", *PIJIP/ TLS Research Paper Series* no. 63, (2020), p. 2.
[437] Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations, for Developing Countries* (Geneva: United Nations Conference on Trade adn Development (UNCTAD, 2009), p. 20-22.
[438] "Module II Copyright and Related Rights" (WTO), p. 43.
[439] *"…he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."* 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use.

"…the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include— (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work…"[440]

In Turkish Law, "Law No 5846" indicates that limitations might be set "due to public order"; "due to public interest" which contains "Legislation and Court Decisions", "Speeches", "Freedom to Perform", "Selected and Collected Works for Educational and Instructional Purposes", "Freedom of Quotation", "Contents of Newspapers", and "News"; "Due to the Interest of Individuals" which contains "Personal Use", "Reproduction and Exhibition" and "Principles Concerning the Use in and/or Communication in Public Premises of Works, Performances, Phonograms, Productions and Broadcasts" and finally, "due to interest of individuals and authorities grated by the government".[441]

Nevertheless, every legislation interprets the limitations and exceptions differently and in this study two examples of them will be discussed in detail: The "freedom of panorama"

[440] 17 U.S. Code § 107 - Limitations on exclusive rights: Fair use.
[441] Articles 30-47.

and “parody”. These notions will be examined in the third part when discussing the problems related to contemporary artworks.

However, the tension between the copyrights and the artworks is not limited to the monopolistic nature of it. The requirements for getting the copyright protection and other notions sometimes might be unsuitable for some forms of this era. In the third chapter, protection of contemporary artworks and issues related to it will be discussed.

CHAPTER III

COPYRIGHT PROTECTION FOR CONTEMPORARY ARTWORKS AND RELATED ISSUES

Even though one can argue that the most appropriate and common way of protection for contemporary artworks might be the copyright protection; in some cases, some contemporary artworks have some problems to meet the requirements of copyright protection. Problems regarding to the notion of work, originality and fixation are incontrovertibly extensive. Also, determining authorship is not always easy and this constitutes problems as well. Moreover, as explained in the first part of this paper, some contemporary artwork forms such as conceptual art is an art of an "idea" instead of an expression of an idea. In addition of these obstacles, some contemporary artworks such as graffities might be considered as illegal in some situations; therewithal, panorama freedom and public presentation exception are controversial, as in some point, they might constrain the copyright protection for the site-specific art. Apart from all these obstacles, defining contemporary art and classifying contemporary artwork are not easy because of its subjective nature.

In this chapter of this study, firstly, I will try to explain the copyright protection for contemporary artworks and then tensions between the copyrights and contemporary artworks with the help of court decisions.

I. NOTION OF ARTISTIC WORK AND RELATED PROBLEMS

A. CLASSIFYING SUBJECT MATTER: WHAT IS ARTISTIC WORK?

1. *IN GENERAL*

Identifying the notion of "art" is not easy as it is very subjective. In this manner identifying the notion of "artistic works" [442] is not easy as well. Especially when it comes to the "contemporary artworks" frame the art would be nearly impossible. This subjectivity and controversiality of the art notion will be dealt in the next part. of this study.

Nonetheless, contemporary artworks are generally fall under the category of the "artistic works" and can be protected by the copyrights as a subcategory under the "work". As indicated above, the "Berne Convention" listed "artistic works" as one the works that is protected, however, it did not identify the notion of "artistic work". The "Berne Convention" gives only examples related to the terms and these examples are not exhaustive.

Under U.S. Copyright law, Section 102(a) of the Copyright Act states that "the subject matter of copyright includes the following categories of works: Literary works, musical works, including any accompanying words, dramatic works, including any accompanying

[442] In this study, terms of "fine artwork" and "artistic work" used synomously.

music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, architectural works."

U.S. "Compendium" explains that the "U.S. Copyright Office defines visual art works as (i) pictorial, graphic, and sculptural works, and (ii) architectural works."[443] When we examine the definition of "pictorial, graphic, and sculptural works"[444] we see that the definition is broad and contains applied artworks too.

Furthermore, I want to mention that the U.S. Compendium state that they do not want the applicants to use the term such as "installation art" instead of terms stated in the law. The reason behind this is the "broadness" and "ambiguity" of the art terms. Compendium states that: "… applicants should identify any copyrightable content in the work and should describe that content using terms such as sculpture, painting, photographs, or the like. This is true even if the overall installation itself is a registrable work of authorship. In such cases the applicant should use accepted terms to describe the work, such as "a series of sequentially and thematically related photographs interspersed with drawn and painted images to create a larger work of authorship."[445] So that, one can state that even if the Office is not exclusionary, their choice is on the side of classical legislation terms instead of the art terms. From one side, I find this approach appropriate as it serves to provide a "legal certainty"; on the other side, this effort to stereotype would constitute

[443] Compendium, "What Is a Visual Art Work?" § 903.
[444] "*The most common types of visual art works are pictorial, graphic, and sculptural works. The Copyright Act protects a variety of works in these categories and specifically identifies the following: Fine art (e.g., painting and sculpture). Graphic art. Photographs. Prints.Art reproductions. Maps and globes. Charts and diagrams. Technical drawings, including architectural plans. Models. Applied art (i.e., the separable features of useful articles). Works of artistic craftsmanship."* Compendium, Pictorial, Graphic, and Sculptural Works § 903.1.
[445] Compendium, "Installation Art" § 918.

problems for art because as Greenberg states art is "art is under no categorical imperative"[446].

In EU law, as discussed above, there is no uniform definition for the notion of "work" and just as "Berne Convention", EU legislator have not defined the notion of "artistic work" under copyright law. Moreover, even though there are some directives about some work types such databases and computer programs, no regulation has been made regarding artistic works.

In Turkish law, in the Article 4 of the "Law No. 5846", the works of fine arts listed as:

> "Works of fine art are following works, which have aesthetic value:
>
> 1. Oil paintings or water colors, all types of drawings, patterns, pastels, engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar methods, calligraphy, silk screen printing; 2. Sculptures, reliefs and carvings; 3. Architectural works; 4. Handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs; 5. Photographic works and slides; 6. Graphic works; 7. Cartoons; 8. All kinds of personifications. The use of sketches, drawings, models, designs and similar works as industrial designs does not affect their status as intellectual and artistic works."

[446] Clement Greenberg, "AbstractArt", *Nation* 158 (April. 15, 1944), p. 450.

This list leads a debate in the doctrine. According to one approach, the artworks which is listed in 8 bends in the article 4 are only examples.[447] On the other side, according to other approach, the artworks in this list are the only artworks which might enjoy the copyright protection because they are established in numerus clausus.[448] According to Tekinalp, even though the list of works was established in *numerus clausus* and creating a new sort of work other than "scientific and literary or musical or work of fine arts or cinematographic work" is not possible; works that is considered in Article 2-5, constitute examples of those four kinds of works while they are not established in numerus clausus.[449] The terms between the Article 2-5 of the "Law No. 5846" proves this.[450] As they contain terms such as "Works that are expressed by language and writing in any form", "All kinds of personifications.", "…other material by engraving, carving, ornamental inlay or similar methods,…", "…geographical or topographical models and similar works, all kinds of architectural and urban designs and projects…,". By this way, newly emerging artworks such as new forms of contemporary artworks might be protected as well if they "carry the characteristics of the author."[451] Additionally, products which has used in the artwork has no importance for copyright protection.[452]

2. *THE SUBJECTIVE VIEW OF ART AND ARTISTIC WORK*

[447] Ateş, *Fikri Hukukta Eser*, p. 223; Erel, *Türk Fikri ve Sanat Eserleri Hukuku*, p.69, Ramazan Uslu, Türk Fikir ve Sanat Eserleri Hukuku'nda Eser Kavramı, (Seçkin Yayıncılık: Ankara, 2003) p. 135; Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p. 39.; Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 106.; Bozgeyik, *Mimaride Telif Hakları,* p. 42.
[448] Ahmet M. Kılıçoğlu, Sınai Haklarla Karşılaştırmalı Fikri Haklar, (Turhan Kitabevi: Ankara, 2017) p. 141.
[449] Tekinalp, *Fikri Mülkiyet Hukuku*, 3rd ed., p. 106; Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 49.
[450] Tekinalp, *Fikri Mülkiyet Hukuku*, 3rd ed., p. 106.
[451] Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 49.
[452] Öztan, *Fikir ve Sanat Eserleri Hukuku,* p. 134.

The "Berne Convention" does not define the artistic work and interprets the term broady[453] yet, it still indicates that "the expression literary and artistic works shall include every production in …. artistic domain…" To this end, one can state that in order to be protected by copyright, a contemporary artwork should be fall into scope of the artistic work while being part of the artistic domain. But, what is the "artistic domain" exactly? Does it have a uniform definition? Does everyone agree on a manual that explains this notion? It appears that the answers are negative.

EU law approaches the term broadly, yet every member state interprets the notion of "artistic work" differently. As I will discuss later, some countries such as Italy and Portuguese, needed an additional aesthetic/artistic value for some artistic works. This leads to an argument that according to some approaches, whether an artistic work should have an aesthetic value. On the contrary, some legislations do not need an aesthetic/artistic value for some artistic works, and this might be showing that according to one approach an artistic work does not have to have aesthetic value. Problems regarding aesthetic judgment will be examined later.

On the other side, U.S. Law also interprets the scope of artistic work broadly. The code's intention is clarified in the House Report, and it states that the scope of the "work" and "artistic work" should be interpreted broadly.[454] In House Report no. 94–1476, it has been indicated clearly that the list in the Code is general and not exhaustive "with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular

[453] Guide to Berne Convention explains that Berne Convention has a "principle of an all-embracing protection for the benefit of all productions in the literary, scientific and artistic domain". Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 13.
[454] 17 U.S. Code § 102 - Subject matter of copyright. House Report no. 94–1476. 17 U.S. Code § 102

categories."[455] According to this, one can say that the U.S. legislations leave the interpretation of the notion of "artistic work" to the courts. Of course, this is beneficial for artworks as every artwork should be interpreted in its own case with the special conditions of the day. Yet, leaving the interpretation to the court might still cause problems because of the subjective nature of the "artwork".

In Turkish Law one can see a provision that indicates: "any intellectual or artistic product bearing the characteristics of its author, which is deemed a scientific and literary or musical or work of fine arts or cinematographic work."[456] According to common approach in doctrine, the four categories in the article are *numerus clausus*, and creating a new category of work other than these four types is not possible.

So, a contemporary artwork, first of all, should be fall under the scope of these four categories; therefore, one should determine whether the artwork fall under the scope of work of fine arts. The interpretation is made by experts, but the subjectivity of the term still constitutes problems as well as the U.S. example. For example, there is a art movement that called "olfactory art" which uses smells as art. Hence, according to one approach, perfumes are artworks.[457] However, in Turkish law, Nal/Suluk indicates perfumes cannot be protected under copyright law because in Turkish law groups of the

[455] 17 U.S. Code § 102 - Subject matter of copyright. House Report no. 94–1476. 17 U.S. Code § 102 - Subject matter of copyright. House Report no. 94–1476. "*Correspondingly, the definition of "pictorial, graphic, and sculptural works" carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise not only "works of art" in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of "applied art." There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) [section 5(k) of former title 17] as "prints or labels used for articles of merchandise"*

[456] Law No. 5846 of 5.12.1951. Part 1/A, "Definition" Art. 1/B-a.

[457] Larry Shiner, "Art and Scent: Interpreting the Olfactory Arts," *Art and Scent: Interpreting the Olfactory Arts* (September 14, 2019), accessed 05 February,2022. https://www.larryshiner.com/art-and-scent

"work" is *numerus clausus* and perfumes are not expressed in these lines; hence, perfumes cannot be protected under Turkish law.[458] İhsan Osman Yarsuvat also asserts that according to current legislation, the smell of the perfume cannot be protected under any of the categories of work.[459] This approach would be applicable for tastes as well.

Considering that everything can be art according to the art of today, broad interpretation and copyright for limitless "artistic works" is more beneficial for contemporary artworks, yet the vague and subjective definition of the term might constitute problems for contemporary artworks as well.

First of all, defining art is not easy. There has been argued that defining the work of art is not possible and most art historian defines art differently from each other. It has no manual, no standards, and is very subjective. Defining art was always hard, but in the contemporary era, one can say that it is nearly impossible.

Before the modern art era, the art had some rules and as I mentioned in the part "Modern Art in Brief", the academy set the rules which indicated the "good", "acceptable" art, and many artists confirmed these rules in order to approve and appreciated by the art society. After Manet's rebellious painting the art world embraced the freedom of creativity; hence, the old structure of the art rules started to vanish. Finally, in today's contemporary era, art world nearly has no rules. Now, art does not have to belong a special form anymore nor there is not an appropriate way of art. As I explained before, from now on, "everything is an artwork" and even, "everyone is an

[458] Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku,* p. 43.
[459] Yarsuvat, *Kokunun Hukuken Korunması,* p. 47.

artist."[460] Hence, defining the art and consequently the artistic work in contemporary era is much harder.

When we consider the contemporary artworks, we see urinals, unmade beds and soap pads. Some might say that these cannot be considered as "works of fine arts" as they can be seen as ordinary objects and even a "five-year-old could do that" while some say they are precious masterpieces of fine arts. It is subjective, and the qualification of the art is up to person who evaluates in that time. This notion is so controversial that even an artwork called "*Periler Ülkesinde*"[461] was to be mentioned as "they have called immorality art; I spit on such art."[462] by the Mayor of Ankara Metropolitan Municipality, İbrahim Melih Gökçek.

Moreover, Art Basel Miami Beach hosted a controversial artwork in 2019: "Comedian". It was a conceptual artwork and artist had affixed a banana to a wall with duct tape. Some said that the artwork is not an "artwork" and the piece faced lots of taunting comments in media; yet some said that it is a "masterpiece" and at the end, two editions of the "artwork" sold for 120.000,00 USD.

[460] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 159.
[461] (Tr) "In the Land of the Fairies", by Mehmet Aksoy, bronz statute, 43 x 32 x 6 cm, accessed https://www.ankaraantikacilik.com/urun/2197920/mehmet-aksoy-d-1939-periler-ulkesinde-bronz-heykel-43-x-32-x-6-cm-1
[462] (Tr) *"ben böyle sanatın içine tüküreyim, ahlaksızlığın adını sanat koymuşlar"* Translated by Emine Kaplan, accessed 29.03.2022 https://www.cumhuriyet.com.tr/haber/ankara-abuzz-with-activity-summit-follows-expulsion-threat-83941" this statement had been a subject of a copyright infringement case. The artist of the artwork sued for damages that caused by this statement and further infringements.
See Turkish Court of Cassation, 4th Civil Chambers Case No: 1998/4939, Decision No: 1998/8994, 17.11.1998

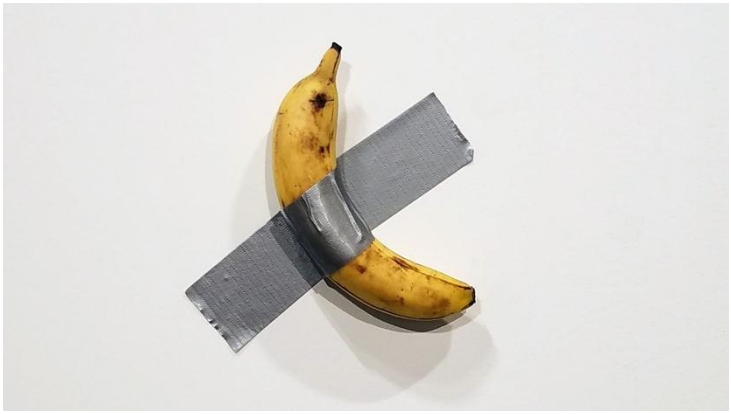

Figure 21 Maurizio Cattelan, Comedian. Photo: RHONA WISE / EPA-EFE / Shutterstock.

Furthermore, Pierre Pinoncelli, an artist that attacked a contemporary artwork -Fountain- "claimed upon his arrest that his vandalism was itself a work of art."[463] Having said that, contemporary art "it seems, can literally be, as one recent commentator suggests, anything, anywhere."[464] These definition problems constitute problems for copyright law. Because of this controversial nature of contemporary art, even the definition of "artistic work" is completely different and vague.

Despite the fact that law does not consider the "morality", "quality", "aim", "effort in creation" of the works while evaluating the qualification of the work,[465] still, considering "law is generally understood to be a mirror of society"[466], a question arises: Would this perspective of the public effects the definition of art on law?

[463] Alan Riding, "Conceptual Artist as Vandal: Walk Tall and Carry a Little Hammer (or Ax)", *N.Y. TIMES*, (Jan. 7, 2006). Accessed April 07, 2022. https://www.nytimes.com/2006/01/07/arts/design/conceptual-artist-as-vandal-walk-tall-and-carry-a-little-hammer.html.
[464] Jonathan Harris, *The Global Contemporary Art World*, p. 8.
[465] See, Paula Westenberger, "Copyright protection of illegal street and graffiti artworks" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis* (Cambridge University Press, 2019). p. 58; Mustafa Ateş, *Fikri Hukukta Eser*, (Turhan Kitabevi: Ankara, 2007), p. 102; Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku,* p. 48-50., Mitchell Brothers Film Group v. Cinema Adult Theater, 604 F.2d 852, 858 (5th Cir. 1979) U.S.
[466] Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2010), Abstract Page.

Öztan argues that issues such as whether the work is beautiful or not, whether it creates some dreams in people will not be taken into consideration and even if the author of the work itself claims that her/his work is "crazy", this would not change a thing. If law defines the art, this will lead a jury role for the courts and there would be a danger. As a jury, courts need to make a judgement about contemporary artworks such pop-artwork that is "a product devoid of any manifestation of personal qualities". So, Öztan asserts that that is why, notion of art must be "described" not "defined".[467]

As "law and art serve discordant cultural functions: law is concerned with providing social stability, whereas art is unpredictable and challenging to social conventions,"[468] hence; the law must adapt itself to the changing nature of the art in order to protect it, not for to restrict it. As Justice Holmes declares:

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke."[469]

At this end, in order to protect the very new, genius, taboo-breaking, revolutionary masterpieces of fine arts; copyright laws should be broad as possible and should avoid establishing subjective requirements which is potentially restricting the protection.

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[467] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p.136-137.
[468] Art After Modernism: Rethinking Representation (Brian Wallis ed., 1984); quoted *."* Robert Kirk Walker and Ben Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard *Northwestern University Law Review* 109, no. 2, (2015), p. 345.
[469] Bleistein v Donaldson Lithographing Company (1903) U.S., 188 239.

To conclude, while the time passes, art continue to evolve therefore the definition of it evolves as well. Even though some people still expect the art as its traditional meaning, as Marshall McLuhan states: "Art is anything you can get away with"[470] Hence, the interpretation of the "artistic work" should be made in compliance with the new contemporary era of art instead of the one that died. So, trying to define the notion of "artistic work" might constitute an exclusion for some contemporary artworks from copyright protection even if it meets the requirement of copyright protection. As a consequence of this, in my opinion, the copyright law should avoid making the definition of "art" and "artistic work".

B. REQUIREMENTS OF ARTISTIC WORKS

The requirements for the protection of the "work" and "artistic work" are generally same. However, we see that debates related to "originality" and "expression". Threshold of them for contemporary artworks are controversial and these controversies will be discussed in next parts.

However, "artistic works" can be protected under the copyright law if they meet the requirements for the protection of the "work" and there is no additional requirement in the U.S. law and in the EU law after the "*Cofemel" decision.* However, even though the old school artistic perspective of "*l'art pour l'art"*[471] is abandoned in the newly formed

[470] Marshall McLuhan, *Understanding Media: The Extensions of Man* (London: Sphere Books, 1967), p.112.
[471] (Fr) Art for art's sake.

law perspectives,[472] sometimes, some additional elements such as "aesthetics" is imposed as an extra requirement.[473] For example, Turkish law needs an extra "aesthetic" requirement for "artistic works" to be vested with copyright protection. Therefore, in the following part, I will try the explain the notion of "aesthetic value" in copyright law.

1. *THE AESTHETIC VALUE*

a) In General

As one can see, meeting the requirements for a work that were mentioned briefly above to be considered as a "work" in the sense of copyright law, sometimes cannot be enough for every legislation such as Turkish legislation. Article 4 of "Law No. 5846" indicates that a fine artwork must have an aesthetic value as opposed to U.S. law[474] and newly enlightened EU law[475] approach. According to Tekinalp, the common feature of the works of fine art is the aesthetic value. The aesthetic value is a *sine qua non requirement* for a work of fine art and if a fine artwork do not have this value, it can only be a work or a design instead of a "fine artwork".[476] However, "Law No. 5846" does not present a definition about "aesthetic value."

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[472] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 135; Brompton Bicycle Ltd v Chedech/Get2Get; Star Athletica v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).
[473] Koray Güven, "Eliminating 'Aesthetics' from Copyright Law: The Aftermath of Cofemel," *GRUR International* 71, no. 3 (2021), p. 213.
[474] *"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 try to avoid 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?," "Who is an author?," "What is misappropriation?," and many other issues essential to copyright."* Walker Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard *Northwestern University Law Review* ,p. 343.
[475] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721, 12.09.2019.
[476] Tekinalp also states that if a work do not have the aesthetic value, it can still be considered as a work under another group which has listed in the Law No. 5846. For example it can be consitute as a work under 3rd subgroup of literary works. Tekinalp, *Fikri Mülkiyet Hukuku,* 2004, p. 117.

According to prevailing approach, aesthetic indicates the notions of "unique, beautiful, pleasant, admirable and it fits the beauty criteria."[477] According to another approach in doctrine, Ayiter states that aesthetic value does not indicate the "beauty" of the work, it intends "an aesthetic claim" and if a work bears this claim, one can consider it as an artwork.[478] However, Uslu objects this argument and argues that as the "Law No. 5846" use the wording of "*have*" and does not have an implication related to the "*claim"* , a claim would not be enough to be considered as an "artistic work".[479]

Another approach indicates that if an artwork was originally created within the concrete measure of the beauty of the creator, it is a fine artwork in the scope of copyright law.[480] Bozgeyik indicates that aesthetic value is the artistic value of the work that is appealing to the artistic sense of person and adequate to evaluate the meanings of subjective values such as "good-bad", "beautiful-ugly", "high-low". He further states that aesthetic value shows itself in not just objective measures of beauty but also in the subjective reflections of the "beauty".[481]

From another approach, aesthetic value means that an artwork should address sense of watching in order to recall the aesthetic feeling and the notion of recall should interpret broadly. According to Nal and Suluk, an ugly and even disgusting artwork might recall the aesthetic feeling. The aesthetic value should not be interpreted as "unique, rare, beautiful, pleasant" as these notions are subjective. Determination which is held according to these notions would lead a change in copyright protection over time and

[477] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed. p. 117; Celal Esad Arseven, *Sanat Ansiklopedisi,* (İstanbul: Maarif Vekaleti, 1943) p. 202.
[478] Ayiter, *Hukukta Fikir ve Sanat Ürünleri*, p.55.
[479] Uslu, *Türk Fikir ve Sanat Hukuku'nda 'Eser' Kavramı,* p.139.
[480] Bozgeyik, *Fikir ve Sanat Eserlerinde Hususiyet*, p. 208.
[481] Bozgeyik, *Mimaride Telif Hakları,* p. 52.

person in according to the personal evaluation of the judge and expert.[482] According to Öztan, the aesthetic aspect must transcend the ordinary in order to be protected. Furthermore, according to him, the aesthetic aspect does not necessarily outweigh the intended use. Moreover, the degree of the aesthetic value is not important.[483]

The Turkish Court of Cassation interprets the aesthetic value as "catering to aesthetic feelings objectively"[484]. In a decision "Turkish Court of Cassation" states that if an artwork has been created by an artistic activity for the purpose of catering the aesthetic felling beyond a functional purpose and it has an high artistic feature, it can be determined as a fine artwork in scope of the Article 1/B and Article 4 of the "Turkish Law On Intellectual And Artistic Works".[485] Turkish Court of Cassation seems to accept the "addressing the sense of watching in order to recall the aesthetic feeling" approach while it indicates that in scope of Law No. 5846 indicated a fine artwork should be created in order to create a watching sense and it should bear high level of aesthetic and artistic value.[486]

When it comes to applied artworks, the discussions related to aesthetic value went intensified. Bozgeyik states that for the copyright protection, the applied artworks should carry a high level of aesthetic value with the reference of "German Federal Court of

[482] Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku,* p. 68.
[483] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 135.
[484] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2008/7336, Decision No: 2009/11814, 13.11.2009.
[485] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2015/12749, Decision No: 2017/570, 06.02.2017.
[486] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2015/12749, Decision No: 2017/570, 06.02.2017; Turkish Court of Cassation, 11th Civil Chamber, Case No: 2016/2193, Decision No: 2017/1563, 06.03.2017.

Justice."[487] However, Bozgeyik also indices that this "aesthethic value" does not have to be "beyond" and "higher" from the functional feature of the work.[488]

Portuguese Law has also this requirement of "artistic creation".[489] Yet, these extra artistic/aesthetic[490] requirements for copyright protection in national laws are controversial. "Directive 96/9/EC of the European Parliament And Of The Council" clearly indicates that "whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied…" Moreover, in "Cofemel — Sociedade de Vestuário SA v G-Star Raw CV", the "CJEU" ruled that designs are capable of classification as "works", within the meaning of "Directive 2001/29", if they meet two requirements: "being the author's own intellectual creation" and "expression of such creation."[491] The criterion of "author's own intellectual creation" as the "maximum requirement" and applicable to "to all categories of works" including applied arts.[492] Koray Güven identifies the EU originality criterion as "a ceiling" thar prevents any "any additional condition for copyright protection.[493]

[487] Bozgeyik, *Mimaride Telif Hakları,* p. 53; BGH, 22.06.1995, GRUR 1995, 581 (Silberdistel).
[488] Bozgeyik, *Mimaride Telif Hakları,* p. 61.
[489] "Article 2 of the Código do Direito de Autor e dos Direitos Conexos (Code on Copyright and Related Rights), headed 'Original works', is worded as follows: '1. Intellectual creations in the literary, scientific and artistic fields, irrespective of their genre, form of expression, quality, mode of communication and objective, shall include, inter alia: … (i) Works of applied art, industrial designs and works of design which constitute an artistic creation, irrespective of the protection relating to industrial property…'" quoted in Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721, 12.09.2019. § 15.
[490] In this study, the terms "artistic" and "aesthetic" are used synonymously. *"Aesthetic theory denotes the branch of philosophy concerned with the interpretation and meaning of art. See generally* Aesthetics: A Critical Anthology (George Dickie et al. eds., 2d ed. 1989*)."* Walker and Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard," p. 345, note 8.
[491] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 48, 29.
[492] Güven, "Eliminating 'Aesthetics' from Copyright Law: The Aftermath of Cofemel," p. 213.
[493] Güven, "Eliminating 'Aesthetics' from Copyright Law: The Aftermath of Cofemel," p. 214.

Hereby, the CJEU ruled that "…the usual meaning of the term aesthetic, the aesthetic effect that may be produced by a design is the product of an intrinsically subjective sensation of beauty experienced by each individual who may look at that design. Consequently, that subjective effect does not, in itself, permit a subject matter to be characterized as existing and identifiable with sufficient precision and objectivity…"[494], and "a specific and aesthetically significant visual effect is not such as to justify those designs being classified as works within the meaning of Directive 2001/29."[495] With this ruling, there need to be remarked that the "CJEU" emphasized the subjectivity of the "aesthetics" and the obstacle caused by it while rejecting it as a "requirement".

Italian Law had also an artistic value requirement for industrial designs which considered under the category of applied artworks before the "*Cofemel"* desicion. Article 2 of the Italian Copyright Law states that "In particular, protection shall extend to: 10) Works of industrial designs which themselves have a creative and artistic value*"*[496] However, after the "*Cofemel", "*Italian Supreme Court" ruled that "layout of KIKO store" is eligible for copyright protection under "Article 2 No 5 of the Italian Copyright Act".[497] The Court clearly stated:

> "The EU Court has thus confirmed that the subsistence of originality as required under copyright, that is the subsistence of a well-defined and creative expressive form, which reflects the free choices and personality of its author, does not also

[494] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 53.
[495] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 55.
[496] Italian Copyright Statute Law for the Protection of Copyright and Neighbouring Rights (Law No. 633 of April 22, 1941, as last amended by Legislative Decree No. 68, of April 9, 2003) accessed February 25, 2022, https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf
[497] Italian Supreme Court (Corte Suprema di Cassazione), Wycon SpA v Kiko SpA, decision 780/2020

imply that it produces a visually relevant effect from an aesthetic standpoint, as it is instead required for protection as a design."[498]

As understood from the quotation above, Italian Court did not need a requirement regarding to "artistic value" or "aesthetic appearance" for copyright protection of the designs anymore. Nevertheless, according to "*Cofemel"* decision, one can state that any national provision which is granting an aesthetic/artistic value requirement for copyright protection in addition to "originality" and "expression" requirements, is not compliant with EU law anymore and *"KIKO"* decision of the "Italian Supreme Court" shows us the endeavor of the Member States in order to comply with the EU law.

In U.S. Law, the "aesthetic value, artistic merit, or intrinsic quality of a work" is not considered as a requirement for copyright protection by the copyright office.[499] As indicated in House Report "the definition of pictorial, graphic, and sculptural works carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality…. There is no intention whatever to narrow the scope of the subject matter now characterized in section 5(k) as prints or labels used for articles of merchandise."[500] This is because, as indicated in the "*Bleistein"* case, "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[501]

[498] Wycon SpA v Kiko SpA, decision 780/2020, translated by Eleonora Rosati from Italian. Eleonora Rosati, "Italian Supreme Court Applies CJEU Cofemel Decision to Make up Store Layout," *Journal of Intellectual Property Law and Practice* 15, no. 7 (2020), p. 502.
[499] Compendium Of U.S. Copyright Office Practices § 101, 3rd ed., (2021) § 310.2
[500] H.R. REP. NO. 94-1476, at 51 (1976) reprinted in 1976 U.S.C.C.A.N. at 5664.
[501] Bleistein v Donaldson Lithographing Company (1903) 188 U.S., 239, 251.

Further, in my opinion, this ruling of the U.S. Supreme Court is in point while one thinks about the necessity of expert examining in Turkish Law for the aesthetic value.[502] The aesthetic judgment cannot be made by a judge and only an expert can make it.[503] Yet, as the "CJEU" indicated, the aesthetic value is "subjective"; furthermore, there is no uniformity for the notion of aesthetics even in the art world itself.[504] So, the criteria of aesthetic value might constitutes problems for contemporary artworks. These potential problems will be addressed in the part.

b) Problems Related to Aesthetic Value

This subjectivity of "art" also emerges in aesthetic value as the evaluation of "aesthetic" is very subjective as seen from the doctrinal debates and this subjectivity might constitute a problem for contemporary artworks to acquire the copyright protection.

According to John J. Costonis:

> "Aesthetics, as the term is used in the visual beauty rationale, connotes pleasure or offense to the sense of sight resulting from the visual form of environmental features or settings. Consequently, aesthetic regulation's purpose is assumed to be the creation or preservation of features or settings that are beautiful - pleasing to the eye - or, conversely, the proscription of those that are ugly - offensive to the eye."[505]

[502] Bozgeyik "Fikir ve Sanat Eserlerinde Hususiyet", p. 211; The Turkish Court of Cassation, 11th Civil Chamber, Case No: 2006/934, Decision No: 2007/455, 13.03.2007.
[503] The Turkish Court of Cassation, 11th Civil Chamber, Case No: 2008/7336, Decision No: 2009/11814, 13.11.2009.
[504] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 135.
[505] John J. Costonis, "Law and Aesthetics: A Critique and a Reformulation of the Dilemmas." *Michigan Law Review* 80, no. 3 (1982), p. 396.

At this and, the human sense of aesthetics is subjective, and it depends on "intellectual, emotional and cultural aspects" and this might be the reason that some senses such as "taste" and "smell" change person to person "with aesthetic sensitivity generally."[506]

Because of this subjectivity, I find, the U.S. Law and CJEU's approach related to "aesthetics" is in point. In today's artwork urinals can be art and even can be considered as masterpiece. Duchamp's artwork *"Fountain"* -a porcelain urinal signed "R. Mutt"- was chose as "Most Influential Piece of Modem Art" in 2004.[507] Some said that Duchamp's work is "ugly" hence it is "anti-aesthetic" and maybe they can be right as ready-made objects do not appeal to the eye, their *raison d'être*[508] is force us to think.[509]

Contemporary artists including Duchamp, (maybe subsequent to Duchamp) did a "Copernican revolution in aesthetics".[510] For contemporary artists, the important thing is the process of the work instead of the work's beauty.[511] Contrary to modern art, contemporary art left this aesthetical value as I explained before. Marcel Duchamp showed the world that aesthetics is no longer a concern for an artist and successful artworks do not need to consist of concerns related to aesthetics and admiration.[512]

[506] Costonis, "Law and Aesthetics: A Critique and a Reformulation of the Dilemmas.", p. 396.
[507] Denis Dutton, *The Art Instinct Beauty, Pleasure, and Human Evolution* (Bloomsbury, 2010), p.193-194.
[508] (Fr) "reason for being" or "reason to be". This French expression used in English commonly.
[509] Maurizio Lazzarato, *Marcel Duchamp Ve İşin Reddi*, trans. Sercan Çalcı, 2nd ed. (İstanbul: Kolektif, 2019), p. 39.
[510] Yakov Rabinovich. "Duchamp: To Say The Least, The Caligula Of Taste", Http://Www. Invisiblebooks.Com/Duchamp.Htm; Quoted in Glen Cheng, "The Aesthetics of Copyright Adjudication," *UCLA Entertainment Law Review* 19, no. 1 (2012), p. 116.
[511] Naomi Blumberg, "What's the Difference Between Modern and Contemporary Art?."
[512] Danto, *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi*, p. 145.

Figure 22 Fountain, Marcel Duchamp, 1917, replica 1964. © Succession Marcel Duchamp/ADAGP, Paris and DACS, London 2022

After years and years, contemporary art went further on aesthetic/beauty aspect. Today, the "abjection" is accepted in art and even artist use disgusting materials and excluded from society for provoking "disgust" in their artistic production. Today's art does not want to be "pleasant", in fact, today's artist's task is not to suppress the repulsive, but to reveal. For this aim, artists use "excrement, garbage, rotten food, and other taboo substances" as a medium of expression.[513]

For example, Bedri Baykam introduced the tissue that his sperm wiped as a work of art and after the reaction of public, he asserted that people in Turkey do not understand art and according to him, reason behind this is "there is an importance that is not given to art" Turkey.[514] Another controversial work is "The Holy Virgin Mary" by Chris Ofili which constitutes a mixed mediums including elephant dung and collaged pornographic images.[515] The artwork determined as "sick", "disgusting" and also "offensive to

[513] Hatice Doğan, "Çağdaş Bir Eğilim Olarak Abject Art (İğrenç Sanat)", *Akademik Sosyal Araştırmalar Dergisi* 5, no. 46, (2017), p.424.
[514] Accessed 07 May, 2022. https://www.mynet.com/bedri-baykama-sperm-sorusturmasi-110100260764
[515] "Ofili became renowned for the use of elephant dung in his works. The material serves a dual purpose here: it is an element of the composition (he uses a ball of dried dung in place of the Virgin's bared

Catholics and is an attack on religion" by The Mayor of New York City, Rudolph Giuliani.[516]

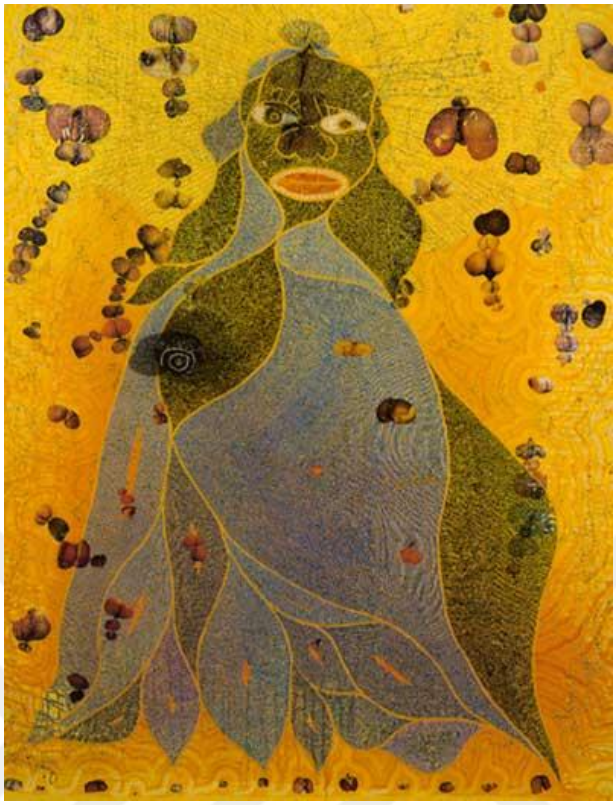

Figure 23 Holy Virgin Mary, Chris Ofili. 1996. https://www.wikiart.org/en/chris-ofili/the-holy-virgin-mary-1996.

This anti-aesthetic tendency would not be a problem for copyright protection if a "work" meets the requirements. However, some countries such as Turkey need an aesthetic value for some works, and this constitutes a very serious conflict with contemporary artwork aspect. As explained above in details, according to Turkish law, if work does not have aesthetic value, it is not possible to consider it as an "artwork" hence cannot enjoy copyright protection.

breast, alluding to an absent baby) and also a support for the painting, which stands on two balls of the material. Map pins letter the name of his subject on the supports; one reads "Virgin" and the other "Mary." Ofili's decision to lean his paintings against the wall, close to the floor, suggests that he envisions them as part of the real space of the viewer's world rather than the suspended space of art dictated by tradition." Accessed 18.03.2022 https://www.moma.org/collection/works/283373

[516] Brooklyn Institute of Arts v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999)

In order to avoid repetition, the above-mentioned evaluations of the aesthetic value will not be expressed in this part. Nonetheless, I find Nal/Suluk's approach more accurate. Seeking a "beauty" in the "aesthetic value" narrows the copyright protection for contemporary artwork. Interpreting the aesthetic value as an aesthetic claim or considering it within an aesthetic feeling or connecting it to a measure of the beauty of someone would not make contemporary arts satisfy the aesthetic criteria as they ignore the aesthetic need entirely. As Walker and Depoorter claims, "aesthetic judgments are dangerous undertakings for courts."[517] Defining or interpreting it "would be subject to the whims of personal taste." and "art is like obscenity"[518] As Justice Stewart of U.S. declared, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."[519]

Hence, the hard-to-define and very subjective nature of the aesthetics is narrowing the scope of protection and to me, U.S and EU's approaches that avoids an "aesthetic judgement" is beneficial for today's art. Also, the subjective nature put the lid on the problems related to legal certainty as every judge or expert would interpret it subjectively according to herself/himself, one cannot be sure whether her/his work is eligible to be protected or not. If art of today leaves the "aesthetic" concerns behind, the law of today should take this into consideration.

2. *EXPRESSION*

[517] Walker and Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard," p. 343.
[518] Walker and Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard," p. 345.
[519] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)

As a "work", artistic works need to meet "expression" criterion. The general aspects of this criterion that is explained above is applicable for artistic works as well. To this extend; concepts, processes and ideas cannot be protected under copyright law.

However, contemporary artworks are not limited with expressions, they also display the "idea" as the work itself; yet, as I discussed above, copyright only protects the material expressions, not the ideas as ideas should remain "free as air"[520] in the public domain in order to flourish the creativity for further works. For some contemporary artworks, there might be impossible to extract the idea from expression and this leads to an exclusion from the copyright protection of these type of artworks.

a) Problems Related to Expression

(1) "Idea" as Artistic Work

As Sol LeWitt indicates, for contemporary artists "the idea becomes a machine that makes the art…. The idea itself, even if it is not made visual, is as much of a work of art as any finished product."[521] For conceptual artists, the end product is not valuable in an artistic angle, the valuable artistic work is that the creative process of the work. Furthermore, one can said that "conceptual art is a form where the leap of imagination, not the execution, is art."[522]

As I mentioned before in the part "Conceptual Art", Maria Eichhorn art gallery closing was indicating "how we ascribe value to time in an age when work and leisure time are ever more intertwined and rarely get the change to pause and reflect"[523] and this indication

[520] Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930).
[521] Sol LeWitt "Paragraphs on Conceptual Art", *Artforum*, June 1967, p.79.
[522] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art", p. 287.
[523] An and Cerasi, *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World*, p. 47.

is not related to an original expression of an artistic work. It indicates an "idea" behind the artists behavior as the "work" itself. Also, Hans Haacke's work "Manet Project", is an artwork that consist of names of people who had acquired Manet's "Bunch of Asparagus" on panels. At the first glance, the "art" of this artwork can be considered as the visuality of end product -the panels, but it is not. The art is the idea "in questioning the association of business transactions with the art world."[524]

Figure 24 Manet-PROJEKT, Hans Haacke. 74, 1974.

Ten black and white panels and framed colour reproduction of Manet's Bunch of Asparagus of 1880, 83 x 94 cm, Private Collection of Dr. Roger Matthys accessed 04.03.2022, https://allaccessarts.com/how-and-why-have-artists-since-the-1960s-criticised-the-museum.

Furthermore, not only in conceptual art but also in performance art the idea prevails the expression. The art is also the process and the idea behind the of the performance. For instance, Vito Acconci's performance art "Following Piece", the artist followed random people in the streets of NYC. From this performance, one can see that "a result-oriented performance that should not be protected."[525] Acconci also published a series of 12

[524] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 122.
[525] "In 1969 [Acconci] undertook a work he called Following Piece, in which he would simply follow, unnoticed, a pedestrian he chose at random until the person disappeared behind a closed door. 'Nobody saw it when it was done,' he says. 'I was the audience.'" Michael Small, Vito Acconci: Put Him On Exhibit, But Don't Say, 'Don't Touch', *People*, (Oct. 31, 1988), p. 78. Quoted in Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 292, note 107.

photographs that were taken each time he blinked while walking randomly.[526] Even the photographs are eligible to copyright protection in "expression" context as they constitute an example of expression of the idea; the process of the photographs, following random people cannot be protected as it does not contain an expression. Nevertheless, "Acconci would not exhibit the photographs by themselves, without an explanation of how they were generated, because for purposes of performance art the act of creation is the essential component of the work."[527] As one can see, the idea is the "core" of the artwork and denying protecting it concludes an exclusion of these type of artworks.

In today's laws, protecting the "idea" is impossible but, to Duchamp and a bunch of artists who are following him, "art was idea".[528] Of course, monopolizing the ideas should be avoided as and it has a legit rational. As ideas are "free career. No one is able to own them because they have a mental form exclusively produced by the mind."[529] However, nowadays, we see "artworks" which is fall out of the scope of copyright protection and laws need to find a solution for those non-copyrightable hence unguarded artworks.

(2) Idea/Expression Dichotomy

As indicated above, art cannot be protected if it indicates idea solely. So, first of all, one needs to determine whether an artwork is an instance of an idea or an expression. However, sometimes, it is not easy to differentiate the idea from the expression. This situation seemed often "in cases where style, technique, or other aspects of a design or

[526] Suzanne Muchnic, Art Review; "LACMA Surveys 150 Years of Photography", *L.A.TIMES*, 21 (December 1989).
[527] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 292, note 293.
[528] Roberta Smith, "Conceptual Art", In *Concepts Of Modern Art*, (ed.) Nikos Stangos, (1981). p. 256, 260.
[529] Estelle Derclaye, *Research Handbook on the Future of EU Copyright*, (Edward Elgar Publishing, 2009), p. 134.

painting have been reproduced but there has been no complete copying"[530] Minimalist, conceptual and site- specific art are constantly having problems related to this dichotomy.

Even if it has a rationale, nevertheless, The U.S. Copyright Act of 1976 and other nations acts did not indicate a guide for courts to decide whether it is an idea or an expression and courts insisting avoid making a definition of the idea/expression and their intention[531]; this also leads a jurisprudential uncertainty[532] The problem is there can be no expression exist without an idea and vice versa.[533] So, this also leads an ambiguity.

Judge Learned Hand stated that "nobody has ever been able to fix that boundary (between idea and expression), and nobody ever can."[534] and also as indicated in *"Peter Pan Fabrics, Inc."* "obviously, no principle can be stated as to when an imitator has gone beyond copying the idea and has borrowed its expression. Decisions must therefore inevitably be ad hoc."[535] Situation is the same for the EU and Turkish Laws. Unfortunately, legal uncertainty is pervaded all around the world when it comes to enlightening the idea/expression dichotomy.

In 1985, artists Christo and Jeanne-Claude wrapped the Paris's Pont Neuf sandstone-colored fabric for two weeks as their installation artwork.[536] However, some media companies took the photos of the artwork and tried to reproduce and distribute them

[530] Daniel McClean and Karsten Schubert, *Dear Images: Art, Copyright and Culture* (London: Ridinghouse, 2002), p. 59.
[531] Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law", p. 551
[532] Alfred C. Yen, "A First Amendment Perspective on the Construction of Third-Party Copyright Liability," *Emory Law Journal* 38 (1989), p. 396-397.
[533] Patrick Masiyakurima, "The Futility of the Idea/Expression Dichotomy in UK Copyright Law," *International Review of Intellectual Property and Competition Law* 38, no. 5 (2007), p. 548.
[534] Holmes v Hurst 17 US 82 (1898) § 121
[535] Peter Pan Fabrics, Inc. v. Dixon Textile Corporation, 188 F. Supp. 235 (S.D.N.Y. 1960)
[536] See artists' own website, Accessed March 06, 2022. https://christojeanneclaude.net/artworks/the-pont-neuf-wrapped/

without seeking an authorization. The Paris Court of Appeals ruled that artwork is original as the usage of a silky tarp to highlight the bridge constitutes an original work and the media companies infringing to artists' rights.[537] According to McClean and Schubert "this language followed from the Court's finding of an idea that is formulated and thus defined, determined, perceptible and capable of being proved."[538] However, only a year later, artists lost a similar lawsuit against an adverting company which uses similar clothing to cover the object in a photo shooting.[539] This time, the artists' artwork was wrapped trees and bridges and the court states that "the law...protects only creations of particular, individualized, and perfectly identifiable objects and not a category or a family of forms that have features in common only because they all correspond to a style or a process arising from an idea"[540]

Öztan also indicates that copyright protects the "work", not the style, technique or manner.[541] However, following to this, he asserts that, if an artist uses a certain "style" and if this style has a distinguishing role in terms of element of form, exceptionally, this style should be protected.[542] To me, even if this argument is fair minded, contains an ambiguity. As one can see, determining whether the work is an idea, style or an expression is difficult and hard to predict the reaction of the law.

Furthermore, some argue that the idea/expression dichotomy neglects the new art forms of today; therefore, todays artists became discouraged to produce these new, revolutionary forms in the fear of to be unprotected by copyright law.

[537] CA Paris, 13 Mars 1986, Gaz. Pal. JP 239; Quoted in McClean and Schubert, *Dear Images: Art, Copyright and Culture*, p. 174.
[538] McClean and Schubert, *Dear Images: Art, Copyright and Culture*, p. 174.
[539] TGI Paris, 26 Mai 1987 (Dalloz 1998. Sommaires Commentés 201, obs. Colombet).
[540] McClean and Schubert, *Dear Images: Art, Copyright and Culture*, p. 174.
[541] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 137.
[542] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 137-138.

According to Amy Cohen "[t]here may be no way for the new artist to extract the 'idea' without the 'expression' of it, and moreover, there may be no point in making that artist attempt to do so because that artist's creation of his or her work may be considered valuable as a reflection of that artist and that artist's definition of what is art."[543]

Cohen is in point with her statement as in particularly in conceptual and performance art, determining the work is whether an idea or an expression is controversial, restricting the artists and these problems grow up gradually day by day.

(3) Expression Merged with Idea

What if there are only limited number of ways to express an idea? In a situation like that, difference between idea and the expression is that little that they merge with each other. According to "CJEU", "the expression of (...) components is dictated by their technical function, the criterion of originality is not met, since the different methods of implementing an idea are so limited that the idea and the expression become indissociable".[544] In a situation that is expression merged with idea, the work cannot be eligible to copyright protection under merger doctrine.[545] According to Nuno Sousa e Silva, the "CJEU" expressed the "merger doctrine" of the U.S. law by this judgement[546]. As the U.S. Court generally stated: "[n]o substantial similarity of expression will be found

[543] Amy B. Cohen, "Copyright Law and The Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments," *Indiana Law Journal* 66, no. 1 (1990), p. 231.
[544] BSA v. Ministerstvo kultury, EU:C:2010:816, 22.12.2010. § 49.
[545] Jones, "The Myth of the Idea/Expression Dichotomy in Copyright Law", p. 575.; *"In such a situation, the components of a graphic user interface do not permit the author to express his creativity in an original manner and achieve a result which is an intellectual creation of that author"* BSA v. Ministerstvo kultury, EU:C:2010:816, 22.12.2010. § 50.
[546] Nuno Sousa Silva, "The Boundaries of EU Copyright Law: Cheese, Jeans and a Military Report in the Court of Justice," *Market and Competition Law Review* 3, no. 1 (2019), p. 139.

when 'the idea and its expression are ... inseparable,' given that protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner."[547]

Once again, even if the rationale of the doctrine is legit; it can be conflicting with contemporary artworks, especially minimalist artworks and instances of performance art.

Kazimir Malevich's "White On White" constitutes an example. In the artwork, artist painted "a white square floating weightlessly in a white field".[548] While painting a monochromic white canvas, Malevich expressed a creative idea[549], yet he did it within a commonplace expression. After all, his artwork reminded of pure white unpainted canvasses. Because of this, Malevic's artwork cannot be protected under copyright as "there is no other way to express the idea of a white square than to paint a white square. To grant copyright protection to the white square would confer a monopoly of the white square on one artist."[550]

Just like Malevic, Roman Opalka has a work that planned to be concluded as a "white canvas". According to his concept he "intent on visualizing the continuum of time"[551], while painting black canvasses with white paint and every year as he gets older, he

[547] Id. (quoting Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir.1971)) (emphasis added); see also Landsberg, 736 F.2d at 489 (factual works); See v. Durang, 711 F.2d 141, 143 (9th Cir.1983) (scenes a faire doctrine); Krofft, 562 F.2d at 1168; quoted Data East USA, Inc. v. Epyx, Inc. 862 F.2d 204, 9 U.S.P.Q.2d (BNA) 1322 (9th Cir. 1988) § 23.
[548] https://www.moma.org/collection/works/80385 accessed 06.03.2022.
[549] *"White, Malevich believed, was the color of infinity and signified a realm of higher feeling, a utopian world of pure form that was attainable only through nonobjective art. Indeed, he named his theory of art Suprematism to signify "the supremacy of pure feeling or perception in the pictorial arts"; and pure perception, he wrote, demanded that a picture's forms "have nothing in common with nature." In 1918, soon after the Russian Revolution, the connotations of this sense of liberation were not only aesthetic but also social and political. Malevich expressed his exhilaration in a manifesto one year later: "I have overcome the lining of the colored sky. . . . Swim in the white free abyss, infinity is before you."*
moma.org, https://www.moma.org/collection/works/80385 accessed 06.03.2022.
[550] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 125.
[551] "OPALKA 1965/1 - ∞; Détail 4988006–5006015," Metmuseum.org, accessed 06.03.2022, https://www.metmuseum.org/art/collection/search/666093.

increased the white parts.[552] Unfortunately, he could not be able to finish his life's project as he passed away in 2011. If he was able to finish his artwork as a white canvas, his artwork could not enjoy the copyright protection as well. Even if the idea is very original and different from Malevic's, his product would be "a white canvas" at the end and cannot be protected as "where a work's underlying expression can only be expressed in one way, a court will withhold copyright protection even if there is some original expression."[553]

Same problem arises for the performance art as well. Copyright protection does not protect the processes, but some performances include the process as an inseparable part of the expression of the artwork. Yves Klein staged his painting process and he indicated that this process of the painting creation should be protected.[554] Acconci's performance art "Following Piece" can also be an example of the merging ideas and expressions as the artwork consists merging performance process with end works -photographs- and they cannot be differentiated from each other.[555]

Furthermore, as art historian Clement Greenberg argues "a found object, once incorporated into a work of art, is inseparable from the idea that motivated the artist"[556] One can add "monochrome works" to this argument as well. This means that the "ready-made" and "monochrome" artworks cannot be protected under copyright law as indicated above, copyright law only protects expressions of the ideas and if the expression merges with the idea, merger doctrine applies to exclude the work from the protection. Moreover, artist Sharon Hayes indicates that in his documentation, idea and the expression are

[552] Robert C. Morgan, "Idea, Concept, System", *Arts Mag*., (September 1989), p. 61-65.
[553] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 125.
[554] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 292.
[555] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 293.
[556] Clement Greenberg, "Avant-Garde and Kitsch," in *Pollock and After: The Critical Debate* ed. Francis Frascina (London: Harper & Row,1985). quoted in Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 284-285.

merged together in an inseparable way. They constitute a "whole".[557] Therefore, as the artists themselves identify their works as a whole of both "idea and expression"; merger doctrine is rising a wall between the contemporary artwork and the copyrights.

(4) Objectivity

Some contemporary artworks contain scents. Olfactory art movement uses scents as a medium.[558] Marcel Duchamp was one of the pioneers of olfactory art and he "sought other methods of expression to put art back in the service of the mind."[559] The sense of smell is eristic in art and philosophy world too. According to Kant, smell has a "level of brute as opposed to aesthetic sensation"[560] For example, the exhibition "The Art of Scent 1889-2012" curated by Chandler Burr, contains scents that changed the aesthetics in scent design.[561] The exhibition includes famous perfume scents such as Chanel N˚5 and Prada Amber. [562]

[557] Michael Wilson, *Çağdaş Sanat Nasıl Okunur*, trans. Firdevs Candil Erdoğan (İstanbul: Hayalperest Yayınevi, 2015), p. 178.
[558] Shiner, "Art and Scent: Interpreting the Olfactory Arts,"
[559] Ashraf Osman, "Historical Overview of Olfactory Art in the 20th Century." Accessed March 7, 2022. https://www.academia.edu/4608919/Historical_Overview_of_Olfactory_Art_in_the_20th_Century. p.5.
[560] Anthony Synnott, "A Sociology of Smell." *The Canadian Review of Sociology and Anthropology* 28, no. 4 (1991), p. 439-440.
[561] Accessed March 7, 2022, https://istanbul74.com/portfolio-item/the-art-of-scent.
[562] Accessed March 7, 2022, https://istanbul74.com/portfolio-item/the-art-of-scent.

Figure 25 Chanel N˚5, Ernest Beaux, 1921, Lent by Chanel, Exhibition "The Art of Scent 1889-2012", the visual taken from https://istanbul74.com/portfolio-item/the-art-of-scent/ accessed March 7, 2022.

In general, "art is typically a very solitary experience, primarily because we have the vocabulary and knowledge to understand the work."[563] But, the olfactory art is not.

Moreover, not just olfactory artworks, but also other forms of artworks use scents. For example, in 2018, Otobong Nkanga's artwork "Anamnesis" contains a "white wall, with a dark, river-like incision running around it at nose level" and the artist used scents "aromatic coffee beans, chopped tobacco leaves, cloves and other spices" as an inseparable part of the artwork in order to make audiences feel the African colonial trade in order to express the anti-colonial message of the artwork.[564]

Contemporary art not only uses scents but also tastes. In "Mad Artists Tea Party" exhibition which was held in "London's Future Gallery", they used tastes as the finishing touch of the artworks. In exhibition, every artwork should be devoured within 72 hours and as the curator Vanilli expresses: "The idea being to play with perceptions, creating

[563] Lauren O'Neill-Butler and Chandler Burr. Chandler Burr on "The Art of Scent 1889–2012." *Artforum*, (November 19, 2012) Accessed February 05, 2022. https://www.artforum.com/interviews/chandler-burr-on-the-art-of-scent-1889-2012-37451.
[564] Shiner, "Art and Scent: Interpreting the Olfactory Arts,"

things that look repulsive but taste delicious". "There is an element of performance and synesthesia with such an approach. It aims to trick the viewer into a cerebral sense that what they're looking at is inedible; meanwhile, their mouths are made to water by the sweet smells it gives off. And the aim of this trick is to remind that if one didn't eat it and enjoy it then all its beauty would be lost anyway – or the food (like Gormley's bread, which was soaked in paraffin) will need to be treated with something to fix its appearance in time, making it inedible."[565] So, the artworks are consisting their tastes as well as their appearances as a whole of the "artwork" that needs to be protected.

However, as scents and tastes are subjective senses that will be different from person to person, they cannot be protected under copyright law. As explained above, according to "CJEU", the expression should be "objective" and identifiable with "sufficient precision"[566]. Hence, expressions of subjective subjects such as tastes, and smells cannot meet the requirements of copyright under EU law. Even if some members decided contrary[567] before the *"Levola"* decision, "CJEU"'s approach is exclusionary for some contemporary artworks. Therefore, these types of contemporary artworks cannot enjoy the copyright protection in EU law at least.

In Turkish law, Turkish Court of Cassation ruled that:

[565] Matilda Battersby, "Eat Your Art out: Artists Develop a Taste for Food," Independent, (August 19), 2010, https://www.independent.co.uk/arts-entertainment/art/features/eat-your-art-out-artists-develop-a-taste-for-food-2056095.html.
[566] Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899, 13.11.2018, § 40.
[567] The Supreme Court of Netherlands, decide that the scents can be protected under copyright law. According to Court *"the description given in Article 10 of the Copyright Act of what is to be understood as a 'work' within the meaning of that Act is general and does not rule out the inclusion of scents"* Hoge Raad, Lancôme v Kecofa, 16 June 2006, NL:HR:2006:AU8940.

> "…intellectual effort must be visible, palpable, audible, in short perceptible. Ideas and thoughts are included in the scope of intellectual law only when they take a form, that is, in the form of a work.[568]

İhsan Osman Yarsuvat asserts that in order to be protected by copyright law, work should be perceived objectively.[569] Perfumes must be perceived objectively and for this, the smell of the perfume must be perceived by the person who makes the assessment.[570] Yarsuvat argues that Turkish Courts will probably have an exclusionary manner. While mentioning the requirement of "being perceived by third parties" in Turkish law, Yarsuvat argues that scents cannot be protected under copyright law because they cannot be perceived "objectively". He asserts that perfumes might face two problems: firstly; perfumes, the smell comes from it cannot be perceived by objectively. Smelling the perfume from the paper or from the bottle might constitute different consequences even the same "nose" of same people does it. Secondly, the sense of smell varies from person to person, so the objectively cannot be provided.[571]

In U.S. law, any of the U.S. courts ruled a case about copyrightability of scents. According to an approach perfume meets all the requirements of copyright protection[572]; whereas another approach denies it.[573] However, the reasoning of the counter argument is different

[568] İstanbul 2nd Specialised Court for Intellectual and Industrial Property Rights, Case No: 2017/776, Desicion No: 2020/66, 30.01.2020.
[569] Yarsuvat, *Kokunun Hukuken Korunması,* p. 45.
[570] Yarsuvat, *Kokunun Hukuken Korunması,* p. 57.
[571] Yarsuvat, *Kokunun Hukuken Korunması,* p. 57-59.
[572] David a. Einhorn and Lesley Portnoy, "The copyrightability of Perfumes: I Smell a Symphony", *Intellectual Property Today*, (April, 2010), p. 8-10.
[573] David Nimmer and Melville B. Nimmer, argues that perfume formulas and food recipes cannot enjoy the copyright protection as "recipes, formulas, compounds, or prescriptions are not subject to copyright protection". U.S. law considers "ingredients as simple statements of fact and thus non-copyrightable material" U.S. Court Of Appeals For The Seventh Circuit ruled that in a cookbook "compilation copyright... may not extend to cover the individual recipes themselves, but only the manner and order in which they are presented." See, David Nimmer and Melville B. Nimmer, *Nimmer on Copyright* (Newark, NJ: LexisNexis, 1963), chapter 21.08.); Leon Calleja, "Why Copyright Law Lacks Taste and Scents",

than "objectivity". When considering the "objectivity", in U.S. law, a work needs a "fixation" requirement for copyright protection. In short, a work needs to be "fixed in a tangible medium of expression", it should be "sufficiently permanent or stable... for a period of more than transitory duration"[574] This "sufficiently permanent or stable" requirement would constitute problems for smells and tastes as they change over time. First bite of a food and the first notes of a perfume do not have the same effect as the ones that come after because of their transitory nature. This requirement of "fixation" will be examined later.

3. *ORIGINALITY*

As I tried to explain above, copyright protection only extends to expressions, not the ideas; yet, is every expression eligible to be protected? Only, expression which are "original" can be protected under copyright law as indicated in the "originality" part. As mentioned before, the level of the "originality" depends on the type of the work. And this level becomes evident in "artistic works"[575] In general, threshold of originality is not high for artistic work, yet the situation of originality is controversial when it comes to applied artworks. In today's art, since contemporary art is "depersonalization, the involvement of random choice, and anti-art"[576] some contemporary artworks are in trouble with "originality" requirement.

a) Problems Related to Originality: Are All Contemporary Artworks Eligible to be Original?

University of Georgia Journal of Intellectual Property Law 21, no.1 (2013), p. 11. note 44.; Publications International, Ltd v Meredith Corp, 88 F (3d) 473 (7th Cir 1996).
[574] 17 U.S.C. § 101.
[575] Suluk, *Telif Hakları ve Korsanlıkla Mücadele,* p. 50-51.; Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku*, p. 46.
[576] McClean and Schubert, *Dear Images: Art, Copyright and Culture*, p. 173.

(1) Ready-Made Objects and Monochrome Artworks

Ready-made objects have problems regarding to originality as the degree of author's stamp upon them is controversial. When Marcel Duchamp launched his famous urinal "Fountain" in 1917, he did not only flare the "aesthetic" debates up, also the debates related to "originality" of readymade objects. Duchamp was not created the urinal, he found it in the trash and signed "R. Mutt" [577] In contemporary art, artists do not have to "create" something as pulling it out of the thin air, instead; they can use any object as their "artwork". So that, any object can be an artwork by incorporated into an artistic context and even a urinal can turn into a "masterpiece". However, since Duchamp, artists have been using the readymade objects but still the discussions, about whether they are eligible to copyright protection or not, continue.

Originality is *sine qua non* requirement of copyright.[578] I will not recapitulate the notion of originality in accordance with legislations and as referring to the "originality" chapter. However, Duchamp wanted to leave the idea of "originality" and "copying" because he thought that in our contemporary era, there is nothing "unique" and the fact is that nearly all the ready-made objects are not "original" even in the simplest sense of the word.[579] Of course, the sense of "originality" of the artist might be different from the "originality"s meaning regarding to copyright law[580]; yet, the denial of the originality from the artists themselves make ready-made objects' copyrightability much more controversial.

[577] Fenzel, "Still Life With 'Spark' And 'Sweat': The Copyrightability of Contemporary Art In The United States And The United Kingdom," p. 554.
[578] Feist Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 489–90.
[579] Lazzarato, *Marcel Duchamp ve İşin Reddi*, p. 37.
[580] Chukwubuikem Azoro, "Original' under the Law of Copyright Is Distinct from the Ordinary Meaning of 'Original': A Discourse," *International Journal of Law* 7, no. 6 (2021), p. 31.

That has been indicated that the ready-made objects are chosen by the artist, not created. Additionally, on the one side, this choice is upon the artists subjectivity, whereas; on the other side, it is disabling the artist completely.[581] According to Duchamp, one cannot choose a ready-made object as the readymade object is the one that chooses the artist.[582]

According to U.S. Supreme Court, originality needs "some minimal degree of creativity".[583] Even though this this creativity is "extremely low" and "even a slight amount will suffice" is enough,[584] "the personal reaction of an individual upon nature," or author's "unique" expression of the author's personality is still the crucial part of originality requirement[585] and this reminds Duchamp's statement about disabling the artist completely.

Moreover, the scope of the protection depends on the degree of creativity. Hence, even if the ready-mades can be protected, this protection would constitute a "thin copyright" protection.[586] U.S. Copyright Office indicates that "thin copyright works includes "works that contain limited copyrightable subject matter, and which derive significant value from material in the public domain, such as facts, processes, ideas, or other elements that are beyond the scope of copyright protection." Furthermore, it must be stated that, thin copyright does not grant a "full coverage" for the subject matter. Hence, "copyright

[581] Lazzarato, *Marcel Duchamp ve İşin Reddi*, p. 40.
[582] Lazzarato, *Marcel Duchamp ve İşin Reddi*, p. 41.
[583] Feist Pubs., Inc. v Rural Tel. Svc. Co., Inc., 499 340 (1991) U.S.
[584] Feist Pubs., Inc. v Rural Tel. Svc. Co., Inc., 499 340 (1991) U.S.
[585] Bleistein v Donaldson Lithographing Company (1903) 188 239. U.S.
[586] Cheng, "The Aesthetics of Copyright Adjudication*,"*, p. 158.

owners should not be able to preclude the public from accessing non-protectible features of a 'Thin Copyright' work."[587]

The most powerful copyright protection is for the unique masterpieces that can only be created by its artist, not by anyone else. As the U.S. Court indicates:

> "[I]n the world of fine art, the ease with which a copyright may be delineated may depend on the artist's style. A painter like Monet when dwelling upon impressions created by light on the facade of the Rouen Cathedral is apt to create a work which can make infringement attempts difficult. On the other hand, an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique."[588]

Copyright law considers the "free choices of the creator" important. EU law needs the "free and creative choices" with the "personal touch" of the author of the work[589] for a work to be eligible to copyright protection. Even though ready-made objects are ordinary objects, they also reflect the intellectual "personal" perspective of the author. Yet, is it enough for them to be copyrightable?

According to Kummer's "representation theory", the artists' choice and representation of an object as an artwork among other objects is makes that object an "artwork" that can be protected. Kummer indicates that "a rustling and sizzling plastic is not a work of art"; however, they can also be works of art that is created contemporary art. In such a case, if

[587] U.S. Copyright Office, Comments on Rulemaking on Exemptions on Anticircumvention, Comment 28 by John C. Vaughn. Executive Vice President, Assoc. Am. Univs. (Dec. 18. 2002),; quoted in Cheng, "The Aesthetics of Copyright Adjudication*,"*, p. 159.
[588] Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir. 1978) U.S.
[589] Eleonora Rosati, "Why Originality in Copyright Is Not and Should Not Be A Meaningless Requirement," *Journal of Intellectual Property Law and Practice* 13, no. 8 (2018), p. 597-598.

the qualities of the work cannot be understood at first glance, the authors of the artworks should indicate that what they are offering is the work and that they want legal protection with some precautions. For example, displaying the artwork in the exhibition warns us that we are facing the artifact.[590] According to Kummer, one should consider the artists consideration about the "object". It is important whether the artist defines the object as an artwork or not.[591]

Furthermore, Kummer argues that the notion of "originality" should be identified as "uniqueness" and "to be another than existing". [592] To him, one must consider "the statistical uniqueness" rather than creativeness or originality. This theory is called "doctrine of statistical uniqueness". It can be seen that some jurisdictions adopt Kummer's approach and even "Swiss Federal Court's taken the latter approach to the extreme by ruling that it is sufficient that the work itself demonstrate individual character: What is relevant is the individuality of the work, not the individuality of the author."[593] However, this doctrine denies the protection for double creation that is accepted as "subjective novelty" with an indication that protection of the same two works created by different people unaware of each other within the scope of copyright cannot be prevented.[594]

[590] Kummer, *Das urheberrechtlich schützbare Werk,* Stampfli Verlag, Bern, 1968, p. 75-76, quoted in Ayiter, *Hukukta Fikir ve Sanat Ürünleri,* p. 44-45.
[591] Kummer, *Das urheberrechtlich schützbare Werk,* Stampfli Verlag, Bern, 1968, p. 75; quoted in Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.127-128.
[592] Kummer, *Das urheberrechtlich schützbare Werk,* Stampfli Verlag, p. 75-76, quoted in Ayiter, *Hukukta Fikir ve Sanat Ürünleri,* p. 44-45.
[593] Bob Marley, Federal Supreme Court of Switzerland, September 5, 2003, BGE 130 III 168; Paul Goldstein and Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice*, 4th ed. (New York: Oxford University Press, 2019), p. 181.
[594] Nordemann, *Handbuch des Urheberrechts*, p. 19; quoted in Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.123.

In German law, the threshold of "originality" is not high and if an artwork surpasses this "low bar", it is accepted as "copyrightable". According to an approach in the doctrine "ready-made objects" can be protected under copyright law.[595] However, another approach states that, representation is not enough to be considered as an artwork and the object needs to leave its ordinary meaning in order to gain a new art meaning in a significant detectable way. This new meaning relies on the place and style of the representation and naming of the object.[596] Prevailing approach of German doctrine also considers the "representation in a way just as they are" is not sufficient for to be considered as work. The German copyright law requires a work to be "author's own intellectual creation"[597] and representation of "ready-made objects" cannot be sufficient to meet this criterion. However, if the artist makes some changes on the "ready-made object" or arranges the ready-made objects in a way that reflects her/his "own intellectual creation" object would be eligible to copyright protection.[598]

Therewithal, according to the Turkish Court of Cassation, an artwork should surpass the originality threshold and a degree of creation in order to be protectable. Because of this, a photograph that can be taken by anyone and a report that can be written by anyone cannot be protected in principle.[599] Based on this, one can state that a urinal can be created and also taken from the garbage to be displayed in an art gallery, by anyone; so, it cannot be protected in principle. Accordingly, Öztan argues that even if "ready-made" objects

[595] Kummer, *Das urheberrechtlich schützbare Werk,* Stampfli Verlag, Bern, 1968, p. 75; quoted in Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.127-128.
[596] Thomy Kerhli, *Der urheberrechtliche Werkbegriff im Bereich der bildenden Kunst*, Stampfli Verlag, (Bern, 1989),. p. 128; quoted in Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.128.
[597] Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG), Division 2, Section 2/2.
[598] Bullinger; Dreyer; Jost/Meckel; Erdmann; Rehbinder; Schack; Loewenheim; quoted in Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p.128.
[599] Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.172.

presented as “work”; they cannot be an “artwork”. According to him, when determining the found objects’ eligibility for copyright protection, the weight of the role of chance in the emergence of the work of art should be compared with the contribution of the artist's creative side.[600]

The problematic aspect is that, as one can see from Duchamp’s statement, sometimes artists define their work as “non-original” for several reasons. Duchamp even reproduced his signature in order to erode and terminate the identity and the authorship[601] and this make one doubt if he really wants copyright law’ protection. Maybe these are the reasons why German Law does not protect ready-made objects unless multiple ready-made objects arranged together ore maker makes some changes on them.[602]

One of the problems also arises from the merger doctrine perspective. If one gives protection to an unchanged single ready-made work, this leads a monopoly on an ordinary communal object and this will lead an unacceptable restriction such as in the case of “ideas”.

While mentioning the “merger doctrine”, I want to recall the “monochrome artworks”. “White on White” of Kazimir Malevich and “Blue Monochrome” of Yves Klein also constitutes examples for “thin copyright” protection. They represent an “idea” with a plain originality. Cheng argues that these types of artworks should be protected under copyright law as well as the ready-made objects with the “thin copyright protection”.[603]

[600] Öztan, *Fikir ve Sanat Eserleri Hukuku,* p. 138.
[601] Lazzarato, *Marcel Duchamp ve İşin Reddi*, p. 61.
[602] Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.128.
[603] Cheng, “The Aesthetics of Copyright Adjudication*,”*, p. 160.

According to one approach in the German doctrine, these artworks are eligible to copyright protection as they indicate that he notion of originality should be interpreted broadly. According to them the "color differences caused by brush strokes, irregulates in color, abstraction of works from objects and simplicity" makes the works original by adding a "sense". Furthermore, the protection does not constate a monopoly because the protection would be "thin".[604]

However, the prevailing approach of the German doctrine does not consider these artworks as "work" under the "German Copyright Law." This is because, these types of works do not contain the "author's own intellectual creations" within the meaning of this Act. of the author at a sufficient level to reflects its stamp. Furthermore, this approach indicates that grating the protection would constitute a monopoly on them.[605]

However, according to Öztan, when problems related to framing the copyrights, one should consider "whether there is a product of a creative individual aspect of the human soul or not." He identifies these artworks are at the minimum level of "individuality" and "creation".[606] According to Öztan, surpassing the minimum level of creation is enough for the protection.[607] Based on this, one can argue that monochrome artworks cannot be copyrightable as they remain in the "minimum level".

[604] Bullinger, Loewenheim, Schütter; quoted in Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.130-131.
[605] Kerhli, Kummer,Nordemann, Schack, Ulmer,; quoted in in Polater, *Fikir ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri ve Eser Sahibinin Hakları*, p.131.
[606] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 138.
[607] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 137.

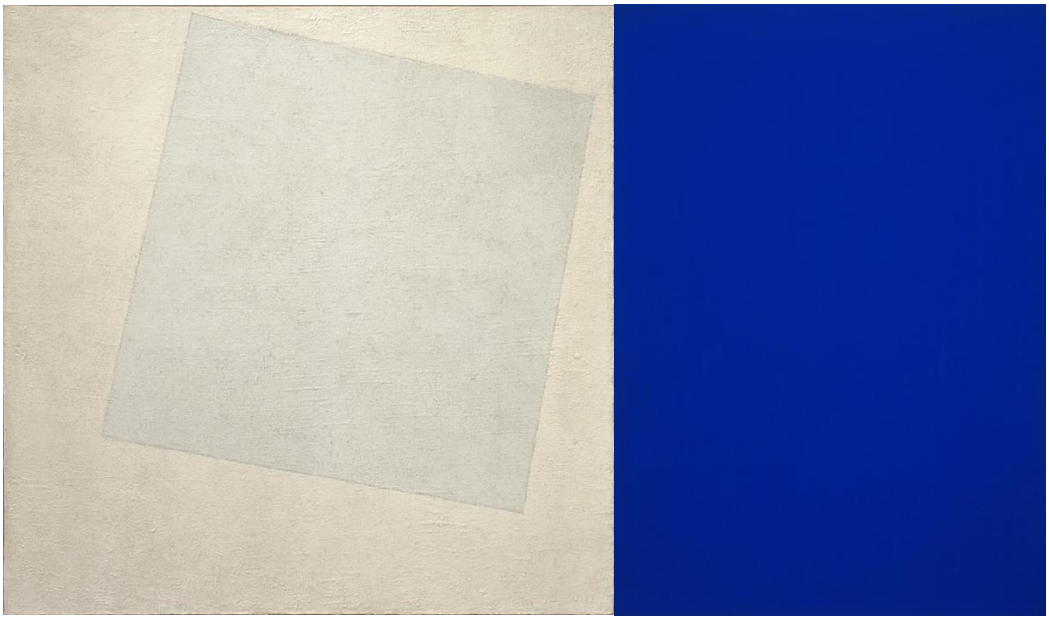

Figure 26 (Left) White on White, Kazimir Malevich. 1918.

Figure 27 (Right) Blue Monochrome, Yves Klein. 1961.

I do not agree with Kummer, as considering the artists consideration about her/his object forces judge to make a motivational reading with a subjective artistic judgement and this would lead arbitrary decisions. Also, even if a ready-made object gains an artistic meaning because of its representation and naming, deciding whether it is art in a "detectable way" or not still would lead to arbitrary decisions. Furthermore, the danger of unwanted, creativity restrictive monopoly remains.

However, these reasons lead a conclusion: "ready-made objects" and "monochrome artworks" cannot be protected under copyright law and copyright laws clash to contemporary art once again. Sherwood-Edwards criticize this notion of originality and expresses that:

> "… given the way business works in a market economy, some form of protection for facts is required. And if appropriation (without any requirement of creativity) is sufficient to found property in tangible matter, why should appropriation not also

be sufficient to found property in non-created intellectual property, such as facts? If there is no requirement of originality in physical property, why have it for copyright?"[608]

It seems that Sherwood-Edwards's critics are radically overhaul of the existing copyright regulations; yet, it can be a trend that "the author's goodwill seems to be a part of the consideration" and famous artists famous artworks which have a low level of originality "are presumed protected under copyright law"[609] Moreover, "thin copyright" might succeed to set a balance between the rights of artists' and public'.

(2) Applied Artworks

The term applied artworks refer to the art which applies to the utilitarian objects in everyday use such as designs and decoration.[610] Works of fine art generally excludes the utilitarian functions whereas works of applied art "are usually functional objects which have been prettified or creatively designed with both aesthetics and function in mind."[611] According to Article 2 of the Berne Convention, the expression artistic works also include "works of applied art".[612] Yet, the Convention left the decision about extension of

[608] Mark Sherwood-edwards, *The Redundancy of Originality* (Heidelberg, Germany: Springer, 1994), p. 663.
[609] Per Jonas Nordell, "The Notion of Originality – Redundant or Not?" *Stockholm Institute for Scandianvian Law*, accessed March 10, 2022, https://www.scandinavianlaw.se/pdf/42-7.pdf, p. 106.
[610] "Applied art" in The Oxford Dictionary of Art. Online edition. Oxford University Press, (2004). www.oxfordreference.com.
[611] http://www.visual-arts-cork.com/definitions/applied-art.htm accessed March 03, 2022.
[612] "(1) The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to

copyright protection for applied artworks to member states.[613] For example, in Portuguese law, works of applies art can be protected under copyright law if they "constitute an artistic creation, irrespective of the protection relating to industrial property"[614] Netherlands law also considers "works of applied art and industrial design" as "literary, scientific or artistic works" that can be protected by copyright law.[615]

In 2019 "CJEU" decided that originality level for applied artworks is not different from every other artwork. Even though some member states needed an extra "aesthetic value" for protection, according to "CJEU", "…a design may generate an aesthetic effect does not, in itself, make it possible to determine whether that design constitutes an intellectual creation reflecting the freedom of choice and personality of its author."[616] German law already had the same approach with "CJEU" before the decision in 2019. Before the "*Geburtstagzug"* decision of the "German Federal Court", prevailing opinion in German

photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

[613] "(7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works."

[614] Article 2 of the Código do Direito de Autor e dos Direitos Conexos (Code on Copyright and Related Rights), headed 'Original works', is worded as follows:

"1. Intellectual creations in the literary, scientific and artistic fields, irrespective of their genre, form of expression, quality, mode of communication and objective, shall include, inter alia:

…

(i) Works of applied art, industrial designs and works of design which constitute an artistic creation, irrespective of the protection relating to industrial property" quoted Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 15.

[615] "Article 1 of the Auteurswet (the Copyright Law) provides:

"Copyright is the exclusive right of the author of a literary, scientific or artistic work, or of his successors in title, to communicate that work to the public and to reproduce it, subject to the limitations laid down by law."

Article 10(1) of the Copyright Law is worded as follows:

'For the purposes of this Law, "literary, scientific or artistic works" shall mean:

…

11. works of applied art and industrial designs;… and, in general, every production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression.'" Quoted in Levola Hengelo BV v Smilde Foods BV, § 12-12.

[616] Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, § 54.

doctrine stated a higher level of originality; yet, the Court did not make a discrimination between work types and indicate that *"Kleine Münze"*[617] applied artworks can be protected if they meet the requirements as the same level with other works.[618] With this decision in 2014, traditional standards for the copyright is also be applicable for applied artworks.

According to Turkish Law, copyright protection for works of applied art is possible. Yet, contrary to "CJEU" and German law, prevailing opinion of both doctrine and judicial decisions indicates that applied artworks need a higher level of originality than other works in order to be protected by copyrights.[619] This is because protection of applied artworks under copyright law that is suitable for mass production which have a low aesthetic value, makes unregistered long-term protection for them in an unfair way and this broad copyright protection might make industrial property protections such as design protection for applied artworks redundant.[620] Another approach indicates that an applied artworks aesthetic aspect must surpass the mediocrity and the artist should have a freedom to reflect her/his own perspective. This aesthetic perspective should not be confused with aesthetic value as the degree of aesthetic value is not important. If an applied artwork reflects its authors personality, it should be enough to gain the copyright protection.[621]

However, for contemporary artworks, both perspectives might not be enough. Prevailing opinion's higher level of originality would make copyright protection even harder for

[617] (D) Small coin, small change.
[618] Case I ZR 143/12 – Geburtstagszug/Birthday Train, November 13, 2013., quoted in Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p. 131-149.
[619] Turkish Court of Cassation, 11th Civil Chambers. Case No: 2016/2193, Desicion No: 2017/1563, 16.03.2017.; Turkish Court of Cassation, 11th Civil Chambers. Case No: 2015/12749, Desicion No: 570, 06.02.2017.
[620] Polater, *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*, p. 170-171.
[621] Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 135.

already lacking "originality" artworks. Other option seems more appropriate, yet contemporary artworks "aesthetic aspect" also hard to determine.

In U.S. law, "an article having intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article."[622] Under U.S. copyright law, works of applied art can be protected "only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[623] This notion of separability test would cause some serious hardships for contemporary artworks.

First of all, as copyright protection only extends to applied arts, not industrial designs; courts must determine the works status.[624] This determination leads problems as judges unavoidably add their subjective evaluations to the decision. However, sometimes, the separability test set a higher bar than the "merger doctrine."[625] An applied artwork is protectable only if its useful elements are "separable" from its aesthetic. In Mazer vs. Stein[626] case the court applied a "physically separability test". In case, a dancer shaped lamb found copyrightable because the statuettes and the lamb itself made up as physically separable and the dancer can be stand alone as an artwork without the lightening function.[627] After this case, in "Esquire, Inc. v. Ringer", there were also a lamb yet this time, the modern aesthetic design of the lamb found inseparable from its utilitarian aspect.

[622] 17 U.S.C. § 101.
[623] 17 U.S.C. § 102 (a)5
[624] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 135.
[625] Jane C. Ginsburg, ""Courts Have Twisted Themselves into Knots": US Copyright Protection for Applied Art," *Columbia Journal Of Law and the Arts* 40, (2016), p.2.
[626] Mazer v. Stein, 347 U.S. 201 (1954).
[627] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 136.

As the court states "when all the design elements ...are directly related to the function of the article"[628] As Petruzelli expresses:

> "Although the district court found that to deny protection to this modem lamp design would give protection to works of traditional art over modem designs, the Court of Appeals argued that this discrimination against modem designs is an "unintentional disproportionate impact on one style of artistic expression."[629]

In "Brandir International v. Cascade Pacific Lumber"[630], the Court used a different test approach and used conceptual separability test. The test is defined as "a pictorial, graphic or sculptural feature incorporated in the design of a useful article is conceptually separable if it can stand on its own as a work of art traditionally conceived, and if the useful article in which it is embodied would be equally useful without it." by Paul Goldstein.[631] Petruzelli argues that this approach lead a conclusion that more traditional lamp would get the protection while lamp base in the Mazer case remain useful when attachment separated, on the contrary, a modern chair cannot be protected while detaching a cushion from the frame makes it useless. "As such, conceptual separability, like physical separability, has caused much concern over aesthetic considerations in that it has a discriminatory effect against modem designs."[632]

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[628] Esquire, Inc. v. Ringer 591 F.2d 796 (D.C. Cir. 1978).
[629] *"The court also stated that denying copyright protection for industrial designs was rooted in administrative efficiency, rather than aesthetic discrimination. Copyrightability of utilitarian design, whether separable or not, would lead to widespread copyrightability of industrial designs such as planes, subways, and bathtubs. There would be no end in sight."* Esquire, Inc. v. Ringer 591 F.2d 796 (D.C. Cir. 1978) §801; quoted in Petruzzelli, "Copyright Problems in Post-Modern Art", p. 136.
[630] Brandir International v. Cascade Pacific Lumber, 834 F.2d 1142 (2d Cir. 1987).
[631] Paul Goldsten, Copyrıght § 1.1 (1989); quoted in Petruzzelli, "Copyright Problems in Post-Modern Art", p. 137.
[632] James H. Carter, "They Know It When They See It: Copyright and Aesthetics in the Second Circuit", *St. John's Law Review* 65, no. 3, (1991). p. 773, 788; quoted in Petruzzelli, "Copyright Problems in Post-Modern Art", p. 137.

However, in the case, court ruled that "the design elements can be identified as reflecting the designer's judgment exercised independently of functional influences." And this judgement leads a consideration upon the artists intend. Considering the intent of the artist is not compliance with traditional copyright protection and this gives also "ready-made" using contemporary artists copyright protection even though "the function and aesthetics were fused" on objects.[633] Yet, as indicated above, these types of subjective based judgments will lead arbitrary decisions and at the end of the day, legal certainty will start to fade away as every judge inject their own subjective comments about an artist's intent.

Nevertheless, in "*Varsity Brands"* decision, the Sixth Circuit ruled that the work "2-dimension designs" which was applied on uniforms is separable so "protectable from the overall design of the uniforms."[634] The reason was that "the arrangement of stripes, chevrons, color blocks, and zigzags are 'wholly unnecessary to the performance of' the garment's ability to cover the body, permit free movement, and wick moisture,"[635] After this decision, The Supreme Court has established a two-step test: firstly one should perceive a two- or three- dimensional element in the work that have a "pictorial, graphic, and sculptural" qualities and if the answer is yes, should determine whether this a two- or three- dimensional element is separate from the utilitarian aspect.[636] The Court also provide a guidance for the test: "If one reverse-engineered the article, could one imagine that the design is standing on its own, with the useful article as something that the design

[633] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 138.
[634] Ginsburg, "'Courts Have Twisted Themselves into Knots': US Copyright Protection for Applied Art," p. 22.
[635] Star Athletica v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).
[636] Star Athletica v. Varsity Brands, Inc., 137 S. Ct. 1002, 1010 (2017); Jane C. Ginsburg, "Copyright Protection for Applied Art and Works of Artistic Craftsmanship After Star Athletica*", Columbia. Journal of Law.and Arts* 43, no. 3 (2020), p. 427.

has been reproduced onto?"[637] Yet, this imagination test would also lead arbitrary decisions especially for contemporary artworks.

Figure 28 "Cocoon Chair", Complaint, Heptagon Creations, Ltd. v. Core Grp. Mktg. LLC, No. 1:11CV01794, 2011 WL 2352535 at *48 (S.D.N.Y. Mar. 15, 2011).

(Image of the plaintiff's "Cocoon Chair" quoted in Ginsburg, "Copyright Protection for Applied Art and Works of Artistic Craftsmanship After Star Athletica", p. 427.)

For instance, an object in a tree trunk can be seen as a sculpture, a fine artwork; yet, if one sees the object as a chair, it will evolve a useful article. One more possibility: if one imagines the tree as the arms of the chair, so the think that considered as pictorial, graphic, and sculptural element (the tree) would turn into a useful element as well. As Ginsburg argues "[t]here may be an internal contradiction in imagining that sculptural element as something existing independently of the chair on the one hand, but on the other hand, because the sculptural element forms the base and arms of the chair, the element is no longer separable."[638] An these also constitutes problems for contemporary artworks that is identified as applied artworks.

[637] Ginsburg, "Copyright Protection for Applied Art and Works of Artistic Craftsmanship After Star Athletica", p. 427.
[638] Ginsburg, "Copyright Protection for Applied Art and Works of Artistic Craftsmanship After Star Athletica", p. 428.

Moreover, as Schonack indicates, copyright law contains an ambiguity situation happens when an artwork contains "objects that have uses outside of an artistic context." Since the copyright protection does not covers "mechanical or utilitarian aspects" of a pictorial, graphic, or sculptural work; Andy Warhol's famous soups pads "Brillo Boxes" and other works that fall under the useful article exception, cannot be protected.[639]

4. *FIXATION*

Even if most civil law countries do not have a fixation requirement for copyright protection, U.S. copyright law needs it. A work must be "fixed in a tangible medium of expression."[640] to be protected.

It can be said that this requirement's purpose is to make the separation between idea and the expression, with ensuring the commodification for a work.[641] While helping the works as "evidence" of proof, this requirement also constitutes some problems as meeting the fixation seems to be problematic for me contemporary art forms such as earth art, conceptual art and performance art.

[639] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 295.
[640] 17 U.S.C. § 102(a) (1988).
[641] As William Patry explains: "Fixation serves two basic roles: (1) easing problems of proof of creation and infringement, and (2) providing the dividing line between state common law protection and protection under the federal Copyright Act, since works that are not fixed are ineligible for federal protection but may be protected under state law. The distinction between the intangible intellectual property (the work of authorship) and its fixation in a tangible medium of expression (the copy) is an old and fundamental and important one. The distinction may be understood by examples of multiple fixations of the same work: A musical composition may be embodied in sheet music, on an audio-tape, on a compact disc, on a computer hard drive or server, or as part of a motion picture soundtrack. In each of the fixations, the intangible property remains a musical composition." Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 304; Simon Stokes. *Art and Copyright.* (Oxford: Hart Publishing, 2012), p. 17.

Even though U.S. copyright law states that this fixation is “fixed in a tangible medium of expression”, it should be "now known or later developed, from which (a work) can be perceived, reproduced, or otherwise communicated ....”[642] and also must be “sufficiently permanent or stable... for a period of more than transitory duration”[643] Yet, in earth art, some artworks cannot be “considered as sufficiently permanent or stable”, as they are made from natural materials that would perish in time. In earth artworks, artists use nature as a medium and change in natural conditions, weather, natural progress of chosen mediums such as growing plants, and human interventions affects the stability of the work.

Even though artists use video and photograph to record their work, in a scenario like this, copyright law only protects the end work: the video or the photograph of the work, not the “artwork” itself.

For instance, artist Robert Smithson created an intricate spiral design in “Great Salt Lake of Utah” in 1970. The famous artwork called “Spiral Jetty,” and it was made from basalt rock, salt crystals, earth, and water.[644] In time, the artwork stated to change due to natural conditions. In 2000’s the lake faced a drought which caused water levels to recede and made the artwork visible.[645] When calendars showed the year 2020, the visuals of the artwork changed dramatically.

[642] 17 U.S.C. § 102(a).
[643] 17 U.S.C. § 101.
[644] Accessed March 22,2022. https://holtsmithsonfoundation.org/spiral-jetty.
[645] Accessed March 22,2022. https://www.artlyst.com/news/robert-smithsons-spiral-jetty-under-threat-from-drought.

Figure 29 (Left) An aerial view shows the Spiral Jetty along the shore of the Great Salt Lake in Utah, in October 2020.

Accessed https://www.theartnewspaper.com/2021/05/27/surge-in-visitors-to-spiral-jetty-through-the-pandemic-leads-to-plans-for-more-amenities-and-ecological-awareness.

Figure 30 (Right) Robert Smithson 1970 Great Salt Lake, Utah Mud, precipitated salt crystals, rocks, water 1,500 ft. (457.2 m) long and 15 ft. (4.6 m) wide.

Dia Art Foundation © Holt/Smithson Foundation and Dia Art Foundation, licensed by VAGA at ARS, New York.

As can be seen from photos above, the transitory nature of the work endangers the need of "sufficiently permanent or stable" for satisfying the fixation requirement. This nature of the earth artworks constitutes a hardship for them to enjoy copyright protection and determining "where the line can be drawn between arranging the environment to create art and creating art by arranging the environment"[646] is not easy.

Furthermore, in a case, the U.S. court ruled that "a living garden lacks … stable fixation normally required to support copyright."[647] Artist Chapman Kelley installed a wildflower display named "Wildflower Works" and promoted it as a "living art"[648] First of all, court indicated that as the seeds or seedlings are originated in nature, they can be changeable[649] and to this extend "to satisfy the primary purpose of fixation; its appearance is too

[646] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 325.
[647] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 303.
[648] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 291.
[649] As Court states: *"Although the planting material is tangible and can be perceived for more than a transitory duration, it is not stable or permanent enough to be called "fixed." Seeds and plants in a garden are naturally in a state of perpetual change; they germinate, grow, bloom, become dormant, and eventually die. This life cycle moves gradually, over days, weeks, and season to season, but the real barrier to copyright here is not temporal but essential. The essence of a garden is its vitality, not its fixedness. It may endure from season to season, but its nature is one of dynamic change."* Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 305.

inherently variable to supply a baseline for determining questions of copyright creation and infringement."[650] Secondly, despite the court accept that art community might determine the "Wildflower Works" as "a work of postmodern conceptual art"; the copyright law has some limits and "a living garden like Wildflower Works is neither authored nor fixed in the senses required for copyright"[651]

Performance art is having the similar fixation issues with earth artworks. Performances are not fixed and therefore works such as Vito Acconci's "Following Piece" cannot be satisfy the fixation requirement unless they fixed the performance with a kind of recording. They must use a recording system to enjoy copyright protection. By this way, by extension of the recording "the performance through which Acconci generated the records is fixed for copyright purposes."[652]

However, performance art's performance changes show to show as most performances incorporated with audiences; hence, the show changes as the audiences' acts change. There is no encore in it and the performance only happens in the "moment". It has an "idea" behind the end work. It has been doubted that the "fixed" recording of a performance might display the "idea" behind the work. Some performance artworks constitute senses such as smell and taste. As indicated before, these senses cannot be fixed in today's technology and considering that senses are a part of performance, how can one state that the recording of the performance displays the performance entirely without some parts of it is absent? This also constitutes a problem as well.

[650] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 305.
[651] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 304.
[652] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 3254.

Some installation artworks constitute examples of this problem as well. Artists such as James Turrel use light instead of a tangible medium. In his work "Skyspaces" according to his narrative, "a Turrell Skyspace is a specifically proportioned chamber with an aperture in the ceiling open to the sky. Skyspaces can be autonomous structures or integrated into existing architecture."[653] His artworks change according to degree of the natural light and correspondingly to the shadow.

Figure 31 (Left) Raising Kayne. James Turrell,, 2013, ©2022 James Turrell.

Figure 32 (Right) Stone Sky. James Turrell. 2005 ©2022 James Turrell.

As the U.S. Court clearly states, "the law must have some limits; not all conceptual art may be copyrighted."[654] Howbeit, leaving some contemporary art forms behind from the copyright protection because of the fixation requirement might set a wall in front of the creativity.

[653] Accessed March 22, 2022. https://jamesturrell.com/work/type/skyspace.
[654] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 304.

II. ISSUES RELATED TO OTHER LEGAL CONCEPTS

A. APPROPRIATION ART: FAIR USE OR INFRINGEMENT?

Appropriation artworks could be the most problematic side of the contemporary art in scope of the copyright law. Appropriation art takes imagines from other artists, and they produce artworks that is originated from other copyrighted works. Even the definition of 'appropriate' is "to take something for your own use, usually without permission".[655] A controversy has arisen about whether they constitute a "plagiarism" or "fair use". This leads some questions regarding to authors some exclusive rights; reproduction right, right to prepare derivative works, and right to display a work publicly. Apparently, there is a clash between the rights of prior artwork's author and the appropriation artist that needs to be balanced.

For example, Andy Warhol did not only use the tomato soups cans in his artworks, but he also used other people's photographs in his "collage works". However, in 1965 he used a reproduction of an amateur photographer's photograph without consent and the creator of the original photograph threatened Warhol for claiming her legal rights. However, Warhol settled with the photograph er but if the photographer had sued, Warhol might be the "first postmodern infringer".[656] However, the notion is not crystal clear and enlighten as the courts decide. Hence, in order to explain the notion better, I will try to explain the notion on some cornerstone court decision below.

[655] "Appropriate", Cambridge English Dictionary, accessed December 11, 2021, https://dictionary.cambridge.org/tr/sözlük/ingilizce/appropriate.
[656] Martin Gayford, "The Arts: What's Yours is Mine", Sunday Telegraph (London: July 26, 1992), p.113; quoted in Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 286, note 64.

1. *U.S. LAW APPROACH*

After more than twenty-five years of silence upon the tension between appropriation art and copyright law, in U.S.; Jeff Koons was sued by Art Rogers. Jeff Koons used Art Roger's famous photograph named "Puppies". Koons bought notecards which displays Roger's photograph. After removing the copyright notice on the card, Koons send the card to an art studio and with "instructions to make a polychromed wood sculptural version of the photograph, a work that Koons instructed Demetz must be just like photo."[657] After this, Koons also reproduced some colored variations of the puppies and at the end Koons made the studio created four sculptures and even three of the sculptures sold to collectors "for a combined $367,000".[658] When Rogers found out the existence of the sculptures, he sued Koons for a copyright infringement.[659]

Figure 33 (Left) Puppies. Art Rogers. 1980.

http://www.artrogers.com/portraits.html.

Figure 34 (Right) String of Puppies, Jeff. Koons.

Polychromed wood 42 x 62 x 37 inches 106.7 x 157.5 x 94 cm © Jeff Koons Edition of 3 plus AP, 1988, http://www.jeffkoons.com/artwork/banality/string-puppies.

[657] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 297; Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), cert. denied sub. nom. Koons v. Rogers, 113 S.Ct. 365 (1992).
[658] Shonack, "Postmodern Piracy: How Copyright Law Constrains Contemporary Art" p. 297.
[659] Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), cert. denied sub. nom. Koons v. Rogers, 113 S.Ct. 365 (1992).

At the end, district court decided that “Koons copied "Puppies" in "String of Puppies" and that this copying was not a fair use” and “it entered a permanent injunction enjoining Koons and Sonnabend Gallery from making, selling, lending or displaying any copies of, or derivative works based on, Puppies, and, pursuant to 17 U.S.C. § 503, requiring defendants to deliver all infringing articles to plaintiff within 20 days, including the fourth or artist's copy of String of Puppies.”[660] And “U.S. Court of Appeals for the Second Circuit” affirmed the decision.

First of all, “Court” decided that “Puppies” is Roger’s “original work of authorship” and author’s “inventive efforts in posing the group for the photograph, taking the picture, and printing” is enough to meet the criteria[661] then make a decision on whether Koons’s artwork is a derivative work or not. Derivative works can be defined as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.”[662] As district court rule Koons’s sculpture was a derivative work of Rogers’ photograph and Rogers had the exclusive right to give authorize to the production of a derivative work. Even though Koons argues that derivative work protection only extends to protection for a photograph extends to other photographs, court ruled that “a change in medium does not preclude infringement.”[663] Nevertheless, Koons copied the photograph with all details including shading, pose and “this case presents the rare scenario where there is direct evidence of copying.”[664]

[660] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)
[661] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)
[662] Koons v. Rogers, 113 S. CL 365 (1992).
[663] Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990).
[664] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)

Even there was a direct copying in the case, actually a work does not need to be identical in every detail to be considered as substantial similar. As Supreme Court stated:

> "Such similarity is determined by the ordinary observer test: the inquiry is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[665] Or, stated another way, whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same."'[666]

Koons's additions – roses, colors, bulbous noses- are not enough to save him from being a "plagiarist". Because "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[667] However, even though the idea of a couple sitting on a bench with puppies is not protected, the original expression of the Rogers' is protected.

Even though Rogers defend himself using the "fair use"[668] doctrine with the parody[669] exception, these defenses rejected by the Court. As Judge Leval stated, copyright law "is

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[665] Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).
[666] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jef; Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)
[667] Sheldon v. Metro-Goldwyn Pictures Corp.. 81 F.2d 49. 56 (2d Cir. 1936).
[668] "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.
The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107.
[669] "Parody or satire, as we understand it, is when one artist, for comic effect or social commentary, closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the

intended to motivate the creative activity of authors and inventors by the provision of a special reward … The monopoly created by copyright thus rewards the individual author in order to benefit the public." Yet, "excessively broad protection would stifle, rather than advance, the [law's] objective … Monopoly protection of intellectual property that impeded referential analysis … would strangle the creative process." and "Fair use should therefore be perceived as an integral part of copyright, whose observance is necessary to achieve the objectives of that law."[670] Hence, fair use is an important defense for artists who accused as copyright infringer.

However, Court ruled that Koons's "String of Puppies" is not a parody. Court clearly stated that first of all, one should determine the purpose and the character of the use and should as "whether the original was copied in good faith to benefit the public or primarily for the commercial interests of the infringer."[671] Then, the copying should not exceed the necessary limit. "It is not fair use when more of the original is copied than necessary. Even more critical than the quantity is the qualitative degree of the copying: what degree of the essence of the original is copied in relation to its whole."[672] In the case, Koons "appropriated the entire photograph". Also, Koons's removal of Rogers's copyright notice on the notecards before sending it to the studio considered as bad faith and affected its situation in a bad way for fair use defense. Furthermore, Koons' financial gain from

style and expression of the original. Under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the creativity protected by the copyright law. See Warner Bros., Inc. v. American Broadcasting Cos., Inc., 720 F.2d 231, 242 (2d Cir. 1983). We have consistently held that a parody entitles its creator under the fair use doctrine to more extensive use of the copied work than is ordinarily allowed under the substantial similarity test. See Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, 253 (2d Cir. 1980) (per curiam)." Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)

[670] Pierre N. Leval, "Toward A Fair Use Standard", *Harvard. Law Review* 103, no.5 (1990), p. 1107, 1109.

[671] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)

[672] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)

"String of Puppies" is also militated against the finding of fair use. Last but not least, court indicates that the audience should be aware of the original work which the parody is derived from hence audience could be aware of the fact that "original and separate expression, attributable to a different artist."[673] Yet, Koons could not meet this need too.

Therefore, as court concluded:

> "even given that String of Puppies is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph Puppies itself. We conclude therefore that this first factor of the fair use doctrine cuts against a finding of fair use. The circumstances of this case indicate that Koons' copying of the photograph Puppies was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work."[674]

Even though Koons argued that "[i]t was only a postcard photo, and I gave it spirituality, animation and took it to another vocabulary." as explained above, the court determined the artwork as an infringement.

After Rogers decision, Koons got sued again. This time he purchased Barbara Champbell's photograph "Boys with Pig" notecard and send it to same art studio in order to produce a sculpture. Once again, Koons lost the copyright infringement case, and his fair use and parody defenses were rejected.[675] Similarly, in United Feature Syndicate, Inc. v. Koons, Court ruled that Koons's sculpture which was derived from famous comic

[673] Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992)
[674] Art Rogers, Plaintiff-appellee-cross-appellant, v. Jeff Koons; Sonnabend Gallery, Inc.,defendants-appellants-cross-appellees, 960 F.2d 301 (2d Cir. 1992)
[675] Campbell v. Koons, 1993 U.S. Dist. IEXTS 3957 (S.D.N.Y. 1993); United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 376 (S.D.N.Y. 1993); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

character "Odie"[676], cannot be considered as a parody or satire because the criticism in the artwork was not indicate the character of "Odie"; instead, it pointed the society. Additionally, Koons' intention was gaining commercial profits and the sculpture was a complete replica of "Odie".[677]

Apart from these, Koons have not always lost. Fourteen years after "*Rogers"* case, Koons appropriated Andrea Blanch's commercial photograph entitled "Silk Sandals by Gucci."[678] Koons used Blanch's work in a collage that entitled "Niagara" with other works.

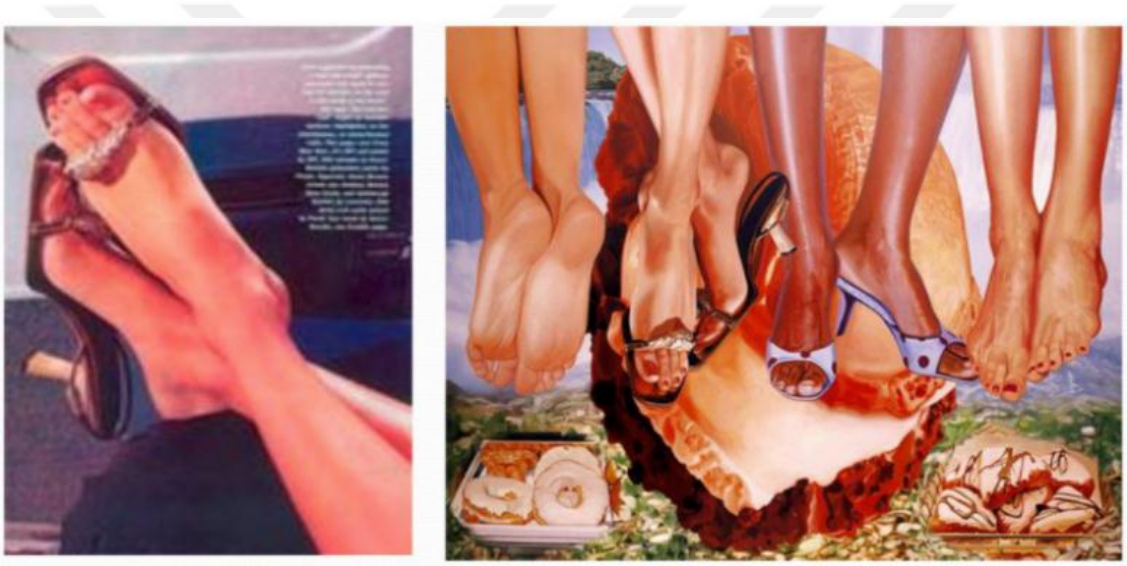

Figure 35 (Left) Silk Sandals by Gucci, Andrea Blanch. August 2000, Allure Magazine; (Right), Niagara (from Easyfun-Ethereal), Jeff Koons. 2000. Oil on canvas, 10 x 14 feet (304.8 x 426.7 cm).

Solomon R. Guggenheim Museum, New York. Visuals taken from https://www.lexology.com/library/detail.aspx?g=da484166-3ae7-408c-a0b3-df382da79f1f.

[676] "Plaintiff UFS owns all right, title and interest in the copyrights covering the Garfield comic strip, which focuses on the life of "Garfield the Cat" and his interaction with several other characters. The Garfield comic strip was created in 1978 by James R. Davis and, since that time, has become one of the most famous comic strips in the United States….
By virtue of its ownership of the copyright interest covering the Garfield comic strip, UFS also owns the copyright in the various characters. Among the most prominent and well-known of the Garfield comic strip characters is the dog "Odie" which has been regularly featured in the comic strip, in both likeness and name, since the strip's inception." United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 376 (S.D.N.Y. 1993).
[677] United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 376 (S.D.N.Y. 1993)
[678] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)

The district court ruled that Koons's artwork did not infringe Blanch's photograph as it constitute a "parody" under fair use. The court determined that Koons's use was transformative. Transformative use is a usage that the author employs another copyrighted work as "raw material . . . in the creation of new information, new aesthetics, new insights, and understandings."[679] In other words, "transformative work alters the original work with a new expression, meaning, or message."[680] The court ruled that Koons's work is transformative and might enjoy copyright protection while Blanch's work is "banal rather than creative".[681]

"Context is everything." in parody works[682] and Court clearly stated that Koons's works "message appears to target the genre of which Silk Sandals is typical, rather than the individual photograph itself." This statement is important because in *"Rogers*" case, Court did not consider the work as parody because it was difficult to discern a parody from Koons's artwork. On the contrary, in Blanch case, Court relied on the Koons' defense[683] and stated that "Koons's use of a slick fashion photograph enables him to satirize life as it appears when seen through the prism of slick fashion photography" Also, "Koons's adaptation of Silk Sandals: the use of a fashion photograph created for publication in a glossy American lifestyles magazine -- with changes of its colors, the

[679] Leval, "Toward A Fair Use Standard", p. 1111.
[680] Elizabeth Winkowski, "A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art", *John Marshall Review Of Intellectual Property Law.* 12, no. 2, (2013), p. 755.
[681] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)
[682] Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 802 (9th Cir. 2003).
[683] Court quoted Koons' explanation about why he choosed Blanch's photopraph in his collage. As Koons stated: *"Although the legs in the Allure Magazine photograph ["Silk Sandals"] might seem prosaic, I considered them to be necessary for inclusion in my painting rather than legs I might have photographed myself. The ubiquity of the photograph is central to my message. The photograph is typical of a certain style of mass communication. Images almost identical to them can be found in almost [**30] any glossy magazine, as well as in other media. To me, the legs depicted in the Allure photograph are a fact in the world, something that everyone experiences constantly; they are not anyone's legs in particular. By using a fragment of the Allure photograph in my painting, I thus comment upon the culture and attitudes promoted and embodied in Allure Magazine. By using an existing image, I also ensure a certain authenticity or veracity that enhances my commentary -- it is the difference between quoting and paraphrasing -- and ensure that the viewer will understand what I am referring to."* Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)

background against which it is portrayed, the medium, the size of the objects pictured, the objects' details and, crucially, their entirely different purpose and meaning -- as part of a massive painting commissioned for exhibition in a German art-gallery space."[684] This situation between two artworks turned the case in favor of the Koons's side and "although the women's legs are the focal point of interest in Blanch's photograph, the image is of limited originality, so the statutory factor concerning "the amount and substantiality of the portion used in relation to the copyrighted work as a whole, was neutral between the parties."[685].

Furthermore, Blanch's photograph's effect of the use upon the potential market was not harmed. This also favored the Koons's defense and finally court. "Koons's use of her photograph did not cause any harm to her career or upset any plans she had for "Silk Sandals" or any other photograph"[686] and Blanch's photograph could not have captured the market occupied by "Niagara," so that the final factor, the effect of the use upon the potential market for the copyrighted work, favored the defendant. Hence, U.S. Supreme Court affirmed the judgement.

After these cases, the U.S. Courts went further and ruled that a work can be considered as transformative even if social comment is absent.[687] Patrick Cariou sued Richard Prince for Prince's appropriation on manipulating Patrick Cariou's ethnic photographs. In Cariou v. Prince case, court indicate that an appropriation work should not have to refer to the original work and the new meaning should not need to be articulated by appropriation artist. "What is critical is how the work in question appears to the

[684] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)
[685] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)
[686] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)
[687] Winkowski, "A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art" p. 760.

reasonable observer, not simply what an artist might say about a particular piece or body of work"[688] Plus, Prince's new composition made the appropriation artwork transformative according to the Court and apart from Cariou's "serene and deliberately composed portraits and landscape photographs depict[ing] the natural beauty of Rastafarians and their surrounding environs," Prince's appropriation was ""crude and jarring works" that were "hectic and provocative."[689] Apparently, this decision was a major change for the tension between appropriation art and copyright artists.

Figure 36 (Left), Yes, Rasta (Powerhouse), Patrick Cariou. 2000 book; (Right)Canal Zone, Richard Prince.

2. *EU LAW APPROACH*

When turning into the EU law approach, one can see that in France, there is also conflicts that is involved Jeff Koons. In Koons v. Bauret, Koons used Jean-François Bauret's photograph as an inspiration for one of his sculptures just like Rogers'. Paris District

[688] Cariou v. Prince, 11-1197-CV, 2013 WL 1760521, (2d Cir. Apr. 25, 2013).
[689] Cariou v. Prince, 11-1197-CV, 2013 WL 1760521, (2d Cir. Apr. 25, 2013).

Court found Koons' work "Naked" constitutes a copyright infringement of "Enfants" and Paris Court of Appeal affirmed the decision.[690]

Firstly, defendants argued that Bauret's photograph is not original, hence, cannot be protected as the work represented a "spontaneous pose" and failed to reflect the author's own personal touch. Yet, the Court denied these arguments and ruled that "Bauret's work revealed a new concept of nude, which is raw and devoid of any sexual connotation, and such as to disclose the personality of the author."[691]

Figure 37 (Left) Enfant. Jean-François Bauret. 1970; (Right) Naked, Jeff Koons. 1988, Part of "Banality" Series.

Defendants also argued that the sculpture is not the same with the photograph. Even though, the color, dimensions, pose, background and the size of the works are different the Court ruled that "essential features" that constitute the stamp of the author of the works are same.[692] So, the question was, even though two works are essentially same, can

[690] Paris Court Appeal, decision No 152/2019.
[691] Eleonara Rosati, "Paris Court of Appeal Confirms That Koons's 'Naked' Sculpture Infringes Copyright in 'Enfants' Photograph, Rejecting Freedom of the Arts and Parody Defences." The *IPKat* (blog), December 23, 2019. https://ipkitten.blogspot.com/2019/12/paris-court-of-appeal-confirms-that.html.
[692] Rosati, "Paris Court of Appeal Confirms That Koons's 'Naked' Sculpture Infringes Copyright in 'Enfants' Photograph, Rejecting Freedom of the Arts and Parody Defences."

Koons's sculpture be considered as a parody? For the answer, one should determine the "CJEU"'s approach just as French court did.

In 2014, "*Deckmyn"*[693] decision constituted an example for the parody determination. First, one should examine the EU law. Article 5/3 of Directive 2001/29[694] states:

> "Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 [, entitled respectively "Reproduction right" and "Right of communication to the public of works and right of making available to the public other subject-matter",] in the following cases:
> ... (k) use for the purpose of caricature, parody or pastiche;..."

So that, "use for the purpose of caricature, parody or pastiche" can be asserted as a copyright infringement defense. The "CJEU" indicated that the concept of 'parody', is "autonomous" and must be "interpreted uniformly throughout the European Union".[695] Even though the Directive does not define the concept of parody, as "CJEU" indicates clearly "the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humor or mockery."[696] With "an original character of its own, other than that of displaying

[693] Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België; ECLI:EU:C:2014:2132, 03.09.2014.
[694] Also, Recital 3 in the preamble to Directive 2001/29:
"The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest." And Recital 31 in the preamble to that directive states that "A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. …"
[695] Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België. § 15.
[696] Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België;. § 20.

noticeable differences with respect to the original parodied work; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work."[697] As the Paris Court of Appeal also indicated: "The parody must also have a humorous character, make fun of or provoke laughter"[698] However, The French Court ruled that Koons's artwork was not constitute a mockery and also it did not fulfill the second requirement while it was not noticeably different from the existing work.

However, French Court also determined the freedom of artistic expression. As indicated in "*Funke Medien"*, a fair balance should be set between interests of copyright holders and others in particular "their freedom of expression and information guaranteed by Article 11 of the Charter, as well as of the public interest"[699] It is not possible to invoke fundamental rights such as freedom of expression -related to this, freedom of artistic expression- or a fair use in order to surpass the copyrights.[700]

Apart from this case, Koons lost in France once again in 2021. Court[701] ruled that Koons's porcelain sculpture "*Fait d'Hiver"* infringed Franck Davidovici's advertising photograph *"Fait d'Hiver*". Firstly, the Court ruled that Davidovici's work is original. Then, ruled that despite the differences between two works, Koons infringed artists copyright as he used original elements of the photograph. Also, parody defense also denied and he freedom of expressions restriction against copyrights is "proportionate and necessary."[702]

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[697] Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België; § 21.
[698] (Fr) "La parodie doit aussi présenter un caractère humoristique, faire oeuvre de raillerie ou provoquer le rire" quoted Rosati, "Paris Court of Appeal Confirms That Koons's 'Naked' Sculpture Infringes Copyright in 'Enfants' Photograph, Rejecting Freedom of the Arts and Parody Defences."
[699] Funke Medien NRW GmbH v Bundesrepublik Deutschland, § 57.
[700] Rosati, "Paris Court of Appeal Confirms That Koons's 'Naked' Sculpture Infringes Copyright in 'Enfants' Photograph, Rejecting Freedom of the Arts and Parody Defences."
[701] Paris Court of Appeal, (decision 34/2021)
[702] Eleonora Rosati, "Jeff Koons Loses (Again) in France: His Fait D'Hiver Found to Infringe Copyright in Franck Davidovici's Own Fait D'Hiver." *IPKat* (blog), (March 11, 2021) accessed March 18, 2022 https://ipkitten.blogspot.com/2021/03/jeff-koons-loses-again-in-france-his.html.

Figure 38 (Up) "Fait d'hiver" Franck Davidovici. photograph, 1985; (Down) "Fait d'hiver", Jeff Koons. sculpture, "Banality" Series, 1988.

Image taken from Christophe Geiger, "Contemporary Art on Trial -The Fundamental Right to Free Artistic Expression and the Regulation of the Use of Images by Copyright Law", March 2021, p.11.

In Denmark, a copyright infringement related with appropriation art occurred upon famous "Little Mermaid" sculpture.[703] Danish newspaper "Berlingske" used the copyrighted sculpture two times in 2019 and 2020.

Firstly, they appropriated the sculpture as drawing it as a zombie with "Evilness in Denmark" caption. Secondly, they use the "Little Mermaid" with a mask on its face with a political caption: "Are you afraid of corona? Then you probably vote for the Danish People's Party" [704]

[703] Tom Jensen ansvarhande chefredaktor Berlingske v Billedhuggeren Edvard Eriksens Arvinger I/S v/Alice K. Eriksen, Danish High Court, 09.02.2022.
[704] Jakob Plesner Mathiasen, Hanne Kirk, and Philip Henszelman. "What Do a (Little) Mermaid and a Non-Statutory Caricature/Parody Exception Share? A Tale from Denmark." *IPKat* (blog), (February 17, 2022) Accessed March 18, 2022. https://ipkitten.blogspot.com/2022/02/guest-post-what-do-little-mermaid-and.html.

Even though the newspaper argued that the appropriations constitute caricatures/parodies and also their use of the sculpture is protected under freedom of expression, Danish High Court denied these defenses. First of all, the Court expressed that caricature and parody exceptions basis does not exist in national law and even if it exists, it would have limited applicability. So, parody/caricature defense is unacceptable. According to the Court, the newspaper could express the points of the articles in other ways than appropriating images of the sculpture. Therefore, freedom of expression defense cannot be accepted either.[705]

To sum up, in EU law, parody defense seems to be more unreliable than U.S. law, for appropriation artists and other defenses are also not sufficient to save appropriation artists from copyright infringement of existing artworks.

3. *TURKISH LAW APPROACH*

In Turkish law, unauthorized usage of a work in an artwork is also constitutes an infringement. Moreover, parody exception is not mentioned in Turkish Code. Yet, the "Draft Law Regarding Making Amendments in the Law on Intellectual and Artistic Works" constituted an article concerning parodies according to the Article 34/C of the draft, use of a publicized work for the aim for caricature, parody and pastiche is free.[706] Even though this draft is not in force; "Regulation of Rights Neighboring the Owner's Rights" mentions the notion of "parody" under the "exceptions" title. Article 24/f of the regulation states: "The situations that do not require the permission of the neighboring right holder are as follows: … Parody and cartoons that comply with the rules of the

[705] Mathiasen, Kirk, and Henszelman, "What Do a (Little) Mermaid and a Non-Statutory Caricature/Parody Exception Share? A Tale from Denmark."
[706] Canan Küçükali, "5846 Sayılı Fikir ve Sanat Eserleri Kanun Tasarısı Üzerine Bir Değerlendirme", *Terazi Hukuk Dergisi*, 12, no. 135, (2017), p. 83; quoted Karaaslan, "Sosyal Medyada Kullanılan Caps'lerin Telif Hukuku Boyutu Ve Yasal Düzenlemelerin Yeterliliği," p. 54.

genre, which will not damage the honor, reputation and personality rights of the author and neighboring right holders…"[707]

Moreover, the Turkish Court of Cassation accepts the notion of parody as a "defense" for the defendant. Firstly, as the court indicates, work inspired must be a "work" in scope of copyright law. İstanbul 2nd Specialized Court for Intellectual and Industrial Property Rights indicates that:

> "Parody is the imitation of a work with satire-humor elements and style. Although there is no clear provision in FSEK[708] that parody is free, in Article 24/f of the Regulation on Rights Neighboring the Rights of the Author; It has been stated that parodies and caricatures that comply with the rules of the genre and do not harm the honor, reputation and personality rights of the owner of the work and neighboring rights holders are allowed … in order for parody to be in question, there must be a work in the sense of FSEK on which the parody operation will take place. Since the image of the person is caricatured in the case subject to the case, it is not possible to use the parody of a work, but to caricature the image of the person, so the parody exception cannot be applied in the case subject to the case."[709]

Furthermore, before this decision, Turkish Court of Cassations stated that court of first instance's "copyright infringement" ruling that is against the expert report which indicates "...in the sketches that are the subject of the lawsuit, it is out of the question that the whole or parts of the TV series "..." are played by copying and some of them are hidden, creating the impression that the defendant is the owner of the work. There is no

[707] Official Gazette. no. 32172, dated 16.11.1997.
[708] Law No. 5846.
[709] İstanbul 2nd Specialised Court for Intellectual and Industrial Property Rights, Case No: 2015/164, Desicion No: 2019/154, 25.04.2019.

plagiarism because it is emphasized that the plagiarism has been taken, it will be clear that the individual sentences used in a movie are used in a humorous way and it will not be possible to use the sketches that are the subject of the case, as it will be understood that they have nothing to do with the use in the "..." series. It has been created within the scope of the principle of freedom of inspiration and freedom of use, and it is stated that it is an independent cinematic work with the characteristics of its owner." is not accurate.[710]

However, in order for free use to be possible, the individual characteristics quoted from the work must be lost in the face of the new work's peculiarity. If another work is ridiculed, there should be an internal distance between the two works and the new work should have a higher quality than the vilified work. Furthermore, Nal and Suluk indicate that parody is a type of free use and parodies should be considered free due to freedom of thought and expression. However, if there is a simple alienation, there is no parody and copyright infringement occur.[711] Tekinalp also states that parody can be an independent work by staying at the level of inspiration within the scope of the principle of free use.[712]

With this in mind, one can conclude that the parody is a good defense for potential copyright infringement, but it is not easy to make the Court consider the appropriation artwork constitutes a lawful example. As can be seen from different Court cases, the determination of the Court is not very objective and the risk of infringement for appropriation artists still consist of a big obstacle against creative freedom. Barış Güner indicates that despite the judicial system or the society that could not understand the

[710] Turkish Court of Cassation, 11th Civil Chamber, Case No: 2013/11793, Decision No: 2014/16523, 31.10.2014.
[711] Nal/Suluk (Karasu), *Fikri Mülkiyet Hukuku,* p. 76-77.
[712] Tekinalp, *Fikri Mülkiyet Hukuku,* 3rd ed., p. 132.

appropriation art, this contemporary aesthetic comprehension will be continue.[713] Based on that, assuming which states that the controversial cases will not get end, might be appropriate.

B. AUTHORSHIP

Today's art's controversial side broke the lines between concepts and one of those is the concept of authorship. The line between producers and consumers are getting blurring. The audiences are taking active parts of making some artworks and this might lead some problems.

The authorship status of interactive artworks is complicated as the audiences are the people that contributes to the "creation" of the work. Some interactive works allow the audiences to join the performance whereas some makes the audiences "create" the work itself. For example, "The Life Cube Project" of the Scott Cohen is an interactive and collaborative project. In the project:

> "The Virtual Life Cube will be designed to surround the planet Earth, providing a venue for visitors to write down their goals and dreams, and share their artistic and creative contributions…In every installation, whether actual or virtual, the Life Cube is a collaborative community art that provides an engaging and interactive place for the shared expression of ambitions, dreams, goals, and wishes"[714]

[713] Barış Güner, "Çağdaş Sanatta Müellif Sorunsalı" (2013), https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/94223/yokAcikBilim_10002291.pdf?sequence=-1&isAllowed=y, p. 104-105.
[714] Acessed March 25, 2022. https://lifecubeproject.com/about/

In Olafur Eliasson's "The Collectivity Project", "three tons of white Lego bricks were delivered to a public square in Tirana, Albania, where people were invited to build their vision of a future city." The project was held by the supervision of the artist and actually the contributors "created" the artwork.[715]

Additionally, Turkish artist Onur Can Özdemir's artwork is an example of audience involved artworks. He installed his artwork in the "ArtAnkara" contemporary art fair with a couple of board pens near it and wanted the visitors to contribute the artwork freely.

Figure 39 untitled, Onur Can Özdemir. 2022, ArtAnkara 2022.

Photograph taken by Berra Aktan while a visitor writes down her statement on the artwork on 11.03.2022 (by the consent of the visitor Aytin Arzum Demirel.)

As seen from the examples above, todays artists choose the visitor/audience contribution as a way of artistic expression. But, these visitor contributions arise questions about the authorship of these artworks. Mostly, questions are revolving around "joint authorship".

Moreover, determining the identities of the authors, sometimes authorship problems arise because of the requirement of the "human authorship". Nowadays, we see that AI creates artworks and the "authorship" status of the AI is very controversial.

[715] Accessed May 07, 2022. https://olafureliasson.net/archive/artwork/WEK100711/the-collectivity-project

1. *JOINT AUTHORSHIP*

According to Article 1/B-(b) of the "Law No. 5846" defines the author as "[t]he person creating the work." In general, the plain definition in the Turkish law defines the notion in its simplest form. Justice Thurgood Marshall's defines the author as "the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection."[716] This creation might be made by a single person or multiple people. When multiple people create the "work" together, a "joint work" is created.

"Berne Convention" does not define the "authorship" and "joint authorship" left it to member states. Just, the Convention mentioned the term "joint authorship"[717]in Article 7bis. Still, fewer laws define the concept of authorship.[718]

It must be stated that "Berne Convention" does not make a division between joint work. U.S., Spanish and French laws approach the term without making a division depending on "inseparable or interdependent parts" on the work. However, Turkish law make a division depending on whether the "joint work" can be divided into parts or not.[719]

However, under the U.S. law, "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent

[716] Community for Creative Non-Violence v. Reid 490 730, (1989). U.S. § 737
[717] Article 7bis "The provisions of the preceding Article shall also apply in the case of a work of joint authorship, provided that the terms measured from the death of the author shall be calculated from the death of the last surviving author"
[718] Jane C. Ginsburg, "The Concept of Authorship in Comparative Copyright Law", *Depaul Law Review* 52, no. 4, (2003), p. 1066.
[719] Ceren Demirel, *Fikir ve Sanat Eserleri Kanunu'nun 10. Maddesi Bağlamında Birden Fazla Eser Sahibi Tarafından Meydana Getirilen Eserler ve Eser Sahipleri Birliği,* (Ankara, Savaş Yayınevi, 2017), p. 60-62.

parts of a unitary whole."[720] Despite the Act giving us a definition, ambiguity in the term remains in this article.

Before the copyright act, in a decision on a joint authorship, the U.S. court decided that a lyrics writer and a composer are joint workers in a song.[721] This is because, authors do not have to work at the same time, nor together for a joint work if "the authors meant for their respective works to combined in a single finished product."[722] In another decision, the court ruled that even one of the authors does not give permission to other author's extra contribution, they still enjoy the "joint authorship".[723] Accordingly, "a combined work could be considered to be a "joint work" even if one of the creators of a component part did not have any intent to merge his or her part into a larger unitary whole. In addition, it allowed the assignee of the composition to have the necessary intent, as opposed to the author himself or herself."[724]

Finally, after the act, in "*Childress"* case, U.S. Court determined the standards of the "joint work" and set two cumulative requirements. According to the court "each of the contributions of the respective collaborators must be independently copyrightable, and there must be intent, at the time of creation, that the parties be joint authors"[725]

According to Paul Goldstein, contributing a work with an "idea" cannot be enough to be considered as a joint author as ideas cannot be copyrightable. The U.S. court agrees with

[720] 17 U.S.C. § 101 (1988).
[721] Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944).
[722] Edward B. Marks Music Corp. v. Jerry Vogel Music Co.; Landau, "Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation," p. 162.
[723] Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir. 1955).
[724] Landau, "Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation," p. 164.
[725] Childress v. Taylor, 798 F. Supp. 981 (S.D.N.Y. 1992) § 504-508; Michael B. Landau, "Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation*," IDEA* 54, no. 2 (2014), p. 160.

Goldstein as well.[726] The second requirement is more controversial. The article does not define the "intent"; yet, according to the court, it means "intent to jointly own" not "intent to merge the contributions".[727]

These requirements are problematic from contemporary artworks' approach. Firstly, some contemporary artists only contribute the work with their ideas. Sometimes they just explain the idea, set the plot that guides the audiences and watch the audiences create the artwork. This is their art. Could this be enough for them to be the author of the work while the ideas are not copyrightable? It appears that their contribution cannot be copyrightable.

Secondly, assessing the intent is not easy and not all the artists make negotiations with the audiences before their contribution to the work. Some left some mediums on the street ground and left for a period while random anonymous people contributing/creating the artwork. Furthermore, some people do not aware of what they are doing when keeping a stroke to the canvas. So, what if the audiences' intention is not parallel to "to merge the contributions"? What if they do not want their separate work to be merged with others by the artist? And what if the audiences claim copyrights upon the artwork? Can we say that the "artist" is infringing the audiences' rights?

In a case, the court used a test and ruled that "lacked control over the work, and absence of control is strong evidence of the absence of co-authorship."[728] The Court expressed the

[726] Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000) Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990); S.O.S. Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989).
[727] "Ulloa v. Universal Music and Video Distrib. Corp., 303 F. Supp. 2d. 409, 411-12, 417-18 (S.D.N.Y. 2004) (citing Childress,945 F.2d at 509) (finding no shared intent to be joint authors when an accidental contributor dropped in on Shawn Carter's recording session, but contribution of vocal countermelody to a song's instrumental phase allowed copyright infringement claim to survive motion to dismiss); Dockery, note 52, at 10-13".; quoted in Landau, "Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation," p. 181.
[728] Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000).

"inventive or master mind". The "author superintends the work by exercising control" and this mastermind can be defined as the one "who is the effective cause" on the creation of the work.[729] Determining the "mastermind" and the "control" over the work is not easy and might cause to arise potential conflicts as well.

In EU law, Art. 1/2 of the "Term Directive", the term is mentioned under name of "co-authorship".[730] Yet, the term's interpretation has left to the member states there is no "uniformity". Some members choose to deny making a division whether the "joint work" can be divided into parts or not, however, some members such as Germany and Italy make a division.[731]

For instance, "German Act on Copyright and Related Rights"s Section 8/1 which is titles as "Joint Authors" expresses that "[w]here several persons have jointly created a work without it being possible to separately exploit their individual shares in the work, they are joint authors of the work" while Section 9 which is titled as "Authors of compound works" indicates "[w]here several authors have combined their works for the purpose of joint exploitation, each may require the consent of the others to the publication,

[729] Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000). § 1233-1234.
[730] 1. The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.
2. The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work."
Christina Angelopoulos identifies this term "co-authorship" as "joint-authorship". She stated that "Under Art. 1(2) of the Term Directive, where a work is considered to be a work of joint authorship, the term of protection is 70 years after the death of the last surviving from among the joint authors." Christina Angelopoulos, "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States", *International Review of Intellectual Property and Competition Law* 43, no.5 (2012), p. 570.
[731] Demirel, *Fikir ve Sanat Eserleri Kanunu'nun 10. Maddesi Bağlamında Birden Fazla Eser Sahibi Tarafından Meydana Getirilen Eserler ve Eser Sahipleri Birliği,* p. 60, note. 260.

exploitation or alteration of the compound works if the consent of the others may be reasonably expected in good faith."[732]

However, when it comes to interpretation, some members choose to apply a common formula, "collaboration + inseparability" for the interpretation.[733] Yet, the interpretation of the formula still depends on the state, and this leads an ambiguity as every member interprets the notion of "joint works" and also the "standards" of it.

According to Supreme Court of Netherlands, "a work will be considered to be a work of joint authorship where no one author is able to single out a distinct substantial part of the work as being solely the fruit of his or her own creative exertions with no input from other contributors."[734] This might be considered as a "factual indivisibility" whereas; another member state interprets it from an economic approach. According to article 10 of the Czech Copyright Law, "a work of joint authorship as a work which has been produced until the time of its completion as a single work by the creative activity of two or more authors and where the individual contributions of the individual authors are (regardless of whether or not they can be distinguished from each other) not capable of being used independently."[735]

According to French approach that does not choose to make a division, a joint authorship work should be "the product of concerted creative effort, a community of inspiration and

[732] Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 25 of the Act of 23 June 2021 (Federal Law Gazette I, p. 1858), translated by Ute Reusch.
[733] Christina Angelopoulos, "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States", *International Review of Intellectual Property and Competition Law* 43, no.5 (2012), p. 570.
[734] J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, Auteursrecht – Auteursrecht, naburige rechten en databankenrecht, Kluwer, Deventer 2005, 32. Quoted in Angelopoulos, "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States", p. 4.
[735] Angelopoulos, "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States", p. 4.

mutual control." and there is no significant need of the factual or economic divisibility of the contributions while it seeks an intellectual indivisibility. So that, as can be seen from different there is no harmonized notion of "joint authorship" in the EU as every member interprets the notion according to their "homing" tendencies.[736] Moreover, as can be seen from the cited articles above, the wording of the articles is open to different interpretations.

In Turkish Law, "Law No. 5846", Art. 10. Which titled "union of authors" indicates that "if a work created by the participation of more than one person constitutes an indivisible whole, the author of the work is the union of the persons who created it." Also, Article 9/1 of the "Law No. 5846" that titled "multiple authors" indicates that: "[i]f a work created jointly by more than one person can be divided into parts, each person shall be deemed the owner of the part he created."

As Tekinalp states, under the Article 10 of the "Law No. 5846" if two painters create a painting together, there is a "union" of the people who created it.[737] According to Tekinalp, there must be a jointly determined idea that makes authors work together. This intentions timing is not important unless it occurs until the work has finished.[738] Here is the point that this intention does not comprise the works of authorship that had finished by another author unless the author have expressed an intention in the way of "jointly authorship".[739] Moreover, all of the authors' stamps must be reflected on the work.[740]

[736] Angelopoulos, "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States", p. 570.
[737] Tekinalp, *Fikir ve Sanat Eserleri Hukuku*, p. 141.
[738] İlhan Öztrak, *Fikir ve Sanat Eserleri Üzerindeki Haklar*, (Ankara, 1971). p. 47.
[739] Erel, *Türk Fikir ve Sanat Hukuku,* p. 91.
[740] Tekinalp, *Fikir ve Sanat Eserleri Hukuku*, p. 141.

Furthermore, the Turkish Law states that "technical services or assistance pertaining to detail rendered for the creation of a work shall not be deemed a basis for participation." Tekinalp's interpretation on this article is that the contributor who gives the idea, the inspiration and assembles the authors cannot join the union of authorship.[741] Yet, Article 10/4 of the Law states that "the rights on the joint work shall be exercised by the natural or legal person who has assembled the authors"[742] So that, under Turkish law, even if the artist who assembled the audiences (authors) cannot join the union of authorship, she/he can still enjoy the copyrights of the work.

Moreover, to be considered as a "joint work", a work must be made by more than one author and the contribution of the authors must be "creative". If the contribution is not eligible to reflect the contributor's personality, this contribution would not lead a "joint authorship" under Article 10.[743] For example, Ceren Demirel states that in case the assistant draws a project with the precise instructions of the architect, without leaving any field of creativity for him, the owner of the work is the architect. The important thing is, the end product should be same even if another assistance draws the project within the same directives of same architect. However, if a sculptor who lost her/his hands if she/he has her/his assistant make the statue with her instructions, the author would be the assistance solely. This is because, unlike drawing a project, creating a sculpture can be identified as the creative activity itself.[744] This makes one think that the "creative" contributions of the audiences lead a joint authorship and even if the artist assembles them

[741] Tekinalp, *Fikir ve Sanat Eserleri Hukuku*, p. 142.
[742] Law No. 5846 of (Addition: 21.2.2001 - 4630/6) Art. 10/4, "If a work created by the participation of more than one person constitutes an indivisible whole, the rights on the joint work shall be exercised by the natural or legal person who has assembled the authors, provided that nothing to the contrary is stipulated in a contract or in the terms of service or in any law that was in force at the time of creation of the work. Rights regarding cinematographic works are reserved."
[743] Demirel, *Fikir ve Sanat Eserleri Kanunu'nun 10. Maddesi Bağlamında Birden Fazla Eser Sahibi Tarafından Meydana Getirilen Eserler ve Eser Sahipleri Birliği,* p. 185.
[744] Demirel, *Fikir ve Sanat Eserleri Kanunu'nun 10. Maddesi Bağlamında Birden Fazla Eser Sahibi Tarafından Meydana Getirilen Eserler ve Eser Sahipleri Birliği,* p. 77.

and gives the "idea" without a contribution, the artist cannot be the author of the "artwork".

Furthermore, in Turkish law, as the law divide the notion of "joint work" into two and judge two situations with different results, interpretation of the "indivisibility" is important. According to the prevailing opinion in the doctrine, this notion means that "intellectual integrity will be disrupted if the contribution of one of the authors leaves the work."[745]

To conclude, the problem is that determination of the contribution is really complicated, especially when it leads a "reading of intention". Moreover, it also affects the duration of the protection. As "Guide to Berne Convention" indicates, "the work is and remains a joint one. It would not be just to seek to separate their contributions according to how long each lived, and it would be too complicated to seek to do so."[746] Hence, the "Berne Convention" does not start the term protection calculation for the work until "the death of the last surviving author."[747] Even so, first of all, the need to determine the status of the participants remains.

2. *"HUMAN" AUTHORSHIP*

Sometimes authorship problems arise because of the requirement of the "human authorship". Adolf Dietz stated that the "authorship" in the "Berne Convention" addresses

[745] Demirel, *Fikir ve Sanat Eserleri Kanunu'nun 10. Maddesi Bağlamında Birden Fazla Eser Sahibi Tarafından Meydana Getirilen Eserler ve Eser Sahipleri Birliği,* p. 186.
[746] Claude, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971),* p. 52.
[747] Article 7bis of the Berne Convention.

human beings[748] and an author of a work must be a "human" in order to enjoy copyright protection. As the term 'intellectual property' refers to "creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce"[749]; intellectual property can be subject to protection only if it is an intellectual work of humans.[750] Hence, the "human authorship" is a *sine qua non* need for copyright protection The "author" of the "work" which is protected by copyright law can only be a "human". For instance, an artificial intelligence (AI), an animal or nature itself cannot be the "author".

For example, in *"Kelley"* case, the U.S. Court ruled that "gardens are planted and cultivated, not authored."[751] In decision, court stated that even though the garden is arranged by the artist, this "is not the kind of authorship required for copyright." The seeds are not growing in the intellect of the artist, they were grown by nature, and they originate in nature; hence, their "form, growth, and appearance" are not chosen by the artist. As a consequence of these, the garden cannot be determined as a work of "authorship".

[748] Adolf Dietz. "The Concept of Authorship Under the Berne Convention", *RIDA* 155, no. 3 (1993). p. 5.
[749] "What Is Intellectual Property (IP)?" WIPO, Accessed January 02, 2022, https://www.wipo.int/about-ip/en/)
[750] European Patent Office refused patent applications (EP 18 275 163 and EP 18 275 174) that filled by a machine called "DABUS", that is described as "a type of connectionist artificial intelligence", is named as the inventor. *"In its decisions, the EPO considered that the interpretation of the legal framework of the European patent system leads to the conclusion that the inventor designated in a European patent must be a natural person."* See https://www.epo.org/news-events/news/2020/20200128.html; EPO decision of 27 January 2020 on EP 18 275 163; EPO decision of 27 January 2020 on EP 18 275 174. The "DABUS" application was also refused by USPTO in its desicion dated 27 April 2020. USPTO stated that *"Title 35 of the U.S. Code consistently refers to inventors as natural persons."*(Application no: 16/524,350) later, U.S. District Court Affirmed USPTO's desicion in "Thaler v. Iancu, case no. 1:20-cv-00903"; Beech Aircraft Corp. v. EDO Corp., 990 F.2d 1237, 1248 (Fed. Cir. 1993) *("only natural persons can be 'inventors'"*), Burroughs Wellcome Co. v. Barr Labs., Inc., 40 F.3d 1223, 1227-28 (Fed. Cir. 1994) (conception is a "mental act" that must be performed by a natural person), Univ. of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften, 734 F.3d 1315 (2013) *("It is axiomatic that inventors are the individuals that conceive of the invention."*)
[751] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011 § 304.

Moreover, U.S. Copyright Office rejected a copyright registration application for an artwork that was created by an artificial intelligence which is named "creativity machine". The application was made by the owner of the machine. In 14.02.2022, the The Review Board affirmed[752] the refusal decision and expressed that "Thaler does not assert that the Work was created with contribution from a human author, so the only issue before the Board is whether, as he argues, the Office's human authorship requirement is unconstitutional and unsupported by case law" and as the answer to issue is clear, an artwork that is created by an artificial intelligence cannot enjoy the copyright protection.

Figure 40 Stephen Thaler's AI that named "Creativity Machine"s creation, A Recent Entrance to Paradise, 2018. https://www.smithsonianmag.com/smart-news/us-copyright-office-rules-ai-art-cant-be-copyrighted-180979808.

The Review Board also indicated that "copyright act refers to… terms that all imply humanity and necessarily exclude animals." with a reference to "*Naruto"*[753] case which is about a copyright dispute of selfies taken by a monkey.

[752] U.S. Copyright Office Review Board, Correspondence ID 1-3ZPC6C3; SR # 1-7100387071, 14.02.2022
[753] Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018)

Furthermore, the "Compendium of the U.S. Copyright Offices" clarifies that "the Office will refuse to register a claim if it determines that a human being did not create the work."[754]

In EU law, Article 2/1 of "Directive 2009/24/EC" indicates that "[t]he author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation." In Article 4/1 of the "Directive 96/9/EC" one can see that "[t]he author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation." With these articles, an author can also be "the legal person designated as the rightholder by that legislation" if the legislation of the Member State so allows. However, "Directive 2006/116 refers the calculation of the term of protection of copyright to the life of authors as 'physical persons'"[755]

As explained before, under the "InfoSoc Directive" the work must be "author's own intellectual creation" and "an intellectual creation is an author's own if it reflects the author's personality."[756] Furthermore, as the "CJEU" emphasized "[b]y making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'."[757] Creations of animals and "AI" might face real problems regarding

[754] Compendium, "The Human Authorship Requirement" § 306.
[755] Eleonora Rosati, "The Monkey Selfie case and the concept of authorship: an EU perspective", *Journal of Intellectual Property Law and Practice* 12, no.12, (2017), p. 975.
[756] Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG, and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, § 88.
[757] Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG, and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, § 92.

to originality as well and when considering the degree of "humanness" of these remarks of the "CJEU", one can conclude that in EU law, the "human authorship" is also a necessity. Rosati argues that "in the case of the InfoSoc Directive (as well as the Term Directive, with specific regard to photographs) this might mean that, similarly to what is instead expressly stated Software Directive, the concept of author implies that this is a human being." In addition to this, she also states that there would be problems related to exercising the right of the author such as "right to authorize third parties to make acts of reproduction communication to the public and distribution of their works."[758]

In Turkish Law, natural beauties that created by nature or an animal cannot be an artwork as they are not a product of an intellectual endeavor. A work must be created by an intellectual endeavor and this requirement deems the "human authorship" necessary.[759] In Turkish copyright law, only natural persons can be the author and even legal person cannot be the "author" of the work despite the fact that a legal person might enjoy economic rights of the work.[760]

So, as Yılmaztekin expresses, "according to the intellectual property standards valid in EU, U.S. and Turkish laws; artificial intelligence technologies cannot be considered as the owner of the works they create".[761]

[758] Rosati, "The Monkey Selfie case and the concept of authorship: an EU perspective", p. 977.
[759] Tekinalp, *Fikir ve Sanat Eserleri Hukuku*, p. 105.; Öztan, *Fikir ve Sanat Eserleri Hukuku*, p. 234; Hasan Kadir Yılmaztekin, "Türk Fikrî Haklar Hukuku Yapay Zekâ Tarafından Meydana Getirilen Eserleri Korumak İçin Hazır Mı?" *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi* 19, no. 2 (2020), p. 1543.
[760] Yılmaztekin, "Türk Fikrî Haklar Hukuku Yapay Zekâ Tarafından Meydana Getirilen Eserleri Korumak İçin Hazır Mı?", p.1544.
[761] Yılmaztekin, "Türk Fikrî Haklar Hukuku Yapay Zekâ Tarafından Meydana Getirilen Eserleri Korumak İçin Hazır Mı?", p.1551.

However, Morris Weitz indicated that even an artwork does not need to be an artifact to be considered as a work of art.[762] So, the art world has not agreed on whether the art should be an artifact. Moreover, law scholar Annemarie Bridy indicates that if the "creativity lies in the ability to do the unpredictable, to deviate from or defy rules, to break from the routine" as Ada Lovelace defines; then, the creativity might be able to be coded.[763] Furthermore, philosopher Arthur Miller argues that computers "either have or will acquire the qualities necessary for creativity in the future."[764]

Yılmaztekin argues that it is not possible to suggest a general result regarding the artifact quality of intellectual products created by artificial intelligence. However, he asserts that the copyright should be given to the real person or people who contribute to the intellectual product created by artificial intelligence in a creative way.[765] He mentioned the "*auteur"* theory[766] in the modern cinema that indicates the director is the person who is influential in the whole process and even though the film is the result of teamwork, the person who manages and directs the team is the director. To him, "*auteur"* is the person who manages the artificial intelligence project and has creative control over the creation of a work with artificial intelligence technology. Thence, just like the director of a movie the steps and choices of these people gives the work its originality.[767]

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[762] Morris Weitz, "The Role of Theory in Aesthetics," *The Journal of Aesthetics and Art Criticism* 15, no.1 (1956), p. 27-35.
[763] Annemarie Bridy, "Coding Creativity: Copyright and the Artificially Intelligent Author" *Stanford Technology Law Review* 5, no. 1 (2012), p. 10.
[764] Arthur Miller, *The Artist In the Machine: The World of AI-Powered Creativity*, (Cambridge: MIT Press, 2019), p. 307-309; quoted in Hasan Kadir Yılmaztekin, *Yapay Zekanın Eser Sahipliği,* (Ankara: Adalet Yayınevi, 2021), p. 261.
[765] Yılmaztekin, *Yapay Zekanın Eser Sahipliği,* p. 288.
[766] *"Auteur" is a French word which simply means "author."….Since it was first introduced as part of French film criticism in the late 1940s, this term "auteur" and the phrase "auteur theory" has been a way to describe the distinctive approach of certain film directors who have so much control of a film that they can't help but make it about them personally."* Jourdan Aldredge, "What Does Auteur Theory Mean for Modern Filmmakers?" *soundstripe* (blog), (February 24, 2022.) accessed May 08, 2022. https://www.soundstripe.com/blogs/what-does-auteur-theory-mean-for-modern-filmmakers
[767] Yılmaztekin, *Yapay Zekanın Eser Sahipliği,* p. 280-282.

To conclude, as the extent of contemporary artworks expands, the notion of authorship regarding to these extraordinary artworks started to transform into an important legal dilemma and it seems that the traditional approach of authorship excludes some of the contemporary artworks. Especially, as the number of "AI" creations increases day by day along with the "AI" developments, it seems that the situation of non-human creation artworks will be occupying the agenda of the copyright world.

C. ILLEGALITY

Sometimes, some artworks such as graffities might be illegal. Actually, illegality in an artwork might occur because of its content or its form.[768] Some contents which contains immorality, "obscenity" or hate speeches are not allowed by the laws and vandalism and trespassing also prohibited in most legislations. In this chapter, I will discuss the illegality of artworks and problems related to it in brief.

However, generally, copyrights only deny protection if the work violates another copyright. The U.S. law clearly stated that "protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully."[769] Moreover, one can state that a work "still be copyrightable, but the rights arising from copyright may not be enforceable against someone personally affected by the plaintiff's conduct (such as, in graffiti, the owner of the wall)".[770]

1. *STREET ARTWORKS*

[768] Paula Westenberger, "Copyright protection of illegal street and graffiti artworks" in Enrico Bonadio (ed.) *Copyright in Street Art and Graffiti: A country-by-country legal analysis* (Cambridge University Press, 2019), p. 57.
[769] 17 U.S.C. § 103(a).
[770] Quoted in Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law*,"* p. 319-320.

As graffities are being displayed on random places, such as outer walls; a lack of consent of the place's owner or national laws might cause problems. There is even a paradox whether it is "vandalism or art?"[771] Insomuch as, maybe artists themselves indicate that they are not keen on copyright protection. Famous graffiti artist Banks stated that "Copyright is For Losers ©"[772], yet it is ironic that after saying that, Banksy tried to use his intellectual property rights and get rejected by "EUIPO" in a case where his own argument for copyright used against him.[773] Hence, even if some of the artist indicate the opposite, it seems they need copyright protection but the question is whether they are eligible to copyright protection or not.

Generally, "no one should benefit from his crimes." and "from a dishonorable cause, an action does not arise".[774] Regarding to these, the "unclean hands doctrine" indicated that "one cannot seek protection under the law if he has acted wrongly with respect to the

[771] *"In other words, street art is often a paradoxical phenomenon which entails both urban aesthetic practice, which may boost tourism and cultural interest in local areas, and criminal activity.This paradox has been epitomised by the timing of the convictions handed down by the Southwark Crown Court in London in 2008 when five members of the graffiti crew DPM were jailed after admitting conspiracy to cause criminal damage. Indeed, the very same days the court was dealing with the case and released the harsh verdict, a few yards far from the court the Tate Modern Gallery was celebrating street art by exhibiting the works of world- wide famous street artists251 and covering its riverside facade with their giant murals."* Enrico Bonadio, "Copyright Protection of Street Art and Graffiti under UK Law," SSRN, April 6, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946360, p. 30.
[772] Banksy, *Banksy Wall and Piece* (London: Century, The Random House, 2005), "the copyright page."
[773] *"Banksy permitted parties to disseminate his work and even provided high-resolution versions of his work on his website and invited the public to download them and produce their own items. In his book, 'Wall and Piece', Banksy stated that 'copyright is for losers' and that the public is morally and legally free to reproduce, amend and otherwise use any copyright works forced upon them by third parties. Banksy has known for years that his works are widely photographed and reproduced on a massive and widespread scale by a range of third parties without there being any commercial connection between these parties and Banksy."* EUIPO, Full Colour Black Limited v Pest Control Office Limited, Cansellation Division, Decision on Cancellation No 33 843 C, p. 3
[774] (Latin) maxim, *ex turpi causa non oritur action*; quoted in Celia Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law*," SSRN Electronic Journal*, (2012), p. 316.

matter of the complaint."[775] However, mostly, civil and criminal sanctions occurred solely instead of an extra copyright exclusion for illegal artworks.[776]

U.S. law seems to protect the "artistic vandalism" as it falls under the concept of "the Progress of Science and useful Arts," that was stated in the U.S. Constitution.[777] In order to be protected under copyright law, a "work of authorship" must be "original" and "fixed in any tangible medium of expression."[778] If an illegal work meets this requirement, legality problems will not set a wall against copyright protection. Furthermore, the Act expressed that "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. . . ."[779]. So that, copyrights of the illegal artworks belong to the artist instead of the property holder whose property is used as a canvas.

In *"Villa"*[780] case, the court ruled that graffiti artist "UNONE"'s artworks can be copyrightable while rejecting the defendant's "illegality" defense. The court stated: "We assume, without deciding, that the work is copyrightable..."[781]Also, in *"Reece"*[782], even though the court rejected the copyright claim of graffiti artist, the reason was not because of the "illegality", it was because of the issues related to color, lettering and fonts of the work.

[775] "The law "refuses to lend its aid in any manner to one . . . who has been guilty of unlawful or inequitable conduct in the matter," because the law seeks to "prevent a party from taking advantage of its own wrong." 30A C.J.S. Equity § 109 (2013); Quoted in Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law*,"* p. 316, note 92.
[776] Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law*,"* p. 316.
[777] U.S. CONST. art. I, § 8, cl. 8. Quoted in Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law*,"* p. 296-297.
[778] 17 U.S.C § 102a
[779] 17 U.S.C. § 202.
[780] Villa v. Pearson Education, 03 C 3717 (N.D. Ill. Dec. 8, 2003)
[781] Villa v. Pearson Education, 03 C 3717 (N.D. Ill. Dec. 8, 2003)
[782] Reece v. Marc Ecko Unltd., 10 CIV. 02901 JSR DF, 2011 WL4112071 (S.D.N.Y. Aug. 19, 2011).

Yet, even though the copyright belongs to the artist, one should bear in mind that "copyright extends only to the intangible aspect of the work" and the owner of the property which the illegal artwork – for instance a graffiti- can sell the wall with the artwork itself while "under the first sale doctrine, successive sales of the physical piece would produce no earnings or royalty fees for the artist."[783] This might constitute problems on economic aspect for graffiti artists.

In EU law, the authors rights vary from legislation to legislation. In general, civil law countries protects illegal works as well as the legal artworks within copyright protection and try to set a balance between the competing interests of the parties.[784]

For example, in Germany, the court ruled that non-anonymous graffiti artists can enjoy the copyright protection.[785] In a case related to Berlin Wall, German Court ruled that the owner of the Berlin Wall cannot sell the pieces of the graffities on the wall without the artists permission but still can destroy them along with the wall.[786] As Assaf-Zakharov and Schnetgoke argue, "[t]his somewhat strange position demonstrates the difficulty of applying copyright law, which is designed to protect works made in a prospect of financial gain, to works made illegally and without such intention."[787] However, German Court's

[783] 17 U.S.C. §109 "(a) Notwithstanding the provisions of section 106 (3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."; Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law," p. 325.
[784] Westenberger, "Copyright protection of illegal street and graffiti artworks" p. 60.
[785] "Bundesgerichtshof [BGH] [Federal Court of Justice] GRUR 1995, 673, 675 - Mauer-Bilder [Wall-Murals] ("Die Kl. sind auch nicht - wie bei der gegen den Willen der Eigentümer aufgesprühten Graffiti-Kunst meist - anonym geblieben, sondern haben sich zu ihrer Urheberschaft bekannt und sind in Publikationen über die Mauer-Bilder auch namentlich genannt worden.") ["Unlike in most cases of graffiti art sprayed against the owner's will, the plaintiffs did not stay anonymous, but admitted their authorship and were mentioned by names in publications about [the Berlin] wall murals."]" quoted in Assaf-Zakharov and Schnetgoke, "Reading the Illegible: Can Law Understand Graffiti?" p. 130., note 61.
[786] Kammergericht Berlin [KG] [Higher Regional Court] GRUR 1994, 212; Bundesgerichtshof [BGH][Federal Court of Justice] GRUR 1995, 673 - Mauer-Bilder [Wall-Murals].
[787] Assaf-Zakharov and Schnetgoke, "Reading the Illegible: Can Law Understand Graffiti?" p. 135.

approach to copyright protection for illegal artwork seems to be in favor of the artists. The Court ruled clearly ruled that "it is not in principle relevant that the way in which it [the artwork] was produced is evidently unlawful this case by virtue of an act of damage to property subject to civil and criminal sanctions"[788]

French law also does not prohibit the copyright protection for illegal artworks. In a case, it "did not appear to regard illegality as any obstacle when considering the originality of the work"[789] In Greece, creation of street art without permission might likely be considered as illegal; yet, the graffiti "can remain copyright protected if the subsistence requirements are met"[790]

Even though the legal disputes related to illegal artworks are in limited number, as Westenberger argues, "analogies could be made with the fact that copyright law does not deny protection to illegal or immoral artworks or based on public policy." [791]

In Turkish Law, "vandalism" is a crime and under article 151/1 of the "Penal Code of Turkey."[792] So that, unauthorized graffiti is illegal in Turkey. Still, this illegality does not

[788] Re Pictures on the Berlin Wall (Case I ZR 68/93) [1997] ECC 553.; quoted in Enrico Bonadio, "Graffiti, Street Art and Copyright.," Street Art and Urban Creativity Journal 4, no. 1 (2018): pp. 75-80, p. 78.
[789] *"In France, there is no express provision in the French Code denying protection to illegal works, and the Court in the (Space) Invader case "did not appear to regard illegality as any obstacle when considering the originality of the work""*; see Shane Burke, "Graffiti, Street Art and Copyright in France" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis* (Cambridge University Press, 2019); quoted in Westenberger, "Copyright protection of illegal street and graffiti artworks" p.60, note 22.
[790] Stavroula Karapapa, "Copyright Protection of Street Art and Graffiti in Greece: Intellectual Property and Personal Property in Conflict?" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis* (Cambridge University Press, 2019), p. 250.
[791] Westenberger, "Copyright protection of illegal street and graffiti artworks" p.50, note 22.
[792] "Any person who, partially or completely, destroys, demolishes, eliminates, damages, renders unusable or soils another person's movable or immovable property shall be sentenced to a penalty of imprisonment for a term of four months to three years, or a judicial fine, upon complaint."

affect its artwork status as immorality or violation of public order do not affect the copyright protection.[793]

It should be mentioned that this balance between the competing interests might lead some "destruction" problems for street artists in many jurisdictions. As I cited above in U.S. "the rights arising from copyright may not be enforceable against someone personally affected by the plaintiff's conduct (such as, in graffiti, the owner of the wall)…"[794]

German Court has the same approach and ruled that "the owner [of the physical property] must in principle be granted the right to destroy the work"[795] France has a similar approach and there had been granted the "to remove the unsolicited graffiti" from the "owners of buildings" can be found there.[796] Therefore, even though illegal artworks are protected under copyright law, if a conflict with the interests of other parties or the public occurs; artist would face "destruction" for her/his work and cannot prohibit it. Additionally, the possibility to be excluded from commercial circulation in some jurisdictions such as Turkish, also constitute serious problems for artist.

2. *PORNOGRAPHIC ARTWORKS*

In today's art, "taboo-breaking" artists use artworks that contains "pornographic" content. This leads some debates. The "Berne Convention" does not interfere with its members regardant to the control of the works. As the Article 17 puts in: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit by legislation or regulation, the circulation,

[793] Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku*, p. 50-51.
[794] Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law," p. 319-320.
[795] Re Pictures on the Berlin Wall [1997] ECC 553
[796] Westenberger, "Copyright protection of illegal street and graffiti artworks" p. 20.

presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right." As Bonadio and Lucchi states, this provision does not affect the eligibility of the works for copyright protection.[797] Furthermore, it must be noted that according to "WTO", "government censorships" are not related to copyright protection, they are related to different interests. Hence, "censorship regulations …. cannot eliminate rights that are inherent in a copyrighted work."[798]

In compliance with that, "U.S. Compendium" states that "[p]ornographic works may be registered with the U.S. Copyright Office, provided that they contain a sufficient amount of original authorship. As a general rule, a registration specialist will not examine a work or authorship to determine whether it contains material that might be considered obscene."[799]

In "*Mitchell"* case, an adult movie was the subject of dispute. The owner of the adult movie sued a cinema for exhibiting the movie without permission. However, cinema defend itself with the unclean hands doctrine and claimed that as the work is "obscene" and illegal, not eligible to copyright protection. At the end, the court ruled that Mitchell has the copyright[800] and the doctrine of unclean hands was not applicable.[801] According

[797] Enrico Bonadio and Nicola Lucchi, "Copyright and Pornography," in *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* (Cheltenham, UK: Edward Elgar Publishing, 2018), p. 426.
[798] See WTO case DS362 China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, report of 26 January 2009.; quoted in Bonadio and Lucchi, "Copyright and Pornography", p. 426.
[799] Compendium, "Obscenity" § 315.
[800] Court indicated *"that there is not even a hint in the language of [the copyright act] that the obscene nature of a work renders it any less a copyrightable 'writing',";* Mitchell Brothers Film Group and Jartech, Inc., Plaintiffs-appellants, v. Cinema Adult Theater, A/k/a Cinema 69, et al., Defendants-appellees, 604 F.2d 852 (5th Cir. 1979) see also Jartech, Inc. v. Clancy, 666 F.2d 403, 406 (9th Cir. 1982) (endorsing the Mitchell court's views).
[801] Mitchell Brothers Film Group and Jartech, Inc., Plaintiffs-appellants, v. Cinema Adult Theater, A/k/a Cinema 69, et al.

to U.S. court, it should be a "plaintiff's unethical behaviour related to the subject matter of the lawsuit" in order to apply the doctrine of unclean hands's and adult movies "obscene" situation is not related to the subject matter of the case as "the alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that he has been personally injured by the plaintiff's conduct.[802]

EU law does not contain a provision that restricts the copyright protection of "pornographic artworks". However, in 2013, German court rejected copyright protection for "porn movies". In the case, court discussed whether the "porn movie" reflects the "personal intellectual creation" of the author or not. Court ruled that "the porn films did not appear to be a "personal intellectual creation" as the films merely showed "sexual intercourse in a primitive way" they were not entitled to be protected under the German Copyright Act"[803]

By 2017, In France, that has been argued that "even pornographic works can be characterized by the personality of the author and of the director and therefore be individualized and recognizable".[804] "Tribunale de Grande Instance de Lyon" stated that the "pornographic works" that is discussed in the case, are "based largely on scenes of fornication between different individuals ... in various places and positions ... However, the choices that underlie a movie, the conception and the design of such work can be original and, as such, be protected under copyright'"[805] So, one can state that copyright

[802] Mitchell Brothers Film Group and Jartech, Inc., Plaintiffs-appellants, v. Cinema Adult Theater, A/k/a Cinema 69, et al.
[803] The Regional Court of Munich, A.Z: 7 O 22293/12 of 29 May 2013; Birgit Clark, "The IPKat," *The IPKat* (blog), (September 2, 2013), accessed May 08, 2022. https://ipkitten.blogspot.com/2013/09/regional-court-of-munich-no-copyright.html?m=0.
[804] Bonadio and Lucchi, "Copyright and Pornography", p. 424.
[805] TGI de Lyon, ch. 10 cab. 10 J, jugement du 7 février 2017.; quoted in Bonadio and Lucchi, "Copyright and Pornography," p. 425.

law does not establish a discrimination against the "pornographic artworks" and they can be protected as long as they meet the criteria for protection.

In Turkish law, immorality and violation of public order do not affect the copyright protection of the work but the provisions in other codes are reserved.[806] However, "obscenity" is a crime under Turkish Penal Code.[807] According to Hirsch, literary and artistic works which is related to obscenity cannot "fully" enjoy copyright protection.[808] He stated that he made this conclusion while interpreting the former Article 426-428 of the "Turkish Penal Code"[809] with the Article 52[810] of the "Laws Governing the Press"[811]. However, the "Laws Governing the Press" repealed with the article 42 of the "Press Code"[812] and "Turkish Penal Code" also repealed with the law no 5237. Current provisions of both codes are different and there is no longer a provision indicates publications contains immoral obscene pictures can be collected by the order of prosecutors. Just, according to Article 20 of the "Press Code", those who publish articles and pictures of "promoting sexual assault, murder and suicide" are punished with fines.[813]

[806] Suluk and Nal (Karasu) *Fikri Mülkiyet Hukuku*, p. 50-51.
[807] "(1) Any person who:
a) gives to a child obscene written or audio-visual material; or who reads or induces another to read such material to a child or makes a child watch or listen to such material;
b) makes public the content of such material in a place accessible or visible to a child, or who exhibits such material in a visible manner or who reads or talks about such material, or who induces another to read or talk about such material to a child;
c) offers such materials for sale or rent in such a manner a store veal the content of that material;
d) offers for sale, sells or rents such materials, in any place other than a specified points of sale;
e) gives or distributes such materials along with the sale of other products or services as a free supplement; or
f) advertises such products
shall be sentenced to a penalty of imprisonment for a term of six months to two years and a judicial fine." Article 226 of Turkish Penal Code.
[808] Ernst Hirsch, "Memleketimizde Mer'i Olan Telif Hakkı Kanununun Tahlili", *Journal of Istanbul University Law Faculty* 6, no. 2-3 (1940), p. 423-426.
[809] Law No 765, dated 13.03.1926.
[810] (Tr) "Adaba münafi müstehcen resimleri havi neşriyat Cümhuriyet müddeiumumilerinin emrile toplattırılabilir." (publications contains immoral obscene pictures can be collected by the order of prosecutors) translated by the author.
[811] Code No.1881, acceptance date 25.07.1931, Official Gazette No 1867, dated 08.08.1931.
[812] Law No 5680, dated 15.07.1950. Later, this code is repealed by the article 30 of the "new" Press Code No. 5187, dated 09.06.2004.
[813] Press Code No. 5187, dated 09.06.2004.

Moreover, Article 226/7 of the "Turkish Penal Code" contains a provision that indicates: "the provisions of this article shall not apply, except for paragraph 3, to artistic or literary works where children are prevented from accessing such." As seen from the provision, the only exception of this provision is paragraph 3 which is about using children in obscene materials. So that, one can say that Turkish Law's perspective for illegal artworks such as obscene materials in copyright aspect might be changed over time.

3. *FURTHER REMARKS*

Not just graffities and pornographic artworks, but also photographs are also protected by copyright law even though they violate the rights of privacy. In a decision, The U.S. court ruled that even though the photograph of the child was taken without the parents' permission, the photographer obtained copyright protection.[814] Moreover, nowadays, the lawsuits that was filed by the paparazzi against celebrities are very popular. Paparazzies claim that a photograph of a celebrity that was taken by a paparazzi is an artwork of photographer and sharing the celebrity's own photograph without the permission of the photographer constitutes a copyright infringement.[815]

[814] "Alison Chang, whose photo taken by her youth counselor was distributed over the Internet and used by Virgin Mobile Australia without her consent, under a Creative Commons License...The counselor held copyright in the picture even though it was unauthorized by Chang and violated her privacy rights. While the photograph might technically have been unauthorized, the counselor uploaded the photo to Flickr and issued a license under Creative Commons. Id. Ultimately the court dismissed the suit for lack of personal jurisdiction without ruling on whether Chang could have asserted an invasion of privacy claim. Id. at 828, n. 10. For a further discussion of the relationship of privacy and copyright; Lerman, "Protecting Artistic Vandalism: On Graffiti and Copyright Law*,"* p. 318.

[815] See Xposure Photos UK Ltd. v. Khloe Kardashian et al, 2:17-cv-03088 (C.D.Cal.); Cepeda v. Jelena Noura "Gigi" Hadid and IMG Worldwide, Inc., 1:17-cv-00989 (E.D. Va.); Splash News and Picture Agency, LLC, v. Jessica Simpson, et al, 2:17-cv-00591 (C.D.Cal.); Odell Beckham Jr v. Splash News and Picture Agency, LLC and Miles Diggs, 2:18-cv-01001 (E.D. La.); Barbera v. Ariana Grande and Grandari, Inc., 1:19-cv-04349 (SDNY); Barbera v. Justin Bieber Brands, LLC et al, 1:19-cv-09532 (SDNY); Mishiev v. Hadid AKA Bella Hadid, 1:20-cv-00959 (SDNY).

Finally, even though some artworks are illegal, it seems like they also can be protected under copyright if they meet the requirements of the protection. On one hand, I agree with Bonadio when he stated that "[t]he copyright system should be neutral towards, and blind about, the way eligible subject matter is produced.[816]" However, on the other hand, there also should be a balance between interests of public and the "intellectual" property owners. I believe that art should not demolish other' rights and interests while claiming some for itself. Yet, as "copyright was originally intended to serve creators as an engine of free expression[817]", todays new ways to implement "freedom of expression" should not be left alienly.

D. PUBLIC ARTWORKS

Some artworks such as site-specific artworks, architectural artworks, street artworks, land artworks and sculptures are presented in public because of their nature. However, these types of works face additional problems for them regarding freedom of panorama and public presentation exception of U.S.'s Visual Artists Rights Act of 1990.

1. *FREEDOM OF PANORAMA*

Copyright holder of a work normally has the right to allow or prohibit the reproduction of the work; however, an "exception"[818] called freedom of panorama makes people to freely reproduce the artistic works that are located permanently in public places without

[816] Bonadio, "Graffiti, Street Art and Copyright." p.78.
[817] Geiger, "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?" p. 413.
[818] Mélanie Dulong de Rosnay and Pierre-Carl Langlais, "Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence," *Internet Policy Review* 6, no. 1 (2017), p. 4-6.

infringing the copyrights of the owner.[819] This reproduction can occur as taking a photograph, recording a video, drawing a picture and publishing them without the authorization of the artworks' owners. Barran Oda indicated that this freedom's rationale is that if a work is presented among the public for various purposes such as "the public's aesthetic enjoyment, education, or enrichment"; the public should make "reasonable reproductions" of the work itself.[820] That can be said that the purpose is to "serve a balance between interests of authors and the public."[821]

Long before then, taking pictures and recording videos were not so common in people because of the expensiveness of the technological devices that makes the recording possible. Also, limited internet sources kept the photos and videos in a private circle around the photographer and video recorder and barred their spread. However, this changed in time and nowadays we are living in a world of communication thanks to world-wide-web. Yet, this broad share of the reproductions of the artworks might constitute some problems for artists as well as their benefits.

In U.S. one can state that this freedom is interpreted in a narrow aspect.[822] The main focus is on architectural artworks. The U.S. Copyright Act Article § 120(a) clearly states that

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[819]), Dulong de Rosnay and Pierre-Carl Langlais, "Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence," p. 6.

[820] Barron Oda, "Mobile Devices, Public Spaces, and Freedom of Panorama. Reconciling the Copyright Act with Technological Advances and Social Norms Regarding Content Creation and Online Sharing" *SciTech Lawyer* 14, no.2, (2018); quoted in Anna Shtefan, "Freedom of Panorama:The EU Experience", *E*uropean *Journal of Legal Studies* 2 no. 2, (2019), p. 14, note 1.

[821] "*Similar exceptions are found in many Berne member countries, and serve to balance the interests of authors and the public. Architecture is a public art form and is enjoyed as such. Millions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip. Additionally, many scholarly books on architecture are based on the ability to use photographs of architectural works.*
These uses do not interfere with the normal exploitation of architectural works. Given the important public purpose served by these uses and the lack of harm to the copyright owner's market, the Committee chose to provide an exemption, rather than rely on the doctrine of fair use, which requires ad hoc determinations." U.S. H.R. REP. No. 101-735, at 3, 22.

[822] Bryce Clayton Newell, "Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography", *Creighton Law Review*. 44, no. 2 (2011), p. 406.

copyrights do not cover “right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work” if the architectural artwork is sited in public sphere or “ordinarily visible” from there.[823] In a case where plaintiff sued while claiming his installation artworks are “"unitary sculptural work," and distinct from the connected work of architecture” with a “conceptual separation” from the architecture even though it was “embodied or incorporated within a useful article”[824] For these reasons, plaintiff argued that Article § 120(a) could not applied and his artwork’ usage in the movie “Batman Forever” constitute a copyright infringement despite the fact that Warner Bros obtained permission[825] from the owner/developer of building that the artwork is on.[826]

Yet, this clause is only applicable to architectural works and panorama freedom “does not exempt photographers of monuments or other works of non-architectural art in the public space from copyright liability”.[827] In the case, the district court ruled that there is no copyright infringement in the film because the artwork that is visible in the movie (group of four towers) were not separate artworks from the architectural work, actually they are “part” of the building.[828] Hence, according to Article § 120(a), the “pictorial representations” is allowed. Furthermore, “the Ninth Circuit agreed and also held that the artist's contract with the owner/developer of the Tower gave the latter a sublicensable exclusive right to reproduce the sculptural works in three dimensions in all sizes.”[829] The

[823] 17 U.S.C. § 120(a): “The copyright in an architectural work that has been con- structed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photo- graphs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordi- narily visible from a public place.”
[824] Leicester v. Warner Bros., 232 F.3d 1212, 1213 (9th Cir. 2000); Newell, “Freedom of Panorama:A Comparative Look at International Restrictions on Public Photography” p. 414.
[825] Mary LaFrance, "Public Art, Public Space, and the Panorama Right" 1321 *Scholarly Works* (2020).
[826] Leicester v. Warner Bros., 232 F.3d 1212, 1213 (9th Cir. 2000)
[827] Newell, “Freedom of Panorama:A Comparative Look at International Restrictions on Public Photography”, p. 416.
[828] Leicester v. Warner Bros., 232 F.3d 1212, 1213 (9th Cir. 2000)
[829] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 609.

important part was that the artworks were significant parts of the buildings "streetwall" and were also linked both artistically and historically to the Tower because of the thematic connection between the artwork and the building.[830]

In another case, U.S. Federal Court held a dispute about a sculpture and ruled that § 120(a) could not be applicable because the sculpture – "Korean War Veterans Memorial"- subject matter was not an architectural work.[831]

It should be mentioned that murals painted on building exteriors are also in the scope of § 120(a) if they are not a part of the building designs.[832] In "*Mercedes Benz"*[833] case, Mercedes used mural paintings in the background of their advertisement campaign and shared the campaign images with public via Instagram. After receiving an object from the artists, Mercedes filed a lawsuit and demand a declaratory judgment of non-infringement under section 120(a).[834] In the case, court ruled that "section 120(a) applied because the murals were painted on publicly visible architectural works."[835] It was an important remark because court applied section 120(a) despite the commercial usage.

However, in EU, most countries have the "freedom of panorama" and one can state that freedom of panorama interpreted broader than the U.S. The rationale behind the freedom is similar with the U.S. As the Swedish Supreme Court puts in: It is "founded on the

[830] Leicester v. Warner Bros., 232 F.3d 1214 (9th Cir. 2000)
[831] Gaylord v. United States, 595 F.3d 1364, 1368 (Fed. Cir. 2010).
[832] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 610.
[833] Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 WL 4302769 (E.D. Mich. Sep. 11, 2019)
[834] Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 WL 4302769 (E.D. Mich. Sep. 11, 2019)
[835] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 610.

public interest to freely reproduce the town or landscape irrespective of the right to works of art that are included therein."[836]

However, the "European Copyright Directive"[837] states that "Member States may provide for exceptions or limitations to the rights …. use of works, such as works of architecture or sculpture, made to be located permanently in public places"[838] When considering the wording of the article, one can see that EU law exempts the freedom to other works such as sculptures alongside with the works of architecture.

One has to say that this exception is not compulsory for Members and each of them can decide freely on the exception.[839] This might be the reason why there are different interpretations of this freedom in national laws. Member states are free to interpret the "public place" notion, "types of works" that are subject to the right and the nature of the use, whether it can be commercial or not.[840]

Germany is the first legislation to establish panorama freedom for public artworks in 1840[841] and generally, has interpreted broadly this freedom.[842] In Germany; reproduction, distribution and sharing the two-dimensional copies is permitted under panorama

[836] Högsta Domstolen [HD] [Supreme Court of Sweden] Apr. 4, 2016, 2016- 04-04 O 849-15 (Swed.), https://www.domstol.se/globalassets/filer/domstol/ hogstadomstolen/avgoranden/2016/o-849-15.pdf.; quoted in LaFrance, "Public Art, Public Space, and the Panorama Right" p. 617.
[837] Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related rights in the Information Society, 2001 O.J. (L 167) 10.
[838] Directive 2001/29/EC, Article 5/3-h.
[839] Shtefan, *"Freedom of Panorama: The EU Experience"*, p. 14.
[840] Shtefan, *"Freedom of Panorama: The EU Experience",* p. 15.
[841] "In 1840, the Kingdom of Bavaria edicted the very first "freedom of panorama": an exception to this general rule regarding the "work of arts and architecture in their exterior contours" situated in a public space" quoted in Mélanie Dulong de Rosnay and Pierre-Carl Langlais, "Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence," *Internet Policy Review* 6, no. 1 (2017), p. 4-5.
[842] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 625.

freedom.[843] Moreover Germany interpreted the notion of "public work" broadly as well while considering "any work" that is located permanently on public ways, streets and places as located in "public place".[844] Germany, considers "both two-and three-dimensional works and permits commercial uses."[845] It must be mentioned that, the photograph "must be taken from a publicly accessible point" in order to enjoy panorama freedom. Hence, as an instance, if a photograph is taken from a "helicopter" or a "private building", this photograph cannot enjoy freedom of panorama as the helicopter is not a "publicly accessible point" nor a "private building."[846] However, surprisingly, this exception does not extend to the works that located in the public parks even though they are publicly accessible.[847]

Sweden also is one of the states that interpreted the freedom broadly. It allows reproduction, distribution and communication to the public[848] of "any artwork" that is located in public places and also "in film or television programs if the exploitation of the artwork is incidental to the contents of the program, and in pictures if the artwork is in the background or is otherwise an insignificant part of the picture"[849] Moreover, there is no limitation under Swedish law that permits the reproduction of a work if it is located

[843] Gesetznber Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBl §59.
[844] Gesetznber Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BGBl §59
[845] "Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 19, 2017, I ZR 242/15 (Ger.) (allowing advertising use of photos of artwork painted on remains of Berlin Wall)." Quoted in LaFrance, "Public Art, Public Space, and the Panorama Right" p. 626, note 244.
[846] Dulong de Rosnay and Pierre-Carl Langlais, "Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence," p. 7.
[847] "Public parks in Germany are owned by foundations, leading German courts to conclude that they are not public spaces for purposes of the panorama right. See Domenico Piero Muscillo, Freedom of Panorama(FOP)in Franceand Germany, DANDI (May 1, 2017), https://www.dandi.media/en/2017/05/freedom- panorama-france-germany/." Quoted in LaFrance, "Public Art, Public Space, and the Panorama Right" p. 626.
[848] 2 ch. 20a § (Sweden). quoted in LaFrance, "Public Art, Public Space, and the Panorama Right" p. 625.
[849] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 625.

"permanently" in a public place. But, of course, this freedom does not extend to "online distribution, even for noncommercial purposes."[850]

In France, there was no freedom of panorama until 2016.[851] It can be said that France had interpreting the freedom narrower than Germany and Sweden. France only allows "reproductions and representations of architectural works and sculptures located permanently on public roads"[852] Also, the reproduction or representation should be made by a "natural person" and not be used for "commercial uses"[853]

After the change in 2016, now that, visitors can take pictures of the Eiffel Tower's at nighttime as well as the daytime. Even though the tower itself is copyrights free, the nighttime lightening is not.[854] Hence, the freedom of panorama is applicable to the the lighting's copyrights if the reproduction is only made for noncommercial purposes.[855]

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[850] "Högsta Domstolens (HD) [Supreme Court], Bildupphovsratt i Sverige (BUS) ek for v Wikimedia Sverige [The Visual Arts Copyright Society in Sweden v. Wikimedia Sweden] 2016-04-04 0 849-15 (Swed.), https://www.domstol.se/ See Agence France-Presse, Wikimedia's Free Photo Database of Artworks Violates globalassets/filer/domstol/hogstadomstolen/avgoranden/2016/o-849-15.pdf. "Copyright, Court Rules", The Guardian (Apr. 4, 2016)" quoted in LaFrance, "Public Art, Public Space, and the Panorama Right" p. 625.

[851] Loi 2016-1321 du 7 octobre 2016 pour une Republique numerique [Law 2016-1321 of October 7, 2016 for a Digital Republic], Journal Officiel De La Republique Franqaise [J.O.] [Official Gazette Of France], Oct. 7, 2016, art. 39.

[852] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 624.

[853] France: Law No. 2016-1321 of October 7, 2016, for a Digital Republic.

[854]"The image of the Eiffel Tower by day falls within the public domain: its use is rights-free, and may therefore be reproduced without prior authorisation by the SETE, the managing company of the image of the Eiffel Tower on behalf of the Mairie de Paris.
Controlled use The various illuminations of the Eiffel Tower (golden illumination, twinkling, beacon and events lighting) are protected. The use of the image of the Eiffel Tower at night is therefore subject to prior authorisation by the SETE. This use is subject to payment of rights, the amount of which is determined by the intended use, the media plan, etc.
Views of the Eiffel Tower taken by private individuals for private use do not require prior agreement. However, professionals must contact our teams, who will inform them of the conditions of use governing images.", "The Eiffel Tower image rights" https://www.toureiffel.paris/en/business/use-image-of-eiffel-tower, Accessed 02.04.2022.

[855] "The Eiffel Tower image rights", https://www.toureiffel.paris/en/business/use-image-of-eiffel-tower, Accessed 02.04.2022.; Intellectual Property Code Art. L122-5(11) (Fr.). quoted in LaFrance, "Public Art, Public Space, and the Panorama Right" p. 625.

On the other side, there are still members that do not have the "freedom of panorama". As the Directive does not set a requirement for the members, Greece, Italy and Luxembourg choose to adopt the freedom.[856]

However, in Turkey, there is also a freedom of reproduction and exhibition for "[w]orks of fine arts permanently placed on public streets, avenues or squares"[857] The reproduction might be a drawing, graphic or a photograph and in other similar way.[858] Also, the the artwork can be "distributed, shown by projection in public premises or broadcast by radio or similar means"[859] This exception only includes the exterior forms of the architectural work. Hence, one can only take a photograph or draw a picture of the exterior form of a building, not the interior parts of its architectural design.

According to Arslanlı, this reproduction right of third parties is absolute and cannot be precluded by a declaration of the owner of the work because the placement of the work on public places means that the work is lay publics hands on in a way. Also, Arslanlı and Erel clearly state that the reproduction of a work with a change in embodiment is forbidden.[860] For instance, one cannot produce a sculpture, a fresco or a mosaic with a dimension change only.

Arslanlı and Erel indicated that this freedom occurs when the artwork places in a "street, avenue or square" and he interprets these "public places" as it comprises not only places that belongs to public but also private properties. The criterion is that the place must be

[856] LaFrance, "Public Art, Public Space, and the Panorama Right" p. 621.
[857] Article 40 of the Turkish Law On Intellectual And Artistic Works.
[858] Article 40 of the Turkish Law On Intellectual And Artistic Works.
[859] Article 40 of the Turkish Law On Intellectual And Artistic Works.
[860] Arslanlı, *Fikri Hukuk Dersleri,* p. 150; Erel, *Türk Fikir ve Sanat Hukuku,* p. 271.

in an open air and also must be dedicated to public's access.[861] If the area is open to anyone, it is accepted as a "public". Arslanlı also remarks that one cannot enjoy this freedom for artworks that is placed in indoor places such as mosques and churches.[862]

This freedom also only expands the works which placed permanently. If a work placed in a public place for only exposition purposes, one cannot enjoy this freedom on the artwork.[863]

Erel argues that under this freedom, a sculpture or other artworks located on "public streets, avenues or squares" via drawing, or a photograph is not an exact reproduction, it is actually an adaptation.[864] This is because, by this way, the work of fine art transform in another form.[865] He expressed that the freedom of reproduction for architectural works is already impossible with a way of imitation, hence; according to Article 40/1, the freedom of reproduction of the "exterior form" of architectural works with a photograph or a similar way, is actually a limitation on the adaptation right of the author, instead of the reproduction right.[866]

However, Tekinalp argues that "the freedom of panorama" under Turkish law can be found in Article 34/3 of the Turkish Law On Intellectual And Artistic Works instead of the Article 40 which was explained above.[867] According to Tekinalp[868], Article 34/3 of

[861] Arslanlı, *Fikri Hukuk Dersleri*, p. 150; Erel, *Türk Fikir ve Sanat Hukuku*, p. 271.
[862] Arslanlı, *Fikri Hukuk Dersleri*, p. 150.
[863] Arslanlı, *Fikri Hukuk Dersleri*, p. 150.
[864] Erel, *Türk Fikir ve Sanat Hukuku,* p. 272.
[865] See Erel, *Türk Fikir ve Sanat Hukuku,* p. 272. For this interpretation, Erel mentiones Article 6/5 of the Turkish Law on Intellectual and Artistic Works. Article 6 which is titled "Adaptations And Collections" indicates that "Intellectual and artistic products created by benefiting from another work but that independent of such work are adaptations, of which the main types are listed below:….
5. Transforming works of fine arts from one form to another…"
[866] Erel, *Türk Fikir ve Sanat Hukuku,* p. 272.
[867] Ünal Tekinalp, *Fikri Mülkiyet Hukuku*, 5th ed. (İstanbul: Vedat Kitapçılık, 2012), p. 203.
[868] Tekinalp, *Fikri Mülkiyet Hukuku*, 5th ed., p. 203.

the Turkish Law can be interpreted broadly in an expedient way to permit the "freedom of panorama" that was indicated on the "German Act on Copyright and Related Rights" According to Article 34/3 "The permission of the author is necessary for making selected or collected works for purposes other than education, by way of quotations of published musical, literary and scientific works and works of fine arts that are made public.". However, comparing the Article 34/3 with the German Act on Copyright and Related Rights's related section, the sections "freedom of panorama" seems establishing much more accurate relations with the Article 40 of the Turkish Law On Intellectual And Artistic Works.

"German Act on Copyright and Related Rights"[869] indicates:

> "'Works in public places'
>
> (1) It is permitted to reproduce, distribute and make available to the public works located permanently on public paths, roads or open spaces. In the case of buildings, this authorisation only extends to the façade.
>
> (2) The reproductions may not be carried out on a building."

The first two paragraphs of the Article 40 of the "Turkish Law On Intellectual And Artistic Works":

> "'Reproduction and Exhibition'
>
> Art. 40. Works of fine arts permanently placed on public streets, avenues or squares may be reproduced by drawings, graphics, photographs and the like, distributed,

[869] German Act on Copyright and Related Rights (Urheberrechtsgesetz – UrhG) Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 25 of the Act of 23 June 2021 (Federal Law Gazette I, p. 1858) Section 59

shown by projection in public premises or broadcast by radio or similar means. For architectural works, this freedom is only valid for the exterior form.

Works of fine arts may be publicly exhibited by their owners or by others with their consent, unless the author has expressly prohibited such exhibition…."

In my opinion, Article 40 of the Turkish Law on Intellectual And Artistic Works is in compliance with the German Act's related section and identifies the "panorama freedom" under Turkish Law. According to this approach, in this part of the work, I choose to explain Article 40 under this chapter that discusses "freedom of panorama".

To conclude, freedom of panorama is an exception that limits the exclusive rights of the author. This exception constrains the right to allow or prohibit the reproduction[870] of the work and when one considers the site-specific artworks. Contemporary artists sometimes use the public places as their canvas, and sometimes they create and placed their artwork in public places as a part of their "art". Street artists place their artworks in so-called "streets" that is openly accessible to the public and some installation and land artworks are sited in the public areas. Some legislations such as Belgium, Hungary and Sweden "permit the use of images of works for commercial purposes without obtaining a permit and without remuneration of the original artist."[871] Hence, the restriction provided from the panorama freedom might cause some difficulties, especially economic difficulties such as loss of revenue, to contemporary artists.

[870] According to Erel, panorama freedom constrains right of adaptation. See Erel, *Türk Fikir ve Sanat Hukuku*, p. 272.
[871] Shtefan,"Freedom of Panorama: The EU Experience*",* p. 17.

2. *PUBLIC PRESENTATION EXCEPTION IN U.S. VISUAL ARTISTS RIGHTS ACT OF 1990*

Public presentation exception in U.S. Visual Artists Rights Act of 1990, seems to exclude some contemporary artworks such as minimal artworks, conceptual artworks and site-specific artworks from the protection of the moral rights which has granted by the "VARA" itself for visual artists.

Site specific artworks can be defined as "a work of art designed specifically for a particular location and that has an interrelationship with the location"[872] It is related to installation art and land art as they both also use the location as an important tool and embrace "site specific" art. Nevertheless, as the "Tate Museum" puts in "a site-specific work of art is designed for a specific location, if removed from that location it loses all or a substantial part of its meaning."[873]

"VARA" covers the works of visual art.[874] Visual arts that are covered can be defined as a painting, drawing, print, sculpture, or still photograph.[875] According to "VARA":

> "…the author of a work of visual art— shall have the right— to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create; shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion,

[872] "Site-Specific" Tate, accessed April 6, 2022, https://www.tate.org.uk/art/art-terms/s/site-specific.
[873] "Site-Specific"
[874] Visual Artists Rights Act of 1990, 17 U.S.C. § 106A
[875] "Posters, maps, globes, charts, technical drawings, diagrams, models, applied art, motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, databases, electronic information services, electronic publications, merchandising items or advertising, promotional, descriptive, covering, or packaging materials or containers are excluded from the protection" Copyright Act of 1976, 17 U.S.C. § 101

mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation…"[876]

However, it seems that some contemporary artworks and especially site-specific artworks cannot enjoy this protection. According to "VARA"'s public-presentation exception, "which states that a modification "which is the result . . . of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification" that would otherwise violate "VARA"."[877]

In "Philips v. Pembrokerealestate, Inc.", U.S. Court clearly ruled that "VARA" does not apply to site-specific art at all.[878] Even thought, "the public presentation exception defines the types of changes, such as those in lighting and placement, that do not constitute "destruction, distortion, or mutilation"[879]…,"VARA" does not protect site-specific art and then permit its destruction by removal from its site pursuant to the statute's public presentation exception."[880] This is because, "VARA" does not establish two different regimes for free-standing artworks and site-specific artworks. It is clear that "VARA"'s plain language excludes site-specific artworks from the protection of the moral rights which it has granted.

Also, in "*Kelley"* case, the court continued the same approach. With a reference to "*Phillips"* case, The Court indicated that "Wildflower Works is a painting or sculpture;

[876] 17 U.S.C. § 106A
[877] Elizabeth Plaster, "When Stuff Becomes Art: The Protection Of Contemporary Art Through The Elimination Of Vara's Public-Presentation Exception," *Duke Law Journal* 66, no. 5, (2017), p. 1113.
[878] Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 131 (1st Cir. 2006)
[879] Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 131 (1st Cir. 2006)
[880] Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 143 (1st Cir. 2006)

that it flunks the test for originality; and that all site-specific art is excluded from "VARA"."[881]

Just like the exclusion of site-specific artworks from the moral rights protection under "VARA"; U.S. seems to act more flexible when it comes to moral rights of the artists.

In EU, France and Germany laws, contextual modification "leave the substance of a work intact, but that change the appearance or perception of the work by putting it into a context that differs from the one originally intended or envisioned by the author." can be prohibited by the author.[882] In an American movie, a Soviet composers' compositions which is in public domain, used as background music with credit to the composers. Yet, the composers object to this use of their work. The U.S. Court found no moral right infringement, however, French court ruled "in favor of the composers" as the compositions used in an anticommunism themed American movie.[883]

German jurisdiction has a similar approach to France. In a decision, The German Federal Court of Justice ruled that "putting a painting in a frame" in way that "extends to patterns of the painting" constitute a moral right infringement.[884]

[881] Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011
[882] Cyrill P. Rigamonti, "Deconstructing Moral Rights", *Harvard. International Law Journal* 47, no.2 (2006); quoted in Plaster, "When Stuff Becomes Art: The Protection of Contemporary Art Through The Elimination Of Vara's Public-Presentation Exception," p. 1128.
[883] Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 578–79 (N.Y. Sup. Ct. 1948) (holding that there is no moral-rights violation when an artist's work is placed in an objectionable context), aff'd, 275 A.D. 692 (N.Y. App. Div. 1949); quoted in Plaster, "When Stuff Becomes Art: The Protection of Contemporary Art Through the Elimination Of Vara's Public-Presentation Exception," p. 1128.
[884] Plaster, "When Stuff Becomes Art: The Protection of Contemporary Art Through The Elimination of Vara's Public-Presentation Exception," p. 1128.

Nevertheless, in the U.S., maybe as a reflection to this flexible moral rights approach, it is clear that site-specific art works are not in the scope of "VARA" and this situation is also applicable for minimalist artworks and conceptual artworks. As site specific artworks lose their meaning when they face a change in their specific location, this exclusion constitutes serious problems for them. As well as the site-specific artworks, minimalist "artists sought to involve viewers in a more physical way, acknowledging that their perception shifts as they move through space…, [and] used a wide range of materials to engage both the surrounding space and the viewer." [885] Just like these two artforms, conceptual and land artist also uses site-specific places in their works. There are plenty of contemporary artworks that is on public presentation with a specific site placement and this exclusion leave them unprotected against modifications.

To conclude, I want to repeat the Courts final words of the "*Phillips"* case: "If such a protection is necessary Congress should do the job." It appears that such a protection for contemporary artworks is a need and this exclusion from "VARA" left the contemporary artists vulnerable.

[885] "Minimalism: Constructing Space", MoMa, accessed 06.04.2022 https://www.moma.org/learn/moma_learning/themes/minimalism/constructing-space/

CONCLUSION

"Art is under no categorical imperative to correspond point by point to the underlying tendencies of its age. Artists will do whatever they can get away with, and what they can get away with is not to be determined beforehand"[886]

-Clement Greenberg

Art is unstoppable just like humanity itself. It goes further day by day and while doing this; breaks the taboos along with itself. In favor of the long struggles, today's contemporary art has no boundaries, no limitations, and no uniform description. Today's artists rewrite the meaning of "art", and the "aesthetic" along with its protector', the copyrights, main rules regarding to "originality", "expression" and "authorship".

So, if there are no rules left in today's art, are old copyright laws rules eligible to contemporary art' protection? In this respect, this thesis argues that copyright law's current interpretation of boundaries and limitations are insufficient for the protection of revolutionary contemporary artworks. On one side, when one considers that copyright is the precision scales between creativity and the exclusive rights; it is obvious that this reluctant approach harms the delicate balance in a negative way for contemporary artists. Moreover, copyright's main impetus is to crown artistic creativity with giving a legal monopoly over the "work" created. Howbeit, marginalizing new forms of the contemporary art also undermines this impetus.

On the other side, even though, nowadays "art can be everything"; copyright protection cannot extend to "everything". This lay behind the reason that copyright allow the owner

[886] Greenberg, "AbstractArt", p. 450.

to prohibit others from using copyrighted subject without her/his permission and giving protection to "everything" would explicitly restrict the artistic freedom. For example, conceptual arts core is the "idea" instead of its "expression" and "ideas alone can be works of art". The protection of the idea is not possible as they should remain "free as air"[887] in order to breed further artworks. Moreover, appropriation art has some serious problems as appropriation artworks' use of other works copyrighted constitute a copyright infringement and leads a contradiction between parties' interests. These instances can be enhanced easily and as every day is a new chance for artists to create something unbridled.

Herewith, law should protect the fresh contemporary art forms as well as the classical artforms and establish a fair balance between every party while providing it. At the end, it can be stated that today's copyright laws are still live in the past and should be updated with a more inclusive interpretation to an overarching way. However, copyright law should not lose loose its legal certainty and evener standpoint between all interests'. Still, the law needs a "certainty" yet; "the struggle between legal certainty and equity is as old as the law itself."[888] . We see that in today's world, this tension between legal certainty and equity arises once again in contemporary artworks' copyright protection. Excluding some contemporary artforms from the protection is not equitable, not but what, protecting everything cannot be considered as just as well. Hence, a "broad, unbiased, and workable" limit and a fair interpretation of the copyrights might "embrace the largest amount of work possible without undermining the incentives of fostering new works of original expression"[889] and by this way; todays law can catch the essence of the contemporary art and be competent to articulate our present.

[887] Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930).
[888] Paul Heinrich Neuhaus, "Legal Certainty versus Equity in the Conflict of Laws*," Law and Contemporary Problems* 28, no. 4 (1963), p. 795.
[889] Petruzzelli, "Copyright Problems in Post-Modern Art", p. 145.

REFERENCES

Decisions

U.S.

Aalmuhammed v. Lee, 202 U.S. F.3d 1227 (9th Cir. 2000).

Baker v. Selden, 101 U.S. 99 (1879)

Barbera v. Ariana Grande and Grandari, Inc., 1:19-cv-04349 (SDNY)

Barbera v. Justin Bieber Brands, LLC et al, 1:19-cv-09532 (SDNY); Mishiev v. Hadid AKA Bella Hadid, 1:20-cv-00959 (SDNY)

Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)

Bleistein v Donaldson Lithographing Company (1903) U.S., 188 239

Brandir International v. Cascade Pacific Lumber, 834 F.2d 1142 (2d Cir. 1987)

Brooklyn Institute of Arts v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999)

Burrow-Giles Lithographic Co. v. Sarony - 111 53, 4 S. Ct. 279 (1884)

Campbell v. Koons, 1993 U.S. Dist. IEXTS 3957 (S.D.N.Y. 1993)

Cariou v. Prince, 11-1197-CV, 2013 WL 1760521, (2d Cir. Apr. 25, 2013)

Cepeda v. Jelena Noura “Gigi” Hadid and IMG Worldwide, Inc., 1:17-cv-00989 (E.D. Va.)

Childress v. Taylor, 798 F. Supp. 981 (S.D.N.Y. 1992)

Community for Creative Non-Violence v. Reid 490 730, (1989)

Data East USA, Inc. v. Epyx, Inc. 862 F.2d 204, 9 U.S.P.Q.2d (BNA) 1322 (9th Cir. 1988)

Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944)

Esquire, Inc. v. Ringer 591 F.2d 796 (D.C. Cir. 1978)

Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 340 (1991)

Fendler v. Morosco, 253 N.Y. 281, 171 N.E. 56 (1930)

Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir. 1978)

Gaylord v. United States, 595 F.3d (Fed. Cir. 2010)

Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 539, 556 (1985)

Holmes v Hurst 17 US 82 (1898)

Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).

Jacobellis v. Ohio, 378 U.S. 184, 197 (1964)

Kelley v. Chicago Park Dist., 635 F. 3d 290 - Court of Appeals, 7th Circuit 2011

Leicester v. Warner Bros., 232 F.3d 1212, 1213 (9th Cir. 2000)

Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 802 (9th Cir. 2003)

Mazer v. Stein, 347 U.S. 201 (1954)

Mercedes Benz, USA, LLC v. Lewis, No. 19-10948, 2019 WL 4302769 (E.D. Mich. Sep. 11, 2019)

Mitchell Brothers Film Group and Jartech, Inc., Plaintiffs-appellants, v. Cinema Adult Theater, A/k/a Cinema 69, et al., Defendants-appellees, 604 F.2d 852 (5th Cir. 1979)

Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018)

Odell Beckham Jr v. Splash News and Picture Agency, LLC and Miles Diggs, 2:18-cv-01001 (E.D. La.)

Peter Pan Fabrics, Inc. v. Dixon Textile Corporation, 188 F. Supp. 235 (S.D.N.Y. 1960)

Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 131 (1st Cir. 2006)

Publications International, Ltd v Meredith Corp, U.S. 88 F (3d) 473 (7th Cir 1996).

Reece v. Marc Ecko Unltd., 10 CIV. 02901 JSR DF, 2011 WL4112071 (S.D.N.Y. Aug. 19, 2011).

Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992), cert. denied sub. nom. Koons v. Rogers, 113 S.Ct. 365 (1992).

Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir. 1955).

Sheldon v. Metro-Goldwyn Pictures Corp.. 81 F.2d 49. 56 (2d Cir. 1936).

Splash News and Picture Agency, LLC, v. Jessica Simpson, et al, 2:17-cv-00591 (C.D.Cal.)

Star Athletica v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).

U.S. Copyright Office Review Board, Correspondence ID 1-3ZPC6C3; SR # 1-7100387071, 14.02.2022

United Feature Syndicate, Inc. v. Koons, 817 F. Supp. 370, 376 (S.D.N.Y. 1993)

Villa v. Pearson Education, 03 C 3717 (N.D. Ill. Dec. 8, 2003)

Xposure Photos UK Ltd. v. Khloe Kardashian et al, 2:17-cv-03088 (C.D.Cal.)

EU And European Countries

BSA v. Ministerstvo kultury, EU:C:2010:816, 22.12.2010. CJEU

Bundesgerichtshof [BGH] [Federal Court of Justice] GRUR 1995, 673, 675 - Mauer-Bilder [Wall-Murals] Germany

Bundesgerichtshof [BGH] [Federal Court of Justice] GRUR 1995, 673, 675 - Mauer-Bilder [Wall-Murals] Germany

Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 19, 2017, I ZR Germany.

L'emballage temporaire du Pont neuf par Christo en 1985 (Cour d'appel de Paris, 13 mars 1986, Gaz. Pal. JP p.239). France

Cassazione civile, Sez I, No 4038/2022. Italy

TGI de Lyon, ch. 10 cab. 10 J, jugement du 7 février 2017. France.

Cofemel — Sociedade de Vestuário SA v G-Star Raw CV, ECLI:EU:C:2019:721, 12.09.2019. CJEU

Cour de Cassation, Bsiri- Barnir v Haarmann & Reimer, RIDA, 2006, 349. France

Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG, and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, ECLI:EU:C:2011:239, 01.12.2011. CJEU

Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08), ECLI:EU:C:2011:631, 04.10.2011. CJEU

Football Dataco Ltd, and Other v. Yahoo! UK Ltd. ECLI:EU:C:2012:115, In Case C‑604/10, CJEU

Full Colour Black Limited v Pest Control Office Limited, EUIPO, Cansellation Division, Decision on Cancellation No 33 843 C, 14.09.2020.

Funke Medien NRW GmbH v Bundesrepublik Deutschland, ECLI:EU:C:2019:623, 29.08.2019, CJEU

Hoge Raad, Lancôme v Kecofa, 16 June 2006, NL:HR:2006:AU8940. The Netherlands

Högsta Domstolens (HD) [Supreme Court of Sweden], Bildupphovsratt i Sverige (BUS) ek for v Wikimedia Sverige [The Visual Arts Copyright Society in Sweden v. Wikimedia Sweden] 2016-04-04 0 849-15 (Swed.), https://www.domstol.se/ Sweden.

Wycon SpA v Kiko SpA, decision 780/2020, Corte Suprema di Cassazione. Italy.

Infopaq International A/S v Danske Dagblades Forening, ECLI:EU:C:2009:465, 16 July 2009. CJEU

Johan Deckmyn, Vrijheidsfonds VZW v Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België; ECLI:EU:C:2014:2132, 03.09.2014. CJEU

Kammergericht Berlin [KG] [Higher Regional Court] GRUR 1994, 212; Bundesgerichtshof [BGH][Federal Court of Justice] GRUR 1995, 673 - Mauer-Bilder [Wall-Murals]. Germany

Levola Hengelo BV v Smilde Foods BV, ECLI:EU:C:2018:899, 13.11.2018 CJEU.

Tom Jensen ansvarhande chefredaktor Berlingske v Billedhuggeren Edvard Eriksens Arvinger I/S v/Alice K. Eriksen, Danish High Court, 9 February 2022. Denmark.

Turkey

İstanbul 2nd Specialised Court for Intellectual and Industrial Property Rights, Case No: 2015/164, Desicion No: 2019/154, 25.04.2019.

İstanbul 2nd Specialised Court for Intellectual and Industrial Property Rights, Case No: 2017/776, Desicion No: 2020/66, 30.01.2020.

Turkish Court of Cassation, General Assembly of Civil Chambers. Case No: 2003/4-260, Decision No: 2003/721, 02.04.2003.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2005/13440, Decision No: 2005/12765, 23.12.2005.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2006/934, Decision No: 2007/455, 13.03.2007.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2007/4708, Decision No: 2008/640, 15.05.2008.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2008/7336, Decision No: 2009/11814, 13.11.2009.

Turkish Court of Cassation, General Assembly of Civil Chambers. Case No: 2009/15-459, Decision No: 2009/541, 18.11.2009.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2013/11793, Decision No: 2014/16523, 31.10.2014.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2015/12749, Decision No: 2017/570, 06.02.2017.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2015/12923, Decision No: 2017/2724, 09.05.2017.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2016/2193, Decision No: 2017/1563, 16.03.2017.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2016/6779, Decision No: 2018/814, 06.02.2018.

Turkish Court of Cassation, 11th Civil Chamber, Case No: 2018/1815, Decision No: 2019/3810, 15.05.2019.

Turkish Court of Cassation, 4th Civil Chambers, Case No: 1998/4939, Decision No: 1998/8994, 17.11.1998.

Turkish Constitutional Court, Case No: 2004/81, Decision No: 2008/48, 31.01.2008.

Turkish Constitutional Court, Case No: 2010/73, Decision No: 2011/176, 29.12.2011.

Books

An Kyung, and Jessica Cerasi. *Whos Afraid of Contemporary Art?: An A to Z Guide to the Art World.* New York: Thames and Hudson, 2020.

Arnason, H. Harvard, and Marla Prather. *History Of Modern Art: Painting, Sculpture, Architecture, Photography.* (New York: Harry N. Abrams, Inc., 1998)

Arseven, Celal Esad. *Sanat Ansiklopedisi*, İstanbul: Maarif Vekaleti. 1943.

Arslanlı, Halil. *Fikri Hukuk Dersleri*, İstanbul: Sulhi Garan Matbaası, 1954.

Ateş, Mustafa. *Fikri Hukukta Eser*, Ankara: Turhan Kitabevi, 2007.

Ateş, Mustafa. *Fikir Ve Sanat Eserleri Üzerindeki Hakların Kapsamı Ve Sınırlandırılması.* Ankara: Seçkin Yayıncılık, 2003.

Ayiter, Nuşin. *Hukukta Fikir ve Sanat Ürünleri*, Ankara: Sevinç Matbaası, 1981.

Banksy. *Banksy Wall and Piece.* London: The Random House, 2005.

Bohn, Babette, and James M. Saslow. *A Companion to Renaissance and Baroque Art.* John Wiley & Sons, 2013.

Bonadio, Enrico and Gilberto Cavagna. "Copyright In Street Art and Graffiti: An Italian Perspective'" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis*, Cambridge University Press, 2019.

Bonadio, Enrico, and Nicola Lucchi. "Copyright and Pornography." Essay. In *Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?* Cheltenham, UK: Edward Elgar Publishing, 2018.

Bozbel, Savaş. *Fikir ve Sanat Eserleri Hukuku*. Şişli, İstanbul: On İki Levha Yayıncılık, 2015.

Bozgeyik, Hayri. *Mimaride Telif Hakları.* Ankara: Seçkin Yayıncılık, 2019.

Brenson, Michael. "*Healing in Time", Mary Jane Jacob, Comp., Culture in Action: A Public Art Program of Sculpture Chicago.* Seattle: Bay Press, 1995.

Burke, Shane. "Graffiti, Street Art and Copyright in France" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis.* Cambridge University Press, 2019.

Carroll, Noël. *Theories Of Art Today*. Madison, Wisconsin: University of Wisconsin Press, 2000.

Compendium Of U.S. Copyright Office Practices, Third Edition**.** 2014

Contractor, Farok J. *Valuation of Intangible Assets in Global Operations*. Westport, CT: Quorum, 2001.

Cooper, Elena. *Art and Modern Copyright: The Contested Image.* Cambridge: Cambridge University Press, 2018.

Danto, Arthur C. *Sanatın Sonundan Sonra: Çağdaş Sanat Ve Tarihin Sınır Çizgisi.* Translated by Zeynep C. Demirsü. 3rd ed. İstanbul: Ayrıntı, 2010.

Deazley, Ronan. *Privilege and Property: Essays on the History of Copyright*, Cambridge: Open Book, 2010.

Demirel, Ceren. *Fikir ve Sanat Eserleri Kanunu'nun 10. Maddesi Bağlamında Birden Fazla Eser Sahibi Tarafından Meydana Getirilen Eserler ve Eser Sahipleri Birliği,* Ankara, Savaş Yayınevi, 2017.

Derclaye, Estelle. *Research Handbook on the Future of EU Copyright*, Edward Elgar Publishing, 2009.

Dickie, George. *Art And The Aesthetic: An Institutional Analysis.* Ithaca: Cornell University Press, 1974.

Dutton, Denis. *The Art Instinct Beauty, Pleasure, & Human Evolution.* Bloomsbury, 2010.

Erel, Şafak Nuri. *Türk Fikir ve Sanat Hukuku*, 3rd ed. Ankara: Yetkin Yayınları, 2009.

Eroğlu, Özkan. *Çağdaş Ve Modern.* İstanbul: Tekhne Yayınları, 2018.

Gader-Shafran, Rachel. *Intellectual Property Law Dictionary.* Law Journal Press, 2013.

Gaze, Delia. *Concise Dictionary of Women Artists*. New York: Routledge, 2011.

George, Alexandra. *Globalization and Intellectual Property*. London: Routledge, 2017.

Goldstein, Paul. *Goldstein On Copyright.* 1. 3rd ed. Vol. 1. 5 vols. Austin: Wolters Kluwer Law & Business, 2005.

Goldstein, Paul, and Bernt Hugenholtz. *International Copyright: Principles, Law, and Practice*. 4th ed. New York: Oxford University Press, 2019.

Goodman, Nelson. *Ways of Worldmaking*. Hassocks: Harvester Press, 1978.

Greenberg, Clement. "AbstractArt", *Nation* 158 (April 15, 1944.), reprinted in Patricia Hills, (ed.) *Modern Art in the USA; Issues and Controversies of the 20th Century*, Upper Saddle River NJ: Prentice-Hall, 2001.

Groves, Peter. *Sourcebook on Intellectual Property*. London: Cavendish, 2003.

Güneş İlhami. *Uygulamada Fikir Ve Sanat Eserleri Hukuku*. 2nd ed. Ankara: Seçkin Yayıncılık, 2015.

Harris, Jonathan. *The Global Contemporary Art World*. 1st ed. WILEY Blackwell, 2017.

Hirsch, Ernst. *Fikri ve Sınai Haklar*, Ankara, 1948.

Hirsch, Ernst. *Hukuki Bakımdan Fikri Say*, İstanbul, 1943.

Hodge, Susie. *Why Your Five Year Old Could Not Have Done That Modern Art Explained.* London: Thames & Hudson, 2012.

İpşiroğlu, Nazan, and Mazhar İpşiroğlu. *Sanatta Devrim: Yansıtmacılıktan Oluşturmaya Doğru.* 6th Edition. İstanbul: Hayalperest, 2017.

Jacques, Sabine. *The Parody Exception in Copyright Law*. Oxford University Press, 2019.

Karademir, Artür. *Çalışanların Yarattığı Eserler Üzerinde Fikri Hakların Kullanılması.* Ankara: Seçkin Yayıncılık, 2017.

Karapapa, Stavroula. "Copyright Protection of Street Art and Graffiti in Greece: Intellectual Property and Personal Property in Conflict?" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis.* Cambridge University Press, 2019.

Karasioğlu Gürbüz, Gökçen. *Türk Hukukunda Telif Eserlerin Korunması.* Ankara: Yetkin Yayınları, 2021.

Karasu, Rauf, Cahit Suluk, and Temel Nal. *Fikri Mülkiyet Hukuku.* Ankara: Seçkin, 2017.

Karsten Schubert and Daniel McClean. *Dear Images: Art, Copyright and Culture*. London: Ridinghouse, 2002.

Kılıçoğlu Capadona, Pınar. *Şehir Planlarının Eser Niteliği ve Eser Sahipliği,* Ankara: Turhan Kitabevi, 2011.

Kılıçoğlu, Ahmet M. *Sınai Haklarla Karşılaştırmalı Fikri Haklar*, Turhan Kitabevi: Ankara, 2017.

Lazzarato, Maurizio. *Marcel Duchamp ve İşin Reddi*. Translated by Sercan Çalcı. 2nd ed. İstanbul: Kolektif, 2019.

Lutzker, Arnold. *Content Rights for Creative Professionals Copyrights & Trademarks in a Digital Age.* Saint Louis: Taylor and Francis, 2013.

MacQueen, Hector L.; Charlotte Waelde; Graeme T Laurie, *Contemporary Intellectual Property: Law and Policy.* Oxford: Oxford University Press, 2007.

Masouyé Claude. *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)*. Geneva, Switzerland: World Intellectual Property Organization (WIPO), 1978.

McClean, Daniel, and Karsten Schubert. *Dear Images: Art, Copyright and Culture.* London: Ridinghouse, 2002.

McLuhan, Marshall. *Understanding Media: The Extensions of Man*. London: Sphere Books, 1967.

Miles, Margaret R., and Richard Valantasis. *The Subjective Eye: Essays in Culture, Religion, and Gender in Honor of Margaret R. Miles. Eugene*. Pickwick, 2006.

Nochlin, Linda. "Why Have There Been No Great Women Artists?" *Art and Sexual Politics*, ed. Thomas B. Hess and Elizabeth C. Baker. New York: Macmillan Publishing Co., Collier Books, 1973.

Ochoa, Tylet T. "Copyright Duration: Theories and Practice." in *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age* 1, edited by Peter K. Yu, 4th ed. Vol. 1. Westport, CT: Praeger Publishers, 2007.

Okediji, Ruth L. *The International Copyright System: Limitations, Exceptions and Public Interest Considerations, for Developing Countries*. Geneva: United Nations Conference on Trade adn Development (UNCTAD), 2009.

Öncü, Özge. *Fikir Ve Sanat Eserleri Hukukunda İktibas Serbestisi Ve Sınırları*. Ankara: Yetkin Yayinlari, 2010.

Öztan, Fırat. *Fikir ve Sanat Eserleri Hukuku.* Turhan Yayınevi: Ankara, 2008.

Öztrak, İlhan. *Fikir ve Sanat Eserleri Üzerindeki Haklar,* Ankara, 1971

Paliwal, Khushi. Juris Prudentia: *An Anthology On Human Rights, Law And Society In India.* Where India Writes Publication, 2021.

Polat Akgün, Deniz. *Sanat Özgürlüğü.* İstanbul: Oniki Levha Yayınları, 2020.

Polater, Salih. *Fikir Ve Sanat Eserleri Hukukuna Göre Güzel Sanat Eserleri Ve Eser Sahibinin Hakları*. Istanbul: On İki Levha Yayıncılık, 2021.

Puerta, Marcela Palacio. "Graffiti, Street Art and Colombian Copyright Law" in Enrico Bonadio (ed.) *Copyright in Street Art and Graffiti: A country-by-country legal analysis,* Cambridge University Press, 2019.

Robin, Diana, Carole Levin, and Anne R. Larsen. *Encyclopedia of Women in the Renaissance: Italy, France, and England*. Santa Barbara, CA: ABC-CLIO, 2007.

Şahiner, Rıfat. *Sanatta Postmodern Kırılmalar*. Ankara: Ütopya Yayınevi, 2013.

Sherwood-edwards, Mark. *The Redundancy of Originality*. Heidelberg, Germany: Springer, 1994.

Smith, Roberta. *"Conceptual Art" Concepts Of Modern Art*, 256, 260. Nikos Stangos, 1981.

Snow, Ned. *Intellectual Property and Immorality: Against Protecting Harmful Creations of the Mind*. New York: Oxford University Press, 2022.

Stamatoudi, Irini A. "Originality under EU Copyright Law," in *Research Handbook on Copyright Law*, 2nd ed. Cheltenham, UK: Edward Elgar Publishing, 2017.

Sterling, J.A.L. *World Copyright Law* 3rd ed., Sweet & Maxwell, 2008.

Stokes, Simon. *Art and Copyright*. Hart Publishing, Oxford: 2012.

Suluk, Cahit. *Telif Hakları ve Korsanlıkla Mücadele.* İstanbul: Hayat Yayıncılık. 2004.

Tamanaha, Brian Z. *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press, 2010.

Taubman, Antony, Hannu Wager, and Jayashree Watal. *A Handbook on the WTO Trips Agreement*. Cambridge, United Kingdom: Cambridge University Press, 2020.

Tekinalp, Ünal. *Fikri Mülkiyet Hukuku*. 3rd ed. İstanbul: Beta, 2004.

Tekinalp, Ünal. *Fikri Mülkiyet Hukuku*. 4th ed. İstanbul: Arıkan, 2006.

Tekinalp, Ünal. *Fikri Mülkiyet Hukuku*. 5th ed. İstanbul: Vedat Kitapçılık, 2012.

Toledo, Maria, and Del Junco Manuel Fontan. *Ad Reinhardt: Art Is Art and Everything Else Is Everything Else.* Madrid: Fundacion Juan March, 2021.

Tüysüz, Mustafa. *Fikir ve Sanat Eserleri Kanunu Çerçevesinde Fikri Haklar Üzerindeki Sözleşmeler,* Yetkin Yayınları, Ankara: 2007.

Uslu, Ramazan. *Türk Fikir ve Sanat Hukukunsa 'Eser' Kavramı".* Ankara: Seçkin Yayınları, 2003.

Vaidhyanathan, Siva. *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*. New York: New York University Press, 2003.

Ward, Frazer. 'Marina Abramovic: Approaching Zero', in Anna Dezeuze (ed.), *The 'Do-it-Yourself' Artwork: Participation from Fluxus to New Media*, Manchester 2009, pp.132–44.

Ward, Frazer. *No Innocent Bystanders: Performance Art and Audience*, University Press of New England, 2012.

Westenberger, Paula. "Copyright protection of illegal street and graffiti artworks" in Enrico Bonadio (ed) *Copyright in Street Art and Graffiti: A country-by-country legal analysis*, Cambridge University Press, 2019.

Whitham, Graham, and Grant Pooke. *Çağdaş Sanatı Anlamak.* Translated by Tufan Göbekçin. İstanbul: Hayalperest Yayınevi, 2018.

Wilson, Michael. *Çağdaş Sanat Nasıl Okunur*. Translated by Firdevs Candil Erdoğan. İstanbul: Hayalperest Yayınevi, 2015.

WIPO. *Understanding Industrial Property*, 2nd edition, *2016*.

Yarsuvat, İhsan Osman. *Kokunun Hukuken Korunması.* İstanbul: Platon Plus Yayıncılık, 2022.

Yavuz, Levent, Türkay Alıca, and Fethi Merdivan. *Fikir Ve Sanat Eserleri Kanunu Yorumu*. 1. 2nd ed. Vol. 1. 2 vols. Ankara: Seçkin Yayıncılık, 2014.

Yıldız, Ozan Ali. *Fikir ve Sanat Eserleri Kanunu Kapsamında Çizgi Roman.* İstanbul: On İki Levha Yayıncılık, 2017.

Yılmaztekin, Hasan Kadir. *Yapay Zekanın Eser Sahipliği,* Ankara: Adalet Yayınevi, 2021.

Journal Articles

Akgün, Başak. "Telif Hukuku'nda İntihal Kavramı, Anonim Kullanımlar Ve Tüm Bunların Karşısında Eser Sahiplerinin Fikri İmzası: "Üslup"." *FMR Fikri Mülkiyet Ve Rekabet Hukuku Dergisi* 21, no.1, (2019), pp. 58-76.

Anderson, Peter. "Martial 1.29: Appearance And Authorship*." Rheinisches Museum Für Philologie* 149, no. 1 (2006), pp. 119-122.

Angelopoulos, Christina. "The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States", *International Review of Intellectual Property and Competition Law* 43, no.5 (2012), pp. 567-594.

Assaf-Zakharov, Katya and Tim Schnetgoke. "Reading the Illegible: Can Law Understand Graffiti?" *Connecticut Law Review* 53, no.1 (2021), pp. 117-153

Azoro, Chukwubuikem. "Original' under the Law of Copyright Is Distinct from the Ordinary Meaning of 'Original': A Discourse*." International Journal of Law* 7, no. 6, (2021), pp. 29–36.

Blakeney, Michael. "Contemporary Art and Patents." *Queen Mary Journal of Intellectual Property* 9, no. 3, (2019), pp. 244-61.

Bonadio, Enrico. "Copyright Protection of Street Art and Graffiti under UK Law." *SSRN Electronic Journal*, (April 6, 2017). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946360.

Bonadio, Enrico. "Graffiti, Street Art and Copyright." *Street Art and Urban Creativity Journal* 4, no. 1 (2018), pp. 75–80.

Bozgeyik, Hayri. "Fikir ve Sanat Eserlerinde Hususiyet" *BATIDER* 25, no. 3, (2009), pp. 169-222.

Bridy, Annemarie. "Coding Creativity: Copyright and the Artificially Intelligent Author." *Stanford Technology Law Review* 5, no. 1 (2012), pp. 1–28.

Calleja, Leon. Why Copyright Law Lacks Taste and Scents, *University of Georgia Journal of Intellectual Property Law* 21, no.1, (2013), pp. 1-31.

Chafee, Zechariah. "Reflections on the Law of Copyright: I." *Columbia Law Review* 45, no. 4 (1945), pp. 503–529.

Chang, Lin. "Nature and Modernity in Édouard Manet's Le Déjeuner Sur L'Herbe and William Holman Hunt's The Awakening Conscience: A Comparative and Critical Reading." *Journal of Visual Art and Design* 11, no. 2 (2019), pp. 119-134.

Cheng, Glen. "The Aesthetics of Copyright Adjudication." *UCLA Entertainment Law Review* 19, no. 1 (2012), pp. 113-169.

Cohen, Amy B. "Copyright Law and The Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments." *Indiana Law Journal* 66, no. 1 (1990), pp. 175–232.

Costonis, John J. "Law and Aesthetics: A Critique and a Reformulation of the Dilemmas." *Michigan Law Review* 80, no. 3 (1982), pp. 355–461.

Craig Joyce, and L. Ray Patterson, "Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations". *UCLA Law Review* 36, (1989), pp. 719-814.

Danto, Arthur C. "The End of Art." *The Philosophical Disenfranchisement of Art*, (1986), pp. 81-115.

Dietz, Adolf, "The Concept of Authorship Under the Berne Convention", *RIDA* 155, no. 3 (1993), pp. 2-57.

Doğan, Hatice. "Çağdaş Bir Eğilim Olarak Abject Art (İğrenç Sanat)", *Akademik Sosyal Araştırmalar Dergisi* 5, no. 46, (2017), pp. 421-436.

Dubin, Joseph S. "The Universal Copyright Convention." *California Law Review* 42, no. 1 (1954), pp. 89-119.

Dulong de Rosnay, Mélanie, and Pierre-Carl Langlais. “Public Artworks and the Freedom of Panorama Controversy: A Case of Wikimedia Influence.” *Internet Policy Review* 6, no. 1 (2017), pp. 1-27.

Feather, John. “The Book Trade in Politics: The Making of the Copyright Act of 1710”, *Publishing History* 19, no. 8, (1980).

Fenzel, Cristin. “Still Life With ‘Spark’ And ‘Sweat’: The Copyrightability Of Contemporary Art In The United States And The United Kingdom.” *Arizona Journal of International & Comparative Law*, 24, no. 2 (2007), pp. 541–85.

Geiger, Christophe. "Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?" *UC Irvine Law Review* 8, no. 3 (2018), pp. 413-458.

Geiger, Christophe. “Fair Use" through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations”, *PIJIP/ TLS Research Paper Series* no. 63 (2020), pp. 1-28.

Gervais Daniel J.. 'The compatibility of the skill and labour originality standard with the Berne Convention and TRIPS Agreement” *European Intellectual Property Review* 26, no. 2, (2004), pp. 75-80.

Ginsburg, Jane C.. “"Courts Have Twisted Themselves into Knots": US Copyright Protection for Applied Art,” *Columbia Journal Of Law and The Arts* 40, (2016), pp. 14-526.

Ginsburg, Jane C.. “Copyright Protection for Applied Art and Works of Artistic Craftsmanship After Star Athletica”, *Columbia Journal Of Law and The Arts* 43, no.3 (2020), pp. 423-430.

Ginsburg, Jane C.. “International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?” *Journal Of The Copyright Society Of The USA* 47, (2000), pp. 265-291.

Ginsburg, Jane C.. “The Concept of Authorship in Comparative Copyright Law”, *DePaul Law Review* 52, no. 4, (2003), pp. 1063-1092.

Ginsburg, Jane C.. A Tale of Two Copyrights: Literary Property in Revolutionary France and America, *Tulane Law Review* 64, (1990), pp. 991-1031.

Greenberg, Clement. “AbstractArt”, *Nation* 158 (April 15, 1944.), pp. 450-451.

Güher Erer, Nadide. “A Short History of Copyright in the West, in the Ottoman Empire and in Turkey” *Türk Kütüphaneciliği* 28, no.4 (2014), pp. 638-644.

Güven, Koray. “Eliminating ‘Aesthetics’ from Copyright Law: The Aftermath of Cofemel.” *GRUR International* 71, no. 3 (2021), pp. 213–25.

Hansmann, Henry and Marina Santilli. “Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis.” *The Journal of Legal Studies* 26, no. 1 (1997), pp. 95–143.

Hirsch, Ernst "Memleketimizde Mer'i Olan Telif Hakki Kanununun Tahlili". *Journal of Istanbul University Law Faculty* 6, no. 2-3 (1940), pp. 346-500

Jones, Richard H. "The Myth of the Idea/Expression Dichotomy in Copyright Law". *Pace Law. Rev*. 551, no.3 (1990), pp. 551-607.

Karaaslan, Pelin. "Sosyal Medyada Kullanılan Caps'lerin Telif Hukuku Boyutu Ve Yasal Düzenlemelerin Yeterliliği." *Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi* 24, no. 3 (2020), pp. 41–65.

Kramer, Samuel Noah. "The Oldest Laws." *Scientific American* 188, no. 1, (1953), pp. 26–29.

LaFrance, Mary. "Public Art, Public Space, and the Panorama Right" 1321 *Scholarly* Rosati, Eleonora. "Why Originality in Copyright Is Not and Should Not Be a Meaningless Requirement." *Journal of Intellectual Property Law and Practice* 13, no. 8, (2018), pp. 597–98.

Landau, Michael B. "Joint Works Under United States Copyright Law: Judicial Legislation Through Statutory Misinterpretation." *Idea* 54, no. 2 (2014), pp. 157–224.

Lerman, Celia. "Protecting Artistic Vandalism: On Graffiti and Copyright Law*." SSRN Electronic Journal,* (2012)

Lessig, Lawrence. "The Architecture of Innovation." *Duke Law Journal* 51, no. 6, (2002), pp.1783-1801.

Leval, Pierre N. "Toward A Fair Use Standard", *Harvard Law Review* 103, no. 5, (1990), pp.1105-1116.

Lewitt, Sol. "Paragraphs on Conceptual Art", *Artforum,* (June 1967), pp. 79-84.

Masiyakurima, Patrick. "The Futility of the Idea/Expression Dichotomy in UK Copyright Law*." International Review of Intellectual Property and Competition Law,* 38, no. 5, (2007), pp. 548-572.

Masson, Douglas J. "Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*," Indiana Law Journal* 71, (1996), pp. 1050-1066.

Masterson, Salathiel. "Copyright: History and Development", *California Law Review* 28, (1940), pp. 620-632.

Maxeiner, James R.. "Some Realism About Legal Certainty in the Globalization of the Rule of Law" *Houston Journal of International Law* 31, no. 1 (2008), pp. 27-46.

Meade, Tracy Lea. "Ex-Post Feist: Application of a Landmark Copyright Decision", *Journal of Intellectual Property Law* 2, no. 2 (1994), pp. 245-278.

Millner, Jacqueline, Catriona Moore and Georgina Cole. "Art and Feminism: Twenty-First Century Perspectives." *Australian and New Zealand Journal of Art* 15 (2015), pp. 143 – 149.

Morgan, Robert C. “Idea, Concept, System”, *Arts Magazine* 64, no.1, (1989), pp. 61-65.

Neal, James G. “Copyright Is Dead... Long Live Copyright.” *American Libraries* 33, vol. 11 (2002), pp. 48–51.

Neuhaus, Paul Heinrich. “Legal Certainty versus Equity in the Conflict of Laws.” *Law and Contemporary Problems* 28, no. 4 (1963), pp. 795-807.

Newell, Bryce Clayton. “Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography”, *Creighton Law Review* 44, no. 2, (2011), pp. 405-428.

Nordell, Per Jonas. “The Notion of Originality – Redundant or Not? .” *Stockholm Institute for Scandianvian Law*, pp. 97–111. Accessed March 10, 2022. https://www.scandinavianlaw.se/pdf/42-7.pdf.

Pasa, Barbara. "Industrial Design and Artistic Expression", *Brill Research Perspectives in Art and Law* 3, vol. 2-3 (2020), pp. 1-137.

Petruzzelli, Lori. Copyright Problems in Post-Modern Art, *DePaul Journal of Art, Technology and Intellectual Property Law* 5, vol. 1 (1995), pp. 115-145.

Plaster, Elizabeth. “When Stuff Becomes Art: The Protection Of Contemporary Art Through The Elimination Of Vara’s Public-Presentation Exception.” *Duke Law Journal* 66, no. 5, (2017), pp. 1113–1148.

Rendas, Tito. “Are Copyright-Permitted Uses ‘Exceptions’, ‘Limitations’ or ‘User Rights’? the Special Case of Article 17 CDSM Directive.” *Journal of Intellectual Property Law and Practice* 17, no. 1 (2022), pp. 54–64.

Ricketson, Sam. “The copyright term”, *International Review of Intellectual Property and Competition Law* 23, no. 6 (1997), pp. 758-791.

Rosati, Eleonora. “Italian Supreme Court Applies CJEU Cofemel Decision to Make up Store Layout” *Journal of Intellectual Property Law and Practice* 15, no. 7 (2020), pp. 501–502.

Rosati, Eleonora. “The Monkey Selfie case and the concept of authorship: an EU perspective” *Journal of Intellectual Property Law and Practice* 12, no.12, (2017), pp. 973-977.

Rosati, Eleonora. “Why Originality in Copyright Is Not and Should Not Be a Meaningless Requirement,” *Journal of Intellectual Property Law and Practice* 13, no. 8 (2018), pp. 597-598.

Rowe, Hayley A. “Appropriation in Contemporary Art Works”, *Inquiries Journal* 3, no. 06, (2020). Accessed May 09, 2022. http://www.inquiriesjournal.com/articles/1661/appropriation-in-contemporary-art.

Rushton, Michael. “The Moral Rights of Artists: Droit Moral Ou Droit Pécuniaire?” *Journal of Cultural Economics,* 22, no. 1 (1998), pp. 15–32.

Sganga, Caterina, “The Notion of 'Work' in EU Copyright Law After Levola Hengelo: One Answer Given, Three Question Marks Ahead”. *European Intellectual Property Review,* (December 15, 2018) Available at SSRN: https://ssrn.com/abstract=3323011

Shonack, Steven. Postmodern Piracy: How Copyright Law Constrains Contemporary Art, *Loyola of Los Angeles Entertainment Law Review* 14, no. 2 (1994), pp. 281-339.

Shtefan, Anna. “Freedom of Panorama: The EU Experience”, *European Journal of Legal Studies.* 2, no.2 (2019), pp. 13-27.

Silva, Nuno Sousa. “The Boundaries of EU Copyright Law: Cheese, Jeans and a Military Report in the Court of Justice.” *Market and Competition Law Review* 3, no. 1 (2019), pp. 133–56.

Smith, Terry. “The State of Art History: Contemporary Art*.” The Art Bulletin* 92, no. 4, (2010), pp. 366–83.

Synnott, Anthony. “A Sociology of Smell.” *The Canadian Review of Sociology and Anthropology* 28, no. 4, (1991), pp. 437-459.

Troy, Nancy J. “Copyright as Monopoly.” *Art Journal* 76, no. 1 (2017), pp. 150–57.

Walker Robert Kirk and Ben Depoorter, "Unavoidable Aesthetic Judgments in Copyright Law: A Community of Practice Standard," *Northwestern University Law Review* 109, no. 2, (2015), pp. 343-382.

Weitz, Morris. "The Role of Theory in Aesthetics," *The Journal of Aesthetics and Art Criticism* 15, no.1, (1956), pp. 27-35.

White, Elizabeth. "The Berne Convention's Flexible Fixation Requirement: A Problematic Provision for User-Generated Content*," Chicago Journal of International Law* 13, no. 2, (2013), pp. 685-707.

Winkowski, Elizabeth. “A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art”, *John Marshall Review of Intellectual Property Law* 12, no. 2, (2013), pp. 746-767.

Yen, Alfred C. “A First Amendment Perspective on the Construction of Third-Party Copyright Liability.” *Emory Law Journal* 38 (1989), pp. 393–436.

Yılmaztekin, Hasan Kadir. “Türk Fikrî Haklar Hukuku Yapay Zekâ Tarafından Meydana Getirilen Eserleri Korumak İçin Hazır Mı?” *Galatasaray Üniversitesi Hukuk Fakültesi Dergisi* 19, no. 2, (2020), pp. 1513-1586.

Yang, Deli. “Compulsory Licensing: For Better Or For Worse, The Done Deal Lies In The Balance” *Journal of Intellectual Property Rights* 17, (2012), pp.76-81.

Yanover, Geri J. “The Precarious Balance: Moral Rights, Parody and Fair Use.” *Cardozo Arts and Entertainment* 14 (1996), pp. 79–126.

Yu, Peter K. “TRIPS and Its Achilles' Heel”, *Journal of Intellectual Property Law* 18, no. 2 (2011), pp. 479–531.

Thesis

Güner, Barış. “Çağdaş Sanatta Müellif Sorunsali,” 2013. https://acikbilim.yok.gov.tr/bitstream/handle/20.500.12812/94223/yokAcikBilim_10002291.pdf?sequence=-1&isAllowed=y. (LLM Thesis)

Rosati, Eleonora. “Judge-Made EU Copyright Harmonisation The Case of Originality,” 2012. (PhD Thesis)

Almawla, Hanan Mohamed. “Moral Rights in the Conflict-of-Laws: Alternatives to the Copyright Qualifications,” 2012. (PhD Thesis)

Online Sources

""What You See Is What You See": Frank Stella And The Anderson Collection At SFMOMA Gifts Of Stella Masterworks Shown Together For The First Time." SFMOMA. Accessed December 05, 2021. https://www.sfmoma.org/press/release/what-you-see-is-what-you-see-frank-stella-and-the/.

"Appropriation – Art Term." Tate. Accessed December 11, 2021. https://www.tate.org.uk/art/art-terms/a/appropriation.

"Brillo Boxes." Philadelphia Museum of Art. Accessed November 27, 2021. https://philamuseum.org/collection/object/89204.

"Brillo: Is It Art?" The Andy Warhol Museum. Accessed November 28, 2021. https://www.warhol.org/lessons/brillo-is-it-art/.

"Contemporary Art – Art Term." Tate. January 01, 1970. Accessed November 24, 2021. https://www.tate.org.uk/art/art-terms/c/contemporary-art.

"Contemporary Art Movements Chronological List of Postmodernist Styles and Artforms." Contemporary Art Movements (1970-present). Accessed December 10, 2021. http://www.visual-arts-cork.com/contemporary-art-movements.htm#pop.

"Contemporary Definition & Meaning." Merriam-Webster. Accessed December 27, 2021. https://www.merriam-webster.com/dictionary/contemporary.

"E. H. Gombrich, Press Statement on The Story of Art, Metropolitan Museum of Art, New York, 22nd September, 1995." News release. Accessed November 25, 2021. https://gombricharchive.files.wordpress.com/2011/04/showdoc68.pdf.

"Earth Art Movement Overview." The Art Story. Accessed December 07, 2021. https://www.theartstory.org/movement/earth-art/.

"Expression Definition & Meaning." Merriam-Webster English Dictionary. Accessed January 17, 2022. https://www.merriam-webster.com/dictionary/expression.

"Installation Art Guide: 4 Key Characteristics of Installation Art - 2021." MasterClass. June 28, 2021. Accessed December 04, 2021. https://www.masterclass.com/articles/installation-art-guide#4-characteristics-of-installation-art.

"Installation Art Movement Overview." The Art Story. Accessed December 04, 2021. https://www.theartstory.org/movement/installation-art/.

"Intellectual, industrial and commercial property | Fact Sheets on the European Union". European Parliament. Accessed January 02, 2022 https://www.europarl.europa.eu/factsheets/en/sheet/36/intellectual-industrial-and-commercial-property

"Minimalism – Art Term." Tate. Accessed December 04, 2021. https://www.tate.org.uk/art/art-terms/m/minimalism.

"Modern." Cambridge English Dictionary. Accessed February 23, 2022. https://dictionary.cambridge.org/us/dictionary/english/modern.

"Neanderthal." Neanderthal Noun - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner's Dictionary at OxfordLearnersDictionaries.com. Accessed November 23, 2021. https://www.oxfordlearnersdictionaries.com/definition/english/neanderthal_1.

"Participatory Art – Art Term." Tate. Accessed December 13, 2021. https://www.tate.org.uk/art/art-terms/p/participatory-art.

"Performance Art – Art Term." Tate. Accessed December 08, 2021. https://www.tate.org.uk/art/art-terms/p/performance-art.

"Pop Art – Art Term." Tate. Accessed November 30, 2021. https://www.tate.org.uk/art/art-terms/p/pop-art.

"Pop Art Explore How Pop Artists Were Inspired By—and Made Art Directly From—consumer Goods, Mass Media, and Popular Culture." Moma. Accessed November 30, 2021. https://www.moma.org/learn/moma_learning/themes/pop-art/.

"Pop Art Movement Overview." The Art Story. Accessed November 30, 2021. https://www.theartstory.org/movement/pop-art/.

"The Grand National Assembly of Turkey: History." TBMM Yabancı Dillerde Tanıtım Sitesi. Accessed December 30, 2021. https://global.tbmm.gov.tr/index.php/EN/yd/icerik/12.

"The Luncheon on the Grass, 1862 by Edouard Manet." Manet.org. Accessed December 15, 2021. https://www.manet.org/luncheon-on-the-grass.jsp.

"Think You Know Pop Art? – Look Closer." Tate. Accessed November 30, 2021. https://www.tate.org.uk/art/art-terms/p/pop-art/think-you-know-pop-art.

"What Are The 7 Different Forms Of Art?". Eden Gallery. 2021. Accessed December 15, 2021. https://www.eden-gallery.com/news/7-different-forms-of-art.ü

“Art and Scent.” İSTANBUL74. Accessed March 7, 2022. https://istanbul74.com/portfolio-item/the-art-of-scent/.

“PATFT .” Accessed June 21, 2022.https://patft.uspto.gov.

“Minimalism: Constructing Space”, Moma Learning, Accessed 06.04.2022 https://www.moma.org/learn/moma_learning/themes/minimalism/constructing-space/.

“Module II Copyright and Related Rights.” WTO. Accessed June 23, 2022. https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules2_e.pdf.

“OPALKA 1965/1 - ∞; Détail 4988006–5006015.” Metmuseum.org. Accessed March 6, 2022. https://www.metmuseum.org/art/collection/search/666093.

“Site-Specific.” Tate. Accessed April 6, 2022. https://www.tate.org.uk/art/art-terms/s/site-specific.

“The Eiffel Tower image rights”, Accessed 02.04.2022. https://www.toureiffel.paris/en/business/use-image-of-eiffel-tower.

“What Is Bio Art?” Artdex, May 3, 2021. Accessed 21.06.2022. https://www.artdex.com/what-is-bio-art

“What Is Contemporary Art?” Gateshead, UK: BALTIC. Accessed November 25, 2021. https://baltic.art/uploads/Question_Kit_Cards.pdf.

Abramović, Marina. "Performance Artist Marina Abramović: 'I Was Ready to Die'." Interview by Emma Brockes. The Guardian. May 12, 2014. Accessed December 10, 2021. https://www.theguardian.com/artanddesign/2014/may/12/marina-abramovic-ready-to-die-serpentine-gallery-512-hours.

Aldredge, Jourdan. “What Does Auteur Theory Mean for Modern Filmmakers?” *soundstripe* (blog), Accessed February 24, 2022. https://www.soundstripe.com/blogs/what-does-auteur-theory-mean-for-modern-filmmakers

Battersby, Matilda. “Eat Your Art out: Artists Develop a Taste for Food.” Independent. August 19, 2010. Accessed February 24, 2022. https://www.independent.co.uk/arts-entertainment/art/features/eat-your-art-out-artists-develop-a-taste-for-food-2056095.html.

Blumberg, Naomi. "What’s the Difference Between Modern and Contemporary Art?." Encyclopedia Britannica, Accessed January 05, 2022. https://www.britannica.com/story/whats-the-difference-between-modern-and-contemporary-art.

Bonadio, Enrico. “Banksy Finally Goes to Court to Stop Unauthorised Merchandising, despite Saying Copyright Is for Losers.” city.ac.uk (blog). City University of London, February 25, 2019. Accessed June 21, 2022. https://www.city.ac.uk/news-and-events/news/2019/02/banksy-finally-goes-to-court-to-stop-unauthorised-merchandising-despite-saying-copyright-is-for-losers#.

Brown, Mark. “Tracey Emin ‘Being an Artist Is about Making Art, Not Money.’” The Guardian, May 28, 2017. https://www.theguardian.com/artanddesign/2017/may/28/tracey-emin-being-artist-about-making-art-not-money-hay-festival.

Bonadio, Enrico. “To Banksy, Keeping His Identity a Secret Is More Important than Winning Copyright Cases.” The Fashion Law, December 28, 2021. Accessed June 21, 2022. https://www.thefashionlaw.com/to-banksy-keeping-his-identity-a-secret-is-more-important-than-winning-copyright-cases/.

Clark, Birgit. “Regional Court of Munich: No Copyright Protection for ‘Sexual Intercourse Shown in a Primitive Way.’” *The IPKat* (blog), September 2, 2013. Accessed May 8, 2022. https://ipkitten.blogspot.com/2013/09/regional-court-of-munich-no-copyright.html?m=0.

Drahos, Peter. “The Universality Of Intellectual Property Rights: Origins And Development” p.16, Accessed April 29, 2022. https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_1.pdf

Emin, Tracey. My Bed. 1998. The Duerckheim Collection 2015, Munch Museum. In TATE. Accessed November 25, 2021. https://www.tate.org.uk/art/artworks/emin-my-bed-l03662.

Fontana, Lucio. “Spatial Concept ‘Waiting’”. 1960. Tate, TATE, Tate Museum. In Tate.org. Accessed November 25, 2021. https://www.tate.org.uk/art/artworks/fontana-spatial-concept-waiting-t00694.

France-Presse, Agence. “World's 'oldest Known Cave Painting' Found in Indonesia.” The Guardian. January 13, 2021. Accessed November 23, 2021. https://www.theguardian.com/science/2021/jan/13/worlds-oldest-known-cave-painting-found-in-indonesia.

Geary, Joan. "Abstraction: My Five Year Old Could Do That...." Joan Geary Studio. September 05, 2016. Accessed November 25, 2021. http://www.joangearystudio.com/journal/abstraction-five-year-old.

Guerrilla Girls. "Naked Through The Ages." Accessed January 01, 2022. https://www.guerrillagirls.com/naked-through-the-ages.

Himali Singh Soin. "Maria Eichhorn Talks about Her Solo Exhibition at Chisenhale Gallery." The Online Edition of Artforum International Magazine. April 14, 2016. Accessed December 05, 2021. https://www.artforum.com/interviews/maria-eichhorn-talks-about-her-solo-exhibition-at-chisenhale-gallery-59479. https://mymodernmet.com/what-is-contemporary-art-definition/.

Kéréver, André. “The Universal Copyright Convention*”,* UNESCO, Accessed May 2, 2022, https://en.unesco.org/courier/news-views-online/universal-copyright-convention

Langill, Caroline. "Shifting Polarities, Electronic Media in 1974." Accessed November 29, 2021. https://www.fondation-langlois.org/html/e/page.php?NumPage=1974.

Lansroth, Bob. "Hyperrealism in Art - Ultimately, Is It Art or Skill?" Miami Contemporary Art A to Z, September 12, 2021, Accessed December 11, 2021, https://artmiamimagazine.com/hyperrealism-in-art-ultimately-is-it-art-or-skill/

Martin, Tatty. "What Is Contemporary Art?" Rise Art. November 06, 2020. Accessed November 29, 2021. https://www.riseart.com/guide/2400/what-is-contemporary-art.

Mathiasen, Jakob Plesner, Hanne Kirk, and Philip Henszelman. “What Do a (Little) Mermaid and a Non-Statutory Caricature/Parody Exception Share? A Tale from Denmark.” *IPKat* (blog), Accessed March 18, 2022.https://ipkitten.blogspot.com/2022/02/guest-post-what-do-little-mermaid-and.html.

Morgan, Tiernan, and Lauren Purjeje. "An Illustrated Guide to Arthur Danto’s “The End of Art”." Hyperallergic(blog), March 31, 2015. Accessed November 28, 2021. https://hyperallergic.com/191329/an-illustrated-guide-to-arthur-dantos-the-end-of-art/.

Muchnic, Suzanne. Art Review; “LACMA Surveys 150 Years of Photography”, *Los Angeles Times*, (21 December 1989), accessed May 09, 2022. https://www.latimes.com/archives/la-xpm-1989-12-21-ca-952-story.html

Niaski, Shovava and Viviva Colorsheets. "The Evolution of Hyperrealism: From Religious Paintings to Simulated Reality." My Modern Met. April 10, 2018. Accessed December 11, 2021. https://mymodernmet.com/hyperrealism-history/.

O’Neill-Butler, Lauren, and Chandler Burr. Chandler Burr on “The Art of Scent 1889–2012.” Other. Artforum, Accessed November 19, 2012. https://www.artforum.com/interviews/chandler-burr-on-the-art-of-scent-1889-2012-37451.

Osman, Ashraf. “Historical Overview of Olfactory Art in the 20th Century.” Accessed March 7, 2022. https://www.academia.edu/4608919/Historical_Overview_of_Olfactory_Art_in_the_20th_Century

Quaedvlieg, Antoon. “Copyright and Perfume: Nose, Intellect and Industry .” klos.nl. Accessed February 23, 2022. https://klos.nl/wp-content/uploads/2017/07/Quaedvlieg_Copyright_and_Perfume.pdf.

Rafman, Jon. "Nine Eyes of Google Street View." Net Art Anthology: Nine Eyes of Google Street View. Accessed November 29, 2021. https://anthology.rhizome.org/9-eyes.

Richman-Abdou, Kelly, Shovava, Comma, and Viviva Colorsheets. "What Is Contemporary Art? An In-Depth Look at the Modern-Day Movement." My Modern Met. May 18, 2021. Accessed November 29, 2021.

Richter, Gerhard. Mirror, Blood Red. 1991. Private Collection, The MET. In Metmuseum.org. Accessed November 25, 2021. https://www.metmuseum.org/art/collection/search/816065.

Riding, Alan. "Conceptual Artist as Vandal: Walk Tall and Carry a Little Hammer (or Ax)", *N.Y. TIMES*, (Jan. 7, 2006) accessed May 09, 2022. https://www.nytimes.com/2006/01/07/arts/design/conceptual-artist-as-vandal-walk-tall-and-carry-a-little-hammer.html

Rosati, Eleonara. "Paris Court of Appeal Confirms That Koons's 'Naked' Sculpture Infringes Copyright in 'Enfants' Photograph, Rejecting Freedom of the Arts and Parody Defences." The *IPKat* (blog), Accessed December 23, 2022. https://ipkitten.blogspot.com/2019/12/paris-court-of-appeal-confirms-that.html.

Rosati, Eleonora. "Italian Supreme Court Says That the Quotation Exception in Copyright Law Only Applies to Partial Reproductions of Works, Never to Works in Their Entirety." *IPKat* (blog), Accessed March 13, 2022. https://ipkitten.blogspot.com/2022/03/italian-supreme-court-says-that.html.

Rosati, Eleonora. "Jeff Koons Loses (Again) in France: His Fait D'Hiver Found to Infringe Copyright in Franck Davidovici's Own Fait D'Hiver." *IPKat* (blog), Accessed March 11, 2021. https://ipkitten.blogspot.com/2021/03/jeff-koons-loses-again-in-france-his.html.

Rowe, Keri. "Art History 101: Édouard Manet: The Father of Modern Art." SaatchiArt. January 23, 2017. Accessed December 15, 2021. https://canvas.saatchiart.com/art/art-history-101/edouard-manet-the-father-of-modern-art.

Sganga, Caterina. "The Role of Copyright History in Casting out the Demons of Copyright Propertization," Accessed March 13, 2021. https://www.researchgate.net/profile/Caterina-Sganga/publication/350042899

Shelley, Esaak. "An Art History Timeline From Ancient to Contemporary Art." ThoughtCo. Accessed November 25, 2021. https://www.thoughtco.com/art-history-timeline-183476.

Shiner, Larry. "Art and Scent: Interpreting the Olfactory Arts." Larry Shiner. Lecture presented at the Art and Scent: Interpreting the Olfactory Arts, September 14, 2019. Accessed November 22, 2021. https://www.larryshiner.com/art-and-scent.

Turk, Gavin. TRASH. 2000. In Gavin Turk. Accessed November 25, 2021. http://gavinturk.com/artworks/image/1407/.

ABSTRACT

As time passes, world has changed and parallel to that, in our ‘contemporary’ era, today's art society is a far cry from yesterday’s. Post-modernism subverts both the traditional definition of art and norms that define copyright protection, it is getting harder to apply copyright law to the protection of contemporary artworks. Our study focuses on contemporary artworks as copyrighted works within the Turkish, the European Union and the United States laws. The first chapter of this thesis focuses on the contemporary art with its history, themes, issues and major movements. The second chapter focuses on explaining the scope of copyright and copyrighted work in the Turkish, the European Union and the United States laws along with relevant international agreements. The third and final chapter focuses on the copyright protection for artworks and legal issues related to contemporary artworks in the scope of copyright protection.

ÖZET

Değişen dünya ile birlikte, bugünün sanatının dünün çok ötesinde olduğu görülmektedir. Post-modernizm, hem geleneksel sanat tanımını hem de telif hakkı korumasını tanımlayan normları altüst etmiş olup bu durum çağdaş sanat eserlerinin korunmasına telif hukukunu uygulamayı giderek zorlaştırmaktadır. Bu çalışmada, Türk, Avrupa Birliği ve Amerikan hukuku kapsamında telif eserleri olarak çağdaş sanat eserlerine odaklanılmıştır. Bu kapsamda tezin ilk kısmında çağdaş sanatın tarihi, konusu, meseleleri ve ana akımları incelenecektir. İkinci kısımda ise telif hakkının tarihsel gelişimi, niteliği ve ilgili uluslararası anlaşmalar ile birlikte Türk, Avrupa Birliği ve Amerikan hukukunda telif hakkı ve telif eserlerinin korunması ve koruma şartları incelenmiştir. Nihayet, üçüncü ve son kısımda, telif hakkı koruması kapsamında sanat eserlerinin telif hakkı koruması ve çağdaş sanat eserleriyle ilgili yaşanan hukuki problemlere odaklanılmaktadır.