

*Unavoidable Aesthetic Judgments in Copyright Law:  
The Community of Practice Standard*

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Aesthetic judgments are "dangerous undertakings" for courts, but they are unavoidable in copyright law. In theory, copyright does not distinguish between works on the basis of aesthetic values or merit (or lack thereof), and courts often go to great lengths to 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 in copyright law. Although courts rarely (if ever) explicitly adhere to aesthetic principles in their decisions, the judicial logic used in copyright cases closely mirrors three major aesthetic theories: formalism, intentionalism, and Reader-Response. Formalism assesses the physical configuration of a work irrespective of artistic intent. Intentionalism de-emphasizes physical similarities between works and instead looks for interpretative guidance in an artist's behavior and professed objectives. Finally, Reader-Response theory appraises artworks on the basis of their recognition by the relevant art community. Unfortunately for courts, these theories are largely incompatible. Furthermore, none are sufficiently expansive to cover the variety of artistic practices contained within a single tradition, let alone the panoply of expressive mediums protected by copyright law. As a result, doctrinal inconsistencies abound (both inter- and intra-circuit), and the case law largely fails to provide clear guidance as to the scope of protection-and risk of liability-associated with different artistic practices. This Article examines how courts have applied aesthetic theories to resolve doctrinal issues concerning copyright-eligibility, derivative works, useful articles, and statutory fair use. Based on this analysis, this Article argues that courts should adopt a uniform approach to aesthetic judgments based upon the perspective of a hypothetical Community of Practice capable of situating an expressive work in a specific artistic context.

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