

# **Beyond the Readymade: Michael Asher's Skulptur Projekte Münster Caravan and the Challenges for Copyright Law**

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## **Introduction**

This paper seeks to undertake a comparative analysis of UK and US law in order to examine the possibility of copyright protection for Michael Asher's trailer, a conceptual work of art that has been a feature of the decennial Skulptur Projekte Münster exhibition since 1977. Part one explores the nature of the artwork in question and its broader place within the canon of Conceptual art. Part two examines the prospect of protection under the UK closed list categories of sculpture and works of artistic craftsmanship. Part three investigates the prospect of protection under US law with particular focus on the conceptual separability test relating to copyright protection for elements of useful articles. Part four delivers the conclusions of the paper.

## **Part One: Conceptual Art and the Artwork**

Conceptual art has been alternately portrayed as 'not art', 'non-art' and 'anti-art.'<sup>1</sup> The artist Douglas Huebler has famously stated that 'the world is full of objects, more or less interesting; I do not wish to add any more' and while it must be acknowledged that he expressed a view that he did not intend this statement to support the notion that 'everything is art' or that 'what the artist does is art' it has been widely used to support the notion of dematerialisation that pervaded the conceptual art movement.<sup>2</sup> Kosuth while stressing the fact that the idea in his work was indeed the art stated that the art object was no more 'than a truck which carries a work of art from a studio to a gallery is work of art.'<sup>3</sup>

There were extreme examples of a radically altered, unstable, ethereal and indeed invisible artwork such as Robert Barry's *Inert Gas* pieces from the late 1960's that involved the release of controlled amounts of inert gases into the atmosphere in southern California. Such works 'foregrounded the procedural as much as the innate forces of matter as the determining morphological and structural aspects of sculptural work', and in this case the only visual manifestation of the work was contained in the language used to describe it in its promotional

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<sup>1</sup> Lucy R Lippard, *Six Years: The Dematerialisation of the Art Object* (University of California Press 1973) xix.

<sup>2</sup> Francis Colpitt, 'The Formalist Connection and Originary Myths of Conceptual Art' in Michael Corris (ed), *Conceptual Art: Theory, Myth and Practice* (CUP 2004) 39.

<sup>3</sup> Alexander Alberro, *Conceptual Art and the Politics of Publicity* (MIT Press 2003) 38.

materials.<sup>4</sup> Barry also used electromagnetic fields, radio waves, radiation and ultrasonic sounds similarly in his work.

Of such dematerialisation or alteration of the traditional concept of the art object, Lippard and Chandler stated that 'since dealers cannot sell art-as-idea, economic materialism is denied along with physical materialism', thus emphasising the potential economic and political agenda behind such developments.<sup>5</sup> But this approach may be over stated in that the reality seems to have been in many instances that while there was the elimination of traditional saleable art objects, it was merely the form of the commercial manifestation of works that changed and documentation, maps and other supporting materials were produced or mass produced for sale in its place.<sup>6</sup> In general the art object in reality was altered in conception rather than dematerialized, Harrison observing that it was 'not "conceptualized" into immateriality' but rather came to be regarded as a more contingent and theoretical form of expression.<sup>7</sup> Lippard herself was later to acknowledge that conceptual works were equally susceptible to 'general commercialisation' as their 'less ephemeral counterparts' were in the rest of the art market.<sup>8</sup>

But this still leaves us with the difficulty that, contrary to the Greenbergian assertion that art must self-evidently present itself to the eye as art, that in the context of recent more recent art the retinal experience may not suffice in terms of identifying the object as artwork.<sup>9</sup> Fried building on the earlier criticisms of Greenberg attempted to deem readymade works "non-art" and resorted to reduce them to the category of objecthood stating that, '[i]t is as though objecthood alone can, in present circumstances, secure something's identity, if not as nonart, at least as neither painting nor sculpture; or as though a work of art-more accurately, a work of modernist painting or sculpture-were in some essential respect *not an object*.'<sup>10</sup>

But despite these criticisms, the previously mentioned prominence of process led to what may be described as 'art-as-life' and 'life-as-art' pieces and the project of dematerialisation continued unabated. The form of authorship inherent in the use of the real came to be more widely accepted and its complexities recognised, Martha Buskirk stating that '[t]he readymade derives from a multiple gesture involving the act of selection (choosing an object from among many), designation (as a work of art as well as designation of authorship), and recontextualization.'<sup>11</sup>

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<sup>4</sup> Alexander Alberro, *Conceptual Art and the Politics of Publicity* (MIT Press 2003) 118.

<sup>5</sup> Francis Colpitt, 'The Formalist Connection and Originary Myths of Conceptual Art' in Michael Corris (ed), *Conceptual Art: Theory, Myth and Practice* (CUP 2004) 40.

<sup>6</sup> Francis Colpitt, 'The Formalist Connection and Originary Myths of Conceptual Art' in Michael Corris (ed), *Conceptual Art: Theory, Myth and Practice* (CUP 2004) 40.

<sup>7</sup> Francis Colpitt, 'The Formalist Connection and Originary Myths of Conceptual Art' in Michael Corris (ed), *Conceptual Art: Theory, Myth and Practice* (CUP 2004) 37.

<sup>8</sup> Lucy R Lippard, *Six Years: The Dematerialisation of the Art Object* (University of California Press 1973) 263-64.

<sup>9</sup> Arthur C Danto, *After the End of Art: Contemporary Art and the Pale of History* (Princeton University Press 1998) 71.

<sup>10</sup> Michael Fried, *Art and Objecthood* (University of Chicago Press 1998) 152.

<sup>11</sup> Martha Buskirk, *The Contingent Object of Contemporary Art* (MIT Press 2003) 10.

The American artist Michael Asher since 1977 has placed a caravan in various locations around the German town of Münster as part of that town decennial exhibition Skulptur Projekte Münster. This work has become iconic in terms of this major international sculpture exhibition. The work at its core involves the temporal designation of real objects as artistic works and involves the placing of an apparently anonymous travel trailer, the Eriba Familia BS model, at various locations around the town. The trailer was intentionally selected for its unremarkable qualities and its return to the rental agency from whence it came further evidenced its provisional status,<sup>12</sup> yet it has come to be regarded ‘as a free-standing sculptural object set in relation to its surroundings’ and has been judged an effective artwork in that it has, through its documentation, tracked the development of the area since 1977.<sup>13</sup>

This work has alternately been characterised as both toying with the conventions of sculpture and flirting with the ‘idea of becoming itself.’<sup>14</sup> The trailer neither fulfils the requirements to satisfy categorisation as an aesthetic object or as a classic readymade nor does it fulfil the criteria for a hybrid of the two as:

The caravan can only be seen as art within the context of the exhibition – bringing the institution along on its little trek – it can never be seen only as art, because it abandons its status as a functioning (literal) mass produced thing inserted into active (non-bracketed) social space and observed in multiple contexts: of residence, recreation, business and labour, not of rarefied / abstracted art space. There is no indication, no plaque affixed to it or its site (like almost all the other works in Skulptur have indicated that they are works of art). And since the trailer is rented, its artistic affiliation ceases once the show is concluded. As art it must – according to the logic of the work – disappear. There is no guarantee it will be back.<sup>15</sup>

The work departs from the ‘logic of formal autonomy’ that characterises the majority of outdoor sculptures which are conceived and made in a studio environment and subsequently transplanted to outdoor locations.<sup>16</sup> The status of the trailer as art object appears to be both contingent and temporal and depends on its relationship to the exhibition in question and the literature pertaining to it as handed out at the front desk of the participating museum. Asher referred to the trailer as having ‘a double referent’ both ‘to the context of the exhibition as a work of outdoor sculpture and to the real spatial and temporal context of its sequence of

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<sup>12</sup> Martha Buskirk, *The Contingent Object of Contemporary Art* (MIT Press 2003) 205.

<sup>13</sup> <<http://www.lwl.org/LWL/Kultur/skulptur-projekte/kuenstler/asher/?lang=en>> accessed 27/05/2013

<sup>14</sup> Stephan Pascher, ‘Phantom Limb: Michael Asher’s Sculpture Project’

<<http://www.afterall.org/journal/issue.17/phantom.limb.michael.ashers.sculpture.project>> accessed 29/05/2012

<sup>15</sup> <<http://www.afterall.org/journal/issue.17/phantom.limb.michael.ashers.sculpture.project>> accessed 29/05/2012

<sup>16</sup> Michael Asher and Jennifer King (ed), ‘Skulptur Projekte in Münster: Excerpts from Correspondence 1976-1997’ 120 OCTOBER 87, 88.

placements outside the exhibition.’<sup>17</sup> He further stated that the work ‘used the temporal and contextual body of an exhibition of outdoor sculpture as its materially specific and temporally limited pedestal.’<sup>18</sup>

## Part Two: The Law - UK

Section 1(1) of the Copyright, Designs and Patents Act 1988 specifies that copyright subsists in original literary, dramatic, musical or artistic works. Section 4(1) of the Act defines artistic works as a graphic work, photograph, sculpture or collage, irrespective of artistic quality, a work of architecture being a building or a model for a building, or a work of artistic craftsmanship. Section 4(2) states that sculpture includes a cast or model made for purposes of sculpture. Artistic works must undoubtedly concern the visual image and has visual significance as required of artistic works in *Interlego*.<sup>19</sup> The New Zealand Court of Appeal in that case further stating that sculptures must not lack ‘expressive form of the creator and any idea which the creator seeks to convey.’<sup>20</sup>

### Sculpture

Given that the UK legislation merely gives an illustrative list of what may constitute sculpture and the fact that such works evade formalist definition due to the fact that there ontology must be determined based on their final form as there is no discreet process or range of processes that may be agreed for their production, there have been a range of interpretive approaches used by UK courts in determining what work may inhabit this category.

In *Breville Europe Plc and Others v Thorn EMI Domestic Appliance Limited* plaster shapes of sandwiches contained in a sandwich maker were held to be sculptures based on the fact that they fell within the ‘ordinary’ dictionary meaning of same, namely the ‘[a]rt of forming representations of objects etc or abstract designs in the round or in relief by chiselling stone, carving wood, modelling clay, casting metal, or similar processes; a work of sculpture.’<sup>21</sup>

Alternately the High Court used a definition of sculpture in *Metix v Maughan* that considered such as a ‘three-dimensional work made by an artist’s hand,’<sup>22</sup> an artist being one who considers themselves or is considered by others as such, and the sprawling multi-factor

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<sup>17</sup> Michael Asher, written in collaboration with Benjamin Buchloh (ed), *Writings 1973-1983 on Works 1969-1979* (The press of the Nova Scotia College of Art and Design & The Museum of Contemporary Art Los Angeles 1983) 167-8.

<sup>18</sup> Michael Asher, written in collaboration with Benjamin Buchloh (ed), *Writings 1973-1983 on Works 1969-1979* (The Press of the Nova Scotia College of Art and Design & The Museum of Contemporary Art Los Angeles 1983) 170.

<sup>19</sup> [1989] AC 217 (PC) 263, 266. The requirement for ‘visual appeal’ is also contained in the sixth *Lucasfilm* factor. [2008] EWHC 1878 (Ch) [118].

<sup>20</sup> [1985] RPC 127, 157.

<sup>21</sup> [1995] FSR 77, 94.

<sup>22</sup> [1997] FSR 718, 719. Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 76.

approach as outlined by Mann J in the High Court *Lucasfilm*,<sup>23</sup> as approved of by the Court of Appeal<sup>24</sup> and the Supreme Court<sup>25</sup> in that case. The factors in *Lucasfilm* may be summarised as follows:

1. “Some regard has to be had to the normal use of the word”;
2. A sculpture is not confined to what “one would expect to find in art galleries”;
3. “It is inappropriate to stray too far from what would normally be regarded as sculpture”;
4. “No judgment is to be made about artistic worth”;
5. “Not every three-dimensional representation of a concept can be regarded as a sculpture”;
6. “It is of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well”;
7. Having another use “does not necessarily disqualify it from being a sculpture”;
8. The “purpose” is important, and artistic purpose may be discerned from the context of the display of the work;
9. “The process of fabrication is relevant but not determinative”.<sup>26</sup>

It may be useful at this point also to consider the judgment in *Creation Records v News Group Newspapers* where it was argued that a temporary collection of *objets trouvés* arranged for the purposes of being photographed qualified as a work under the Act. Lloyd J citing *Breville v Thorn EMI*<sup>27</sup> stated that:

I do not see how the process of assembling these disparate objects together with the members of the group can be regarded as having anything in common with sculpture or with artistic craftsmanship. No element in the composition has been carved, modelled or made in any of the other ways in which sculpture is made.<sup>28</sup>

Counsel for the plaintiffs contended that the Act should be construed broadly to reflect novel contemporary artistic practice and queried how it might be found that copyright subsisted in Carl Andre’s ‘Equivalent VIII’, Richard Long’s stone circles sculptures, Rachel Whiteread’s ‘House’, the sculptures of Gilbert and George and ‘examples of installation art generally’.<sup>29</sup> Lloyd J, while declining the invitation to answer this point, did however appear to distinguish

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<sup>23</sup> [2008] EWHC 1878 (Ch) [118].

<sup>24</sup> [2009] EWCA Civ 1328 [77].

<sup>25</sup> [2011] UKSC 39 [47].

<sup>26</sup> [2008] EWHC 1878 (Ch) [118]. Factors cited thus in David Tan and Chan Yong Neng, Copyright Subsistence in Contemporary Times: A Dead Shark, an Unmade Bed and Bright Lights in an Empty Room (2013) *Sing J Legal Stud* 402, 410.

<sup>27</sup> *Breville (Europe) Plc v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77,94.

<sup>28</sup> [1997] EMLR 444, 449.

<sup>29</sup> [1997] EMLR 444, 450.

such examples of innovative contemporary art on the basis of their permanence; the work in question here being dismissed as ephemeral and therefore materially different.<sup>30</sup>

While directly referring to the aforementioned Carl Andre work, the High Court in *Lucasfilm* stated that:

A pile of bricks, temporarily on display at the Tate Modern for 2 weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for 2 weeks preparatory to a building project is equally plainly not. One asks why there is that difference, and the answer lies, in my view, in having regard to its purpose. One is created by the hand of an artist, for artistic purposes, and the other is created by a builder, for building purposes.<sup>31</sup>

It may be argued that the reasoning of the Mann J in the above passage and the definition of sculpture proffered in *Metix* parallels the methodology of the Institutional Theory of art, the most widely acknowledged contemporary approach to defining art, devised by the influential American philosopher George Dickie. Under this theory, contextual factors such as the role of specified actors in the 'Artworld' such as artists, the audience, and curators become central to the process of the definition of a work of art as such rather than a determinative focus on the physical confines of the object in question itself. There is no evidence to suggest that court's judgments have been informed by this theory; their correspondence simply 'demonstrates convergent but independent reasoning.'<sup>32</sup>

### **Analysis of Asher's Work as Sculpture:**

To turn now to the specific Asher work in question here, it does arguably have visual significance but this significance is contingent on the observer being alerted to its existence by the written materials documenting its location around the town and materials available from the exhibition organisers at given locations. In terms of the *Metix* intention and status criteria, Asher undoubtedly has status as an artist, he was a well-respected Professor at the Californian Institute of the Arts and his work is widely recognised and he has expressly enunciated that he intends this work to be a work of art.

On further examination of Asher's caravan work in the context of *Metix* two pertinent questions present themselves. Firstly, whether the act of temporary designation of an object would satisfy the 'three-dimensional work made by an artist's hand' test.<sup>33</sup> Secondly, whether the intention and the status of the artist would have any determinative impact on the judicial

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<sup>30</sup> [1997] EMLR 444, 450. Lloyd J stated that the work in question 'existed for a few hours on the ground. Its continued existence was in the form of a photographic image. Accordingly, it seems to me materially different from all the particular examples put to me...'

<sup>31</sup> *Lucasfilm v Ainsworth* [2008] EWHC 1878 (Ch) [118].

<sup>32</sup> David Booton, 'Framing Pictures: Defining Art in UK Copyright Law' (2003) 1 IPQ 38, 63.

<sup>33</sup> [1997] FSR 718, 719.

response to the first question posed to the potential detriment of other considerations such as those of originality, fixation and the idea expression dichotomy.

In terms of this latter question, if we consider the judicial statements in *Creation* and *Lucasfilm* relating to Carl Andre's bricks work, *Equivalent VIII*, intimating that protection would be granted to a work that, particularly in light of its extremely simple arrangement of materials, in terms of authorship it could be argued that this is essentially little more than a mere act of designation or in other words that this is a work where the idea is the paramount element and the physical rendering thereof is rudimentary and of secondary importance. It is arguable that protection of such artworks could result in the protection of mere ideas contrary to doctrine.<sup>34</sup> The question then needs to be posed as to whether Asher's caravan would or should gain protection also under the same approach.

The reasoning of the courts such as that in *Metix* may be characterised as a defensive action to prevent the proliferation of copyright protection into the area of industrial design, arguably the broader application of such an approach may have wide ranging and positive implications if used more generally as a method for defining what constitutes protectable subject matter. In other words, such an interpretive approach may be useful as a sword not just merely as a shield. But it remains to be seen whether the courts will progress down such a path and it does remain open to question whether the approach would extend protection to a work such as Asher's which involves the physical positioning of an everyday object in an everyday environment (albeit admittedly within the context of an exhibition) rather than within a traditional gallery space would gain protection under the category of sculpture. This particularly so as the 'artist's hand' is only recognisable through supporting documentation and when the context of the work is included in its appreciation.

A number of the *Lucasfilm* factors do however provide encouragement that protection may be potentially possible. Factor two states that '[a] sculpture is not confined to what one would expect to find in art galleries'.<sup>35</sup> Factor six states '[i]t is of the essence of a sculpture that it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well', factor seven accordingly stating that having another use 'does not necessarily disqualify it from being a sculpture'. Factor eight is particularly interesting in the context of Asher's caravan in that it states that 'the "purpose" is important, and this artistic purpose may be discerned from the context of the display of the work.' The question remains as to whether the interpretation of context would be inclusive enough to accommodate that of this work namely within the Münster sculpture exhibition and on another level within its physical surroundings of the town. Would this type of context 'stray too far from what would normally be regarded as sculpture' as was deemed inappropriate in factor three of *Lucasfilm*?

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<sup>34</sup> Carl Andre's work, a tidy, two-layer oblong (brick-shaped) stack of 120 individual fire bricks, appears a pertinent example as in terms of the physical form of the work, a more stylistic composition of bricks could be seen in the yard of a builder's merchants or at the end of many a driveway as the courts have alluded to. The Buddhist conceptual underpinnings of this piece of minimalist art appear to be its reductionist 'artistic' essence.

<sup>35</sup> A corollary that flows from this factor is that the importance of recognition by galleries is indeed significant in the determination of what constitutes sculpture in many instances. Thus the institutional approach to definition is indirectly endorsed further.

Factor five states that '[n]ot every three-dimensional representation of a concept can be regarded as a sculpture' and this may be regarded as a potential tool for the narrowing of the category but this may be balanced against factor nine which specifies that 'the process of fabrication is relevant but not determinative' which may be read as a possible moderation of judicial attitudes to readymade works and by implication those of the nature of Asher's.

In summation, it remains unclear whether UK courts will in fact employ a conception of sculpture that is malleable enough to include work where temporary designation, context and documentation are central. Having said this, the employment of Institutionary Theory style logic in the judgments of *Metix* and *Lucasfilm*, and the broad interpretive potential offered by the factors outlined in the latter case, do leave open the prospect of Asher's trailer attaining classification as sculpture under UK law.

## Works of Artistic Craftsmanship

This category is unusual as 'it requires courts to consider whether the work satisfies the qualitative threshold of being artistic.'<sup>36</sup> The nine diverse judgments of the House of Lords in *Hensher v Restawile*<sup>37</sup> do little to bring authoritative clarity to the situation of what the actual test relating to this category is but what is clear in relation to this category is that the work must be 'artistic' and it must be a work of 'craftsmanship'.

Lord Reid in *Hensher* stated that 'a thing has an artistic character if he gets pleasure or satisfaction or it may be uplift from contemplating it. No doubt it is necessary to beware of those who get pleasure from looking.'<sup>38</sup> He continued that:

'If any substantial section of the public genuinely admires and values a thing for its appearance and gets pleasure or satisfaction, whether emotional or intellectual, from looking at it, I would accept that it is artistic although many others may think it meaningless or common or vulgar.'<sup>39</sup>

Lord Morris stated that the word 'artistic' did not require interpretation but did concede that courts should look to see if there was consensus of opinion 'among those whose views command respect'.<sup>40</sup> For Lord Kilbrandon, dismissing the role of public or expert opinion stated that intent as determined by examining the work and the circumstances of its creation were determinative.<sup>41</sup> Lord Dilhorne held that the question was simply one of fact for the court. Lord Simon argued that it was the craftsmanship rather than the work that must be

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<sup>36</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 78.

<sup>37</sup> [1976] AC 64.

<sup>38</sup> [1976] AC 64, 78.

<sup>39</sup> [1976] AC 64, 78.

<sup>40</sup> [1976] AC 64, 81.

<sup>41</sup> [1976] AC 64, 96.



artistic. He further found that ‘appeals to the eye of the beholder, giving him visual pleasure’ were irrelevant.<sup>42</sup>

Given the range of opinions outlined above has left a confused picture as to the exact test to determine what constitutes artistic in this context. Subsequent case law has done little to clarify this. In *Merlet v Mothercare*<sup>43</sup> Walton J held that the majority in *Hensher* had found that whether the work of entity in question was a work of art was the determinative factor as regards it exhibiting the necessary artistic character. But in an attempt to avoid straying into the arena of aesthetic judgments he cited intention as the crucial factor. He stated:

If his intention was to create a work of art and he has not manifestly failed in that intent, that is all that is required. It is not for the court to say that he has merely done the equivalent of flinging a paint pot in the face of the public. But, of course, he may have manifestly failed in his object, and his own ipse dixit cannot therefore be the sole, although it is the initial and predominant, test.<sup>44</sup>

Contrary to *Merlet*, Evans-Lombe J in *Vermaat v Boncrest*,<sup>45</sup> approving the judgment of the New Zealand High Court in *Bonz Group v Cooke*<sup>46</sup> favoured a new test based on evidence of creativity rather than a pure reliance on the factor of intention. Tipping J in the New Zealand court had stated that:

At the risk of being regarded as unduly simplistic I am of the view that for a work to be regarded as one of artistic craftsmanship it must be possible fairly to say that the author was both a craftsman and an artist. A craftsman is a person who makes something in a skilful way and takes justified pride in his workmanship. An artist is a person with creative ability who produces something which has aesthetic appeal...<sup>47</sup>

In *Vermaat* it was held that although the designs were pleasing to the eye they did not display the necessary element of creativity.<sup>48</sup> In *Guild v Eskandar*<sup>49</sup> Rimer J opted for elements of both of the tests outlined in *Merlet* and *Vermaat* respectively, first looking at intention and then turning to creativity concerns.

The second limb of the test for a work of artistic craftsmanship necessitates that the work must be one of ‘craftsmanship’. The test for this limb is as unclear as that outlined above for

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<sup>42</sup> [1976] AC 64, 93.

<sup>43</sup> [1986] RPC 115.

<sup>44</sup> [1986] RPC 115, 126.

<sup>45</sup> [2001] FSR 5, 49.

<sup>46</sup> [1994] 3 NZLR 216.

<sup>47</sup> [1994] 3 NZLR 216, 223 ; This approach that required the author to be both artist and craftsman was subsequently supported in *Luscasfilm v Ainsworth* [2008] EWHC 1878 (Ch) [124-35] where it was held that the creator of helmets for the Star Wars movies was indeed a craftsman but was not for the purposes of the test an artist.

<sup>48</sup> [2001] FSR 5, 49.

<sup>49</sup> [2001] FSR 38, 645.

the first. Lord Simon in *Hensher* stated that craftsmanship ‘presupposes special training, skill and knowledge for its production...(and) implies a manifestation of pride in sound workmanship - a rejection of the shoddy, the meretricious, the facile. But the craftsmanship - not the work itself - must, in addition, be artistic.’<sup>50</sup> Lord Reid held that such a work should be ‘a durable useful handmade object’.<sup>51</sup> The test is therefore unclear and there is further general confusion as to whether craftsmanship requires that a work is handmade. Lord Reid and Viscount Dilhorne suggested in *Hensher* that works of craftsmanship must be handmade<sup>52</sup>, while Lord Simon did not concur with this view.<sup>53</sup>

There has been a change of position in relation to whether the artistic character and element of craftsmanship should come from the same person. Initially Clauson J in *Burke v Spicer’s Dress Designs*<sup>54</sup> held that this was necessary but this has been rejected in *Bonz Group* where Tipping J held that ‘I do not regard that as being necessary. If two or more people combine to design and make the ultimate product I cannot see why that ultimate product should not be regarded as a work of artistic craftsmanship.’<sup>55</sup>

It has been argued that the unanimous decision of the Australian High Court in *Burge v Swarbrick*<sup>56</sup>, while admittedly dealing with different legislation to that of the UK, has the potential to bring much needed clarity to this area.<sup>57</sup> Here it was held that when considering artistic quality in the context of separating works of artistic craftsmanship from industrial designs, that the crucial factor is whether there was ‘freedom of design choice relatively unconstrained by the function or utility of the article so produced.’<sup>58</sup>

## Analysis of Asher’s Work as Work of Artistic Craftsmanship

In the context of works of artistic craftsmanship Asher’s trailer work is problematic. The act of designation of a pre-existing functional object does not *prima facie* appear to be easily reconciled with the notion of ‘sound workmanship’ as enunciated by Lord Simon in *Hensher*.<sup>59</sup> This would seem to be the case despite his assertion that craftsmanship ‘cannot be confined to handicraft.’<sup>60</sup> Lord Reid’s assertion that such a work should be ‘a durable useful handmade object’ also appears to distance Asher’s piece further from the category.<sup>61</sup>

The decision of Mann J in *Shelley Films Ltd v Rex Features Ltd* held that a film set could possibly fulfil the criteria for a work of artistic craftsmanship, stating that

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<sup>50</sup> [1976] AC 64, 91.

<sup>51</sup> [1976] AC 64, 77.

<sup>52</sup> [1976] AC 64, 77 and 84 respectively.

<sup>53</sup> [1976] AC 64, 90 The view of Lord Simon has subsequently been strongly supported by the Federal court of Australia in *Coogi Australia v Hysport International* (1999) 157 ALR 247.

<sup>54</sup> [1936] 1 Ch 400, 408.

<sup>55</sup> *Bonz Group v Cooke* [1994] 3 NZLR 216.

<sup>56</sup> [2007] HCA 17.

<sup>57</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 82-83.

<sup>58</sup> *Burge v Swarbrick* [2007] HCA706 [75].

<sup>59</sup> [1976] AC 64, 91.

<sup>60</sup> [1976] AC 64, 91.

<sup>61</sup> [1976] AC 64, 77.

if the set is imaginatively conceived and implemented overall as a work of artistic craftsmanship, it cannot matter that it happens to be made up of numerous, perhaps many thousands, of components in some of which, when considered separately, copyright might not exist, provided the effect and intent overall is artistic.<sup>62</sup>

This would appear to provide encouragement for the proposition that Asher's caravan may gain protection under this category but for the fact that Lloyd J in *Creation* distinguished *Shelley* from the facts before him stating that 'I can readily accept that a film set does involve craftsmanship. It is not merely an assembly of "objets trouvés".'<sup>63</sup> In Asher's work, the trailer, and indeed in a broader sense the selected surroundings of the town of Münster, may be reasonably portray as such an assembly. It is therefore submitted that it is unlikely that a work such as Asher's would satisfy the second limb of the test and gain protection. The general lack of clarity around the first limb of the test, namely as regards whether the test for an artistic quality is concerned with intention, creativity or indeed both, makes a judgement on whether Asher's work would satisfy this aspect of the test extremely speculative. It is unlikely therefore that it could be stated with any confidence that Asher's work would receive protection under this category.

## Fixation:

In *Merchandising Corporation of America Inc and Others v Harpbond Ltd and Others*,<sup>64</sup> a case in which copyright protection for facial makeup was sought and refused, an element of fixation was deemed to be required in relation to artistic works. Lawton LJ stating that '[a] painting is not an idea; it is an object; and paint without a surface is not a painting'. Similarly, Whitford J in *Davis (J&S) (Holdings) Ltd v Wright Health Group Ltd*<sup>65</sup> held that dental models and casts were not sculpture because, inter alia, they were 'a model fashioned in plasticine or some other suitable modelling material, which it was never intended should have any permanent existence, being no more than a stage in production...'. An assemblage of *objets trouvés* has also been held not to constitute a collage because, inter alia, it was 'intrinsically ephemeral, existing for only a few hours'.<sup>66</sup> Nevertheless, Laddie J in *Metix v Maughan*,<sup>67</sup> declined to follow *Davis*, stating that a sculpture may have a 'mere transient existence' and that a 'sculpture made of ice is no less a sculpture because it may melt as soon as the temperature rises'. As a result the exact nature of the fixation requirement may be said to be less than clear.

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<sup>62</sup> [1994] EMLR 134, 143.

<sup>63</sup> [1997] EMLR 444, 449.

<sup>64</sup> [1983] FSR 32, 46.

<sup>65</sup> [1988] RPC 403, 412.

<sup>66</sup> *Creation Records v. News Group Newspapers* [1997] EMLR 444, 445.

<sup>67</sup> [1997] FSR 718, 721.

## Originality

As previously stated, the fact that the factors of intention and status may be determinative when assessing the subsistence of copyright in sculpture in the UK does inherently risk the sidelining of originality considerations as well as introducing the possibility of novelty becoming an inadvertent criteria for protection. What must also be acknowledged at this juncture is that the harmonizing effect of recent decisions of the Court of Justice<sup>68</sup> on the standard of originality and other criteria necessary for subsistence. The significance of the move from the traditional 'labour, skill and/or judgement' threshold to the new harmonised concept of 'author's own intellectual creation' and the fact that there is doubt existing as to whether this now is the only relevant criteria necessary for consideration of subsistence, has opened up the possibility of a more dematerialised system of copyright law. It has been stated that:

If the only relevant criterion for copyright entitlement is creativity, the maintenance of a recording requirement may increasingly come to be viewed as anomalous and potentially unlawful. Equally, there is a danger that the UK's statutory 'closed-list' system may also be regarded as incompatible with an exclusive focus on creativity.<sup>69</sup>

### Overall Analysis of Asher's Work in the UK Context:

In relation to the category of sculpture Asher's, the *Metix* and *Lucasfilm* judgments do leave open the possibility at least that highly context dependant works displaying readymade like qualities may qualify as such a work. This is due to the growing judicial reference to extra-legal frameworks such as in institutional theories of art in attempt to define art. Such an approach appears to be gaining currency as traditional approaches such as the retreat to dictionary definitions in previous decisions such as *Breville*, have been replaced as they had previously come to fail to exclude industrial property from the scope of protection. It would appear now in the UK that there are reasons to suspect that appreciation of what is 'normal' in terms of sculptural works is in the process of becoming fused with the gallery system's appreciation of what is valid in terms of contemporary artistic output. One aspect of these development that needs to be considered in the context of the art in discussion here is that there is an inherent danger that a move too far in this direction may lead to a protection of mere ideas contrary to doctrine and also the introduction of novelty factors indirectly into

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<sup>68</sup> See for example: Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569, C-393/09 *Bezpečnostní Softwarová Asociace – Svaz Softwarové Ochrany v Ministry of Culture of the Czech Republic* [2011] ECDR 3. See generally: Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33(4) OJLS 767

<sup>69</sup> Jonathan Griffiths, 'Dematerialization, Pragmatism and the European Copyright Revolution' (2013) 33(4) OJLS 767, 785 citing Christian Handig.

deliberation, this particularly given the fact that more innovative forms of art that art lauded by the gallery system do because that very quality is present in the work.

The onset of the European harmonisation project by the CJEU which may or indeed has altered the current originality threshold and may sound the death knell for the fixation requirement and the concept of the ‘work’ under UK law may only increase the likelihood for protection of such works.

As it stands, the fixation requirement is problematic for such works given the conflicting case law but nonetheless the *Metix* judgment as previously discussed does give some encouragement that fixation may not be an insurmountable obstacle to protection.

Lastly, classification as a the work of artistic craftsmanship would seem unlikely given the profound confusion in the case law in general and the *Hensher* judgment in particular and also due to the explicit statements in *Creation* effectively barring *objet-trouvés* from inclusion in this classification.

## Part Two: The Law - US

Section 102(a)(5) of the Copyright Act 1976 distils classes (f) – (k) contained in the 1909 Act down to the category of ‘pictorial, graphic, and sculptural works.’ Further clarification is offered not by way of a definition but rather by a list of examples, Section 101 of the Act stating that this category includes ‘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.’ The legislative history of the Act reveals that Section 102(a)(5) is taken to include “‘works of art’ in the traditional sense...[and] also works of graphic art, and illustration, art reproductions...and works of ‘applied art.’”<sup>70</sup> Committee Reports also indicate that there is no ‘implied criterion of artistic taste, aesthetic value, or intrinsic quality...’<sup>71</sup> In parallel with the legislative developments in relation to artistic works and US copyright law, there has been significant Constitutional interpretation that has been undertaken by the courts which has led to an expansion of what is considered protectable subject matter. The interpretation of the phrase ‘writings’ in the aforementioned Copyright Clause of the Constitution has been the main forum for such developments.

There have been a number of progressive judicial statements in relation to what may constitute works of art under US law. Mr Justice Holmes in *Blestein v Donaldson Lithographing Company* famously stated that:

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<sup>70</sup> As cited by Melville B Nimmer and David Nimmer ‘*Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*’ (Matthew Bender 1997) Volume 1, 2-83.

<sup>71</sup> As cited by Melville B Nimmer and David Nimmer ‘*Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*’ (Matthew Bender 1997) Volume 1, 2-74.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt.<sup>72</sup>

This passage both reinforces the low level of creativity required for protection and also introduces public acceptance of works as a factor in decision on subsistence. Similarly progressive was the judgment in *Brancusi v United States* from the 1928 case concerning the Tariff Act of 1922 where in determination of whether a bronze object entitled ‘Bird in Flight’ qualified as a sculpture for taxation purposes. This decision engaged in reasoning similar to that of Institutional Theory of art, Waite J accepting the testimony of Brancusi and supporting witnesses ‘who have been familiar with art and artworks in their study and in museums and as artists and writers upon art’<sup>73</sup> who had deemed the postmodern work in question a sculpture rather than simply an industrial product, the professional status of the artist was also acknowledged by the court.<sup>74</sup>

In *Mazer v Stein* the Supreme Court stated that ‘[i]ndividual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art.’<sup>75</sup> There have also been tests for creativity that have been potential regressive in relation to more contemporary forms of art. The Ninth Circuit in *Rosenthal v Stein* formulated a test for a work of art states that ‘[a] thing is a work of art if it appears to be within the historical and ordinary conception of the term art.’<sup>76</sup> It has been argued that there is a fundamental incompatibility between the *Rosenthal* standard and more experimental contemporary artistic expression including that of ready-mades:

By emphasizing that works must be identified with historical and ordinary conceptions of what constitutes art, the standard functions regressively, seeming to negate the possibility of attaining copyright

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<sup>72</sup> *Bleistein v Donaldson Lithographing Company* 88 US 239, 251-52 (1903).

<sup>73</sup> *Brancusi v United States*, 54 Tres Dec 428 (Cust Ct 1928).

<sup>74</sup> Glen Cheng, ‘The Aesthetics of Copyright Adjudication’ (2012) 19 UCLA Ent L Rev 113, 134.

<sup>75</sup> *Mazer v Stein*, 347 US 201, 214.

<sup>76</sup> *Rosenthal v Stein*, 205 F 2d 633 (1953 CA9 Cal). As approved of in *Bailie v Fisher*, 258 F 2d 425 (CADC 1958) CA.

protection for innovative works that break fundamentally with the past.<sup>77</sup>

Fair use analysis has also proved to be a context in which more expansive conceptions of creativity have become incorporated into case law. In *Blanch v Koons*<sup>78</sup> the Second Circuit ‘demonstrated a greater willingness to embrace appropriation art and its postmodern technique of recontextualising or repurposing objects and images in mainstream media or familiar to the public at large.’<sup>79</sup> In *Cariou v Prince* the Second Circuit in the determination of what constitutes transformative uses as opposed to market substitutes stated that ‘[w]hat is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work’<sup>80</sup> But while this judgment potentially allows for a broader conception of creativity by permitting reference to the wider artistic community this approach also risks linking potential market harm to issues of status and recognition, the Court here referencing the appeal of the work of Richard Prince to the ‘wealthy and famous’.<sup>81</sup> This opinion is welcome in that it abandons the much criticised commentary requirement ‘in favor of a broader understanding of transformative use, but it loses its footing in emphasizing the differences in cultural and economic status among the art, artists, and audiences in question.’<sup>82</sup> The danger is thereby created that courts may ‘convert the right to rework, comment on, or otherwise engage with creative works into a privilege largely reserved for the rich and famous.’<sup>83</sup>

## Copyright Protection and Useful Articles

A detailed examination of the history of copyright restrictions on useful articles is beyond the scope of this paper but the basic tenets of the law will now be discussed briefly below.

Section 101 of the US Act states that:

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.

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<sup>77</sup> Lynne A Greenberg, ‘The Art of Appropriation: Puppies, Piracy, and Post-Modernism’ (1992) 11 Cardozo Arts & Ent LJ 1, 6.

<sup>78</sup> *Blanch v Koons*, 467 F 3d 244 (2<sup>nd</sup> Cir 2006).

<sup>79</sup> David Tan, ‘What Do Judges Know About Contemporary Art?: Richard Prince and Reimagining the Fair Use Test In Copyright Law’ (2011) 16 Media & Arts Law Review 381. (Page number needed)

<sup>80</sup> *Cariou v Prince*, 714 Fd 694, 709 (2d Cir 2013).

<sup>81</sup> *Cariou v Prince*, 714 Fd 694, 709 (2d Cir 2013).

<sup>82</sup> Andrew Gilden & Timothy Greene, Fair Use for the Rich and Fabulous? (2013) 80 U Chi L Rev 88, 93.

<sup>83</sup> Andrew Gilden & Timothy Greene, Fair Use for the Rich and Fabulous? (2013) 80 U Chi L Rev 88, 88-89.

The Second Circuit, citing Professor Nimmer, stated in *Kieselstein-Cord v Accessories by Pearl Inc* that:

Examples of conceptual separateness as an artistic notion may be found in many museums today and even in the great outdoors. Professor Nimmer cites Christo's "Running Fence" as an example of today's "conceptual art": it "did not contain sculptural features that were physically separable from the utilitarian aspects of the fence, but the whole point of the work was that the artistic aspects of the work were conceptually separable."<sup>84</sup>

Such analysis involves the equating of the conceptual separability as referenced by Congress with conceptual art. Contrary to such an approach, cogent arguments have been advanced which suggest that the reference in the House Reports to 'some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article'<sup>85</sup> intended a design to qualify for protection only if it can be separately identified, that is, if the design can be *visually* perceived apart from the utilitarian aspects of the article.<sup>86</sup> It is arguable that the present conceptual separability provisions in this area present 'a significant bar to readymade artworks' as the only conceptual separable element that exist in relation to such works exist outside the physical confines of the article itself and are evident only from the context, physical or otherwise, of the work in question.<sup>87</sup> The Second Circuit in *Carol Barnhart Inc v Economy Cover Corp* supported such an analysis when it stated that:

Almost any utilitarian article may be viewed by some separately as art, depending on how it is displayed (e.g., a can of Campbell Soup or a pair of ornate scissors affixed to the wall of a museum of modern art). But it is the object, not the form of display, for which copyright protection is sought. Congress has made it reasonably clear that copyrightability of the object should turn on its ordinary use as viewed by the average observer, not by a temporary flight of fancy that could attach to any utilitarian object, including an automobile engine, depending on how it is displayed.<sup>88</sup>

## Fixation

Section 102 of the US 1976 Copyright Act specifies that copyright subsists 'in original works of authorship fixed in any tangible medium of expression'. Section 101 further elaborates that a work 'is sufficiently permanent or stable to permit it to be perceived, reproduced, or

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<sup>84</sup> *Kieselstein-Cord v Accessories by Pearl Inc*, 632 F2d 989, 903.

<sup>85</sup> HR Rep No 1476, 94th Cong, 2d Sess 55 (1976).

<sup>86</sup> Susan Tennenbaum, Copyright Protection for Commercial Designs: The Moorhead Bill (1985) 7 J Int'l L 117,

<sup>87</sup> Glen Cheng, 'The Aesthetics of Copyright Adjudication' (2012) 19 UCLA Ent L Rev 113, 127-128. The would appear to be the case irrespective of the various tests that have been applied in an attempt to clarify this doctrine, for a summary of these tests see: *Pivot Point International v Charlene Products*, 372 F 3d 913 (7<sup>th</sup> Cir 2004).

<sup>88</sup> 773 F 2d 411, 419.



otherwise communicated for a period of more than transitory duration'. Case law indicates that fixation may be fleeting but as long as the expression can be communicated to or perceived by another that is sufficient. Even random access memory (RAM) copies of a work have been held to satisfy the requirement by the Ninth Circuit.<sup>89</sup> But there is a lack of clarity here also. The House Reports that accompanied the 1976 Act stated that 'the definition of "fixation" would exclude from the concept purely evanescent or transient reproductions such as those projected briefly on a screen...or captured momentarily in the "memory" of a computer'.<sup>90</sup> It has been previously argued that works such as ice sculpture<sup>91</sup> and those such as 'Running Fence'<sup>92</sup> and 'Wrapped Buildings' by the artist Christo, which last only for days or weeks, would not be eligible for protection either.<sup>93</sup> The issue is therefore left less than clear.

## Originality

The abandonment by the Supreme Court in *Feist v Rural*<sup>94</sup> of the 'sweat of the brow' doctrine in favour of the 'modicum of creativity' standard would appear to allow for a standard that may be based on artistic skill 'independent of physical labour or manual precision' the leading to a situation where 'the new standard of originality would incorporate an understanding of art theory, it would be able to comprehend the aesthetic talent that birthed readymade and abstract art.'<sup>95</sup>

## Analysis of Asher's Work as a Pictorial, Graphic, Sculptural Work

The foregoing has attempted to demonstrate that US courts, sensitive to the difficulties of defining art and the inherent danger of alienating new forms of art, have alternately referenced popular acceptance, the views of the artistic community and even in the context of fair use, the celebrity status of the artist and his clientele appears to have influenced deliberations. While this latter approach would appear an elitist and unwise development, and the *Rosenthal* style reference to 'historical and ordinary' conception approach is potentially regressive, it is perhaps the approach in *Brancusi* that would offer the most encouragement to a work such as Asher's given the courts reference to the wider norms of the art world leading to more protection for postmodern works. But nonetheless what is clear from the above analysis is that given the statutory prohibition on the granting of copyright for utilitarian aspects of useful article and the aforementioned fact that the only conceptual separable element of Asher's work exist outside the physical confines of the trailer in question that

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<sup>89</sup> *MAI Systems Corp v Peak Computers Inc* 991 F2d 518 (9<sup>th</sup> Cir 1993).

<sup>90</sup> HR Rep No 1476, 94<sup>th</sup> Cong, 2d Sess 57 (1976).

<sup>91</sup> Russ Vesteg, 'Jurmetric Copyright: Future Shock for The Visual Arts' (1994-95) 13 Cardozo Arts &Ent LJ 125,132.

<sup>92</sup> This work involved the running of 24.5 miles of fence across the Californian countryside.

<sup>93</sup> Donald M Millinger, 'Copyright and the Fine Artist' (1979-1980) 48 Geo Wash L Rev 354, 359.

<sup>94</sup> 499 US 340 (1991).

<sup>95</sup> Glen Cheng, 'The Aesthetics of Copyright Adjudication' (2012) 19 UCLA Ent L Rev 113, 133.

there is a deep incomparability between the tenets of US copyright law as currently constituted and works of this type. This despite the fact that recent developments in the originality criteria would arguably be more inclusive of more experimental artworks and that the fixation requirements while unclear do not conclusively form an obstacle to the protection of such works.

#### **Part Four: The Conclusions**

The desire to limit copyright protection for industrial property has led to potentially divergent outcomes in relation to Conceptual art in both jurisdictions. In the UK, recent case law suggests there has been a move from the 'normal' conception of art being informed by formal definitional approaches, to a situation where factors such as artistic intention and recognition within the artistic community are used for guidance. This approach and the guidelines for sculpture set out by UK courts suggest that Asher's work may qualify for protection but that there is an inherent risk that this may result in the protection of ideas contrary to doctrine. In the US, while progressive judicial interpretive tendencies have presented themselves on occasions, the conceptual separability doctrine denies any prospect of such a work gaining protection.

Asher's trailer is of particular interest as it tests the limits of the Institutional Theory methodologies that have been mirrored in judicial interpretation. As stated, it is only a temporary designation of work and its visual significance depends totally on the supporting materials relating to the exhibition and environmental context within which it is placed. We await further decisions in this area and as yet it remains to be seen how far outside of the physical confines of the gallery UK courts will deem it appropriate to continue to follow such interpretive strategies.