

Copyright – Art and Valuation, Michele Thursz
Legal and Ethical Aspects of Appraising / Spring 2016

“...Law is an obvious instance of how creativity and incentives do not depend upon perfect control over the products created. Like jazz, or novels, or architecture, the law gets built upon the work that went before. This adding and changing is what creativity always is. And a free society is one that assures that its most important resources remain free in just this sense.”¹

The goal of copyright law, as set forth in the US Constitution, is "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." This includes incentivizing the creation of art, literature, architecture, music, and other works of authorship. The term incentive is key to the monetization of information. An incentive is either a promise or an act that is provided for the sake of greater action. In the case of copyright it would be to protect the owner of the copyrighted edition. Due to the far-reaching implications of Copyright in our culture. This paper will focus on the effects of copyright as it pertains to art and the terms of valuation, which is the basis of appraisal.

Many issues related to copyright of art is in the dichotomy of the law itself, Copyright law protects the "expression" of an idea, but copyright does not protect the "idea" itself. The distinction between "idea" and "expression" is fundamental to copyright law. Dichotomy is defined as a contrast between two things that are or are represented as being opposed or entirely different. In Art practice there is a fine line between, expression and the idea itself. Through court decisions and specific language in the Copyright Act of 1976, the scope of copyright has been limited to particular expression of an idea, not the idea that underlies that expression. When we look at copyright protection in art making today expression and idea, merge. Protected under copyright is Idea-Expression Merger and Scènes À Faire, this is when there are only a limited number of ways that a concept or idea can be expressed, there is little difference between the idea and its expression, and it is therefore said that the two have “merged.” When this

¹ Lawrence Lessig. It is licensed under the terms of the “Attribution License” version 1.0 published by Creative Commons.

happens, the limited number of ways of expressing the idea is not entitled to copyright protection because, in essence, that would be protecting the idea, something outside the scope of copyright. The merger doctrine means that even if things are substantially similar, or even identical, there might not be a copyright infringement.² For example this applies to stock images, tried and true story lines, fables, nature all are not copyrightable because this would fall under public domain, and no one can obtain a monopoly on such images by putting them into a fixed medium of expression.

Herzog, Justice Middlebrooks wrote: "Scenes a faire, sequences of events which necessarily follow from a common theme, are not protectable. "Incidents, characters, or settings that are indispensable or standard in the treatment of a given topic are not copyrightable."³

This example puts into question what is public use in today's media saturated culture that use image as extensions to our language. Through replication by means of digital technology many situations have become like movie scenes, or iconic situations in literature as an extension to our universal consciousness, the use of such images would fall under the merger doctrine.

In legal circles the term "appropriation" carries strong negative connotations, signifying essentially theft or piracy⁴.

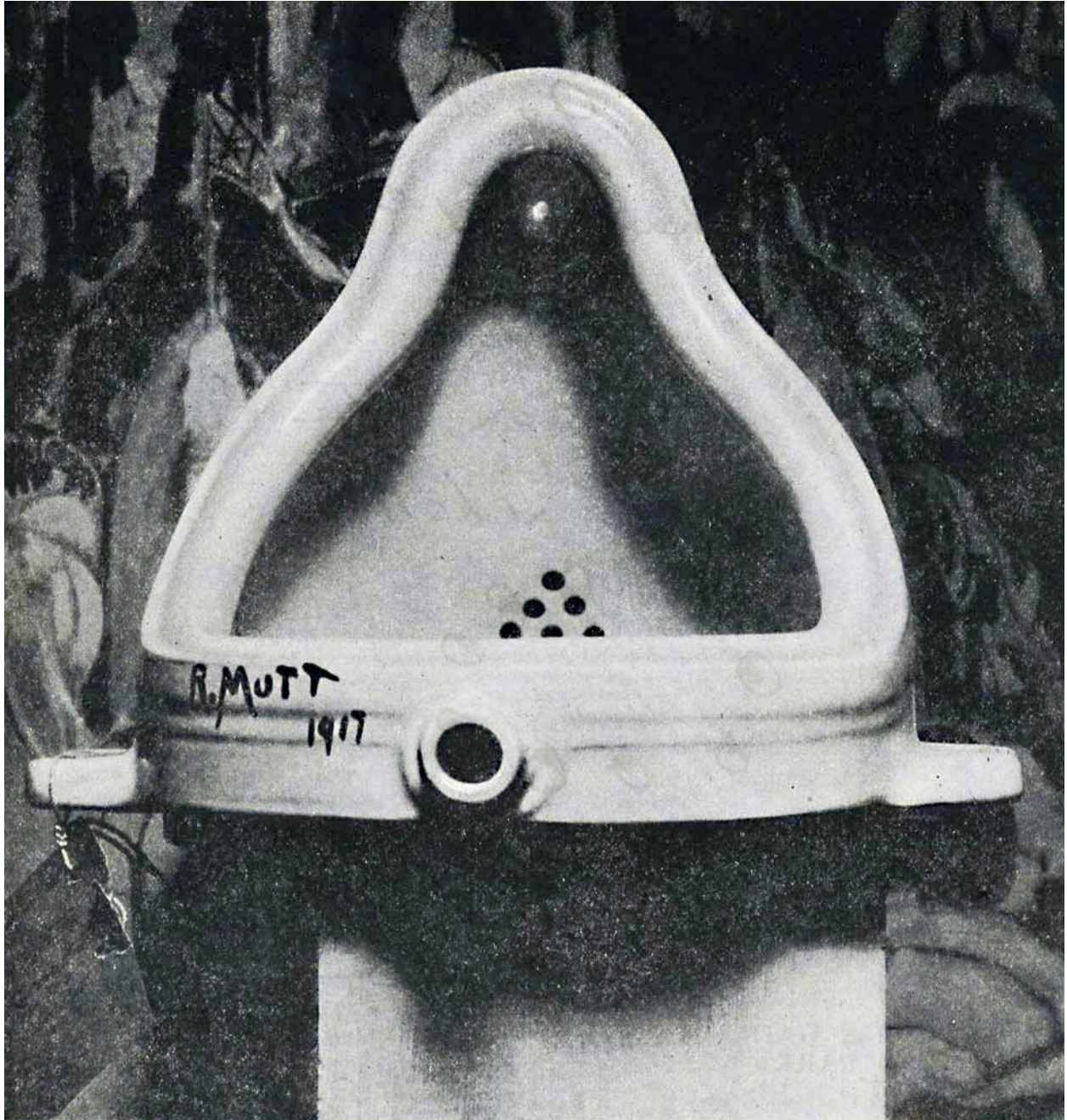
In Art History the action of appropriation is commonplace in Art practice. We can look back in the history of Art over 200 years where artists were replicating images in seminal paintings and sculptures. In this action artists in the Dada movement that originated during the First World War⁵ took the act of appropriation a step further.

² (Buskirk, 2014)

³ *Herzog v Castle Rock Entertainment* 193 F. 3d 1241 (US Court of Appeals, 1st Circuit, 1999), affirming the opinion of Florida district court judge Middlebrooks.

⁴ (Buskirk,2014)

⁵ <http://www.tate.org.uk/learn/online-resources/glossary/d/dada#introduction>



The original Fountain by [Marcel Duchamp](#) photographed by [Alfred Stieglitz](#)

The DADA movement introduced a new art form the readymade, the concept is best illustrated by taking an everyday object out of the context of the utilitarian purpose of the design object, for example you can look at Marcel Duchamp artwork entitled The

Fountain, a porcelain urinal. This action of appropriating the urinal into an art object created an art form that played with terms of copyright. Marcel Duchamp's action monetized an idea. There were many questions about the merger of idea and expression and if the mere idea or action was the art and if the use of the urinal itself could be an infringement of copyright. This issue was resolved in the definition of the nature of the object appropriated basically its purpose was repositioned therefore no infringement " an intrinsic utilitarian object that is not merely to portray the appearance of the article is not entitled to copyright protection." Authenticating the actions of appropriation as an aesthetic –the copyright office also stated, we do not quantify or apply judgments on determining the level of art, therefore the readymade is copyrightable. This being stated marks the readymade as an important part of our culture to date and the terms related to art copyrights. These readymade objects are in major museums, and collections holding values of millions of dollars, and are part of our national treasure, copyrighted. This inclusion illustrates process of art effecting law, and inadvertently the law leads to art - appropriation, were ideas lead to experimentation become a signature form of art.

We can clearly see the effect of Dada movement in the practice or Pop Artist reuse iconic information, brands, celebrity were essential part of the conceptual underpinning of the art practice, the practice not being copyrightable. Some critics have cited that Pop Art choice of imagery promoted the ideas of the capitalist market emphasizing art's place as, at base, a commodity. This statement hinges terms related to copyright to the artist practice, as the copyrighted object acts as a vehicle for future profit. Warhol's copyrighted works have a market value estimated at more than \$120 million and the foundation has earned more than \$2.5 million a year from licensing the designs, according to court papers.⁶ Years later after the death of Andy Warhol many cases have come to suit mostly dealing with authenticity, and copyright infringement. A few years back in 2013 Velvet Underground filed suit against the Warhol foundation. The band, which emerged from the late '60s Avant-garde New York art scene, released their debut

album "The Velvet Underground and Nico" in 1967. The case purpose was who had the copyrights of the album cover art designed by Andy Warhol.

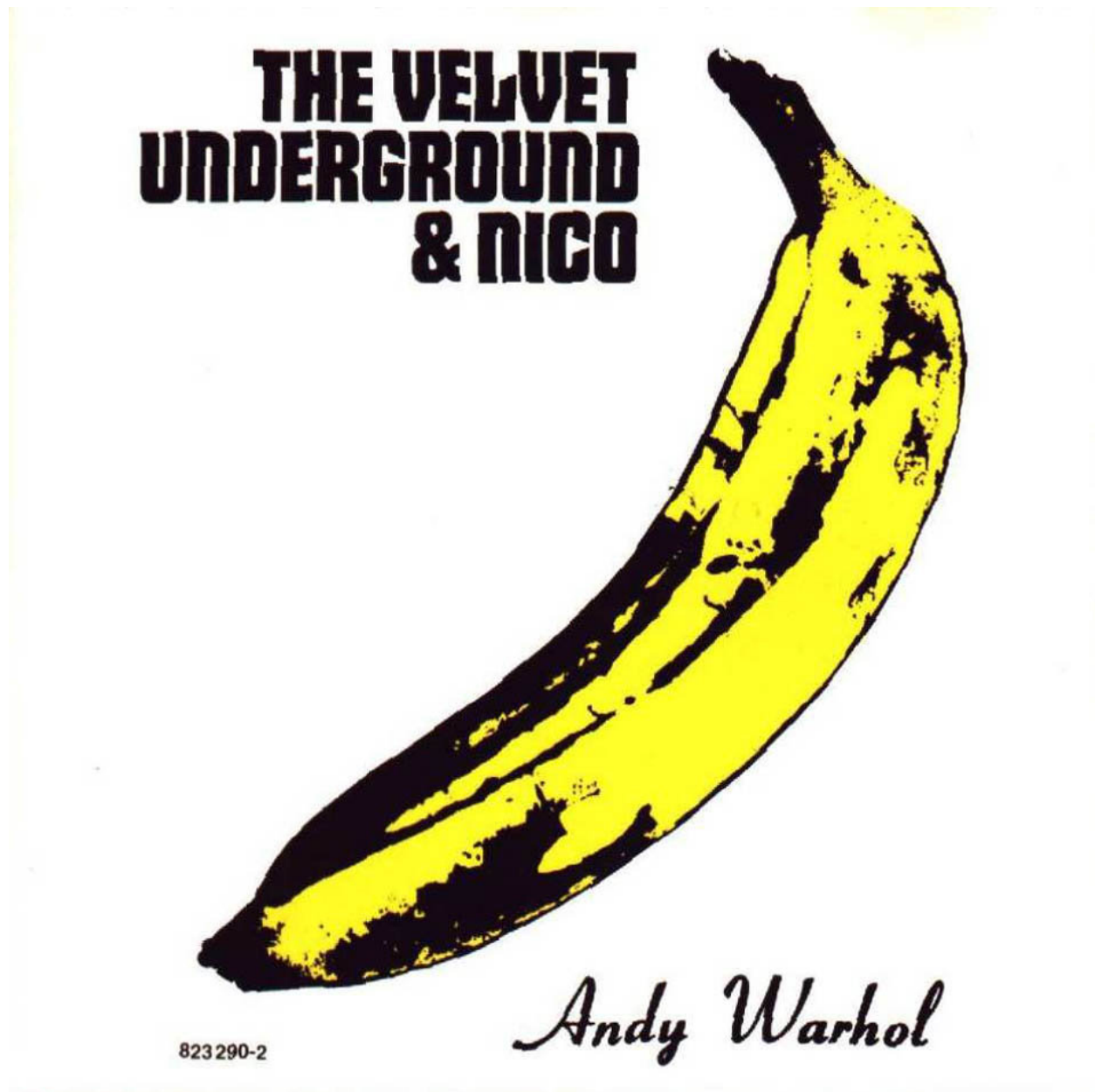
The band was professionally aligned with Andy Warhol factory- there are puns relating the readymade to the factory production- as factory made. Warhol provided its iconic cover image, a screen print of a banana. The case shows the common intersection of two areas of intellectual property -copyright and trademark. Normally the artist who creates an artistic work automatically has copyright interest in the work even if he doesn't register it. Warhol didn't design the banana, he acquired it straight out of a magazine, and the band paid a fee. They therefore claim that no one has any copyright protection in the image. Judge Nathan denied the motion for the declaratory judgment in September, saying that the covenant between the band and the foundation eliminated any controversy over the copyright.⁷

Andy Warhol's appropriation of the banana, as an artwork, to use for the purpose of the velvet undergrounds album was the act likened to a graphic designer making a logo or brand for a company, this branding assigned an identity that in this case signified an era, and the pop movement which now call to question if the appropriated banana is part of the public domain. In this case Andy Warhol, worked in a collaborative manner, with the band, and used the factory mission as a production model were the collaborating sources are working in pursuit of one goal, much like the production model of a movie.

The essence of the collaboration agreement is copyright ownership. In the absence of a written agreement, when two people collaborate, there is a good chance the ensuing work will be considered a joint work The formal legal definition of a "joint work" is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole" ⁸

⁷ <http://www.bloomberg.com/news/articles/2013-05-29/velvet-underground-settles-warhol-suit-over-banana-design>

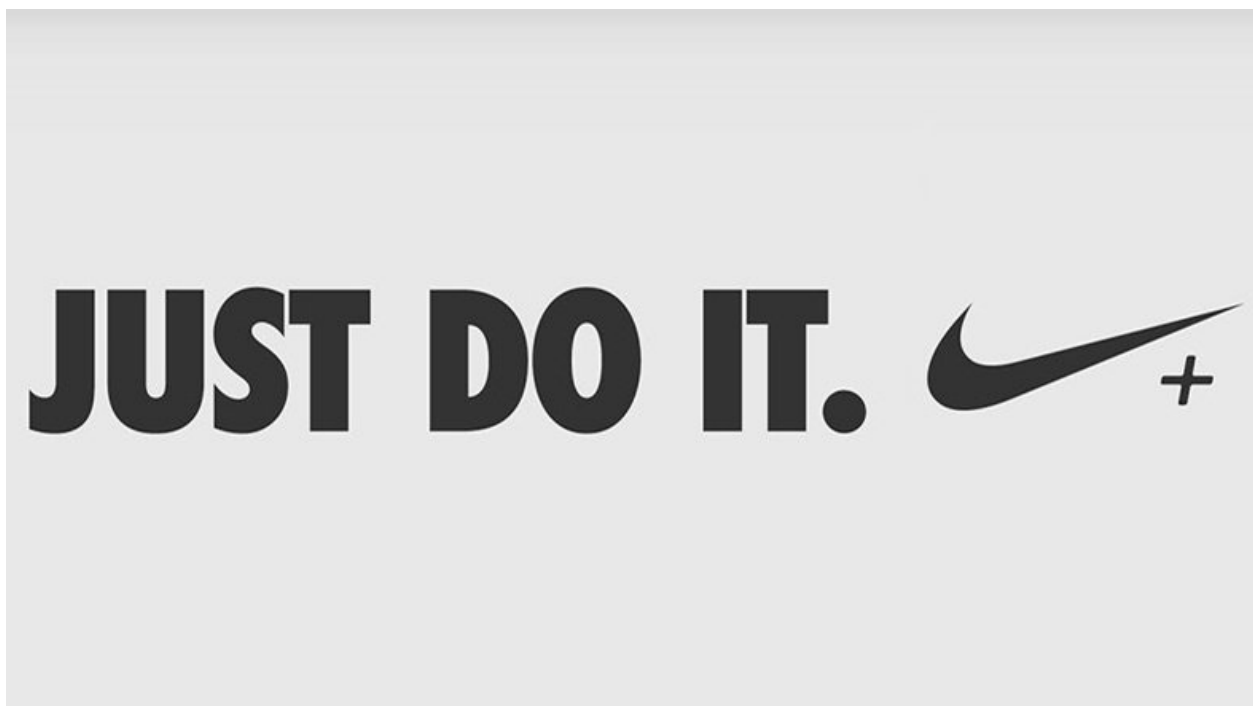
⁸ 1976 Copyright Act, Section 101 (http://www.copylaw.com/new_articles/collab.html)



Velvet Under Grouod, Album Cover, Andy Warhol

The Banana acted as a brand, a logo that is embedded in cultural memory as a signature of Warhol, The Velvet underground, and the era.

In some cases the reuse of the image, even a copyrighted brand identity can encapsulates a culture. For example “Just Do IT” The phrase is trademarked and synonymous with Nike branding.⁹ Just do it, could be a trademark for our culture- here joins ideas around Copyright and Creativity- Just Do IT. Today remix and reproducing is an everyday practice as the Internet is as much about appropriation, decontextualizing and simply copying. Just do it, and artist continue to just do it, replicating and appropriating information under fair use, much like the artist from the Dada and Pop Art movement?



Nike 's "Just do it" slogan has told Dezeen how he based one of the world's most recognizable taglines on the words of a convict facing a firing squad

⁹ <http://www.courtroomstrategy.com/2012/01/battle-over-a-banana-as-the-velvet-underground-sues-over-iconic-album-cover/>

Carlo Zanni a net artist illustrates the transference between industries and art history. He did a series of landscape classical oil painting, "DTP Icons Paintings"¹⁰, as the subject he used the desktop as a landscape with software logos in the horizon to recall the renaissance of portraiture and landscape painting. Documenting the extended landscape being, the computer desktop, and software logos, Zanni examines the simultaneous meanings branding images and the use of the tools to create the many social contexts that we use to exchange information. A significant painting in this series is "landscape, Napster logo" he used Napster logo like the pop artist use of the celebrity, here the celebrity is a brand – replicated as an icon of the times - Napster was a peer to peer software that allowed for file sharing and Internet service that emphasized sharing visual and audio files. Pop artist made use of commodity in the celebrity; as a commercial product, and the celebrity portrait implied the use of graphics design and socio-economic strategies in the art market. Now the commercial market uses art history to validate its products. An example Adobe software, Illustrator uses Sandro Botticelli's "Venus" as a logo. Here the commercial market is using art history to validate its products. The icon as a brand lends validity to the product in recalling classical art masters craft and using of mythological icon Venus to lend many entrances to the product, as if reassuring the user that you too could be Botticelli if you use this tool, or allow you to be seduced by the power of Venus. Carlo Zanni borrows back the commercial logo of illustrator for his painting "Landscape, Illustrator". Just like the readymade, these painting uses of the brand are in the realms of fair use, as the software is utilitarian in design¹¹ and the use of the historic painting are not copyrighted due to the limitations of duration of a copyright.

¹⁰ <http://zanni.org/wp/index.php/portfolio/dtp-icons-paintings/>

¹¹ <http://www.zanni.org/html/txtcritics/micheletfull.htm> , Catalog Text, Thursz, Michele, 2003



Carlo Zanni,Landscape, Napster Logo, 2002

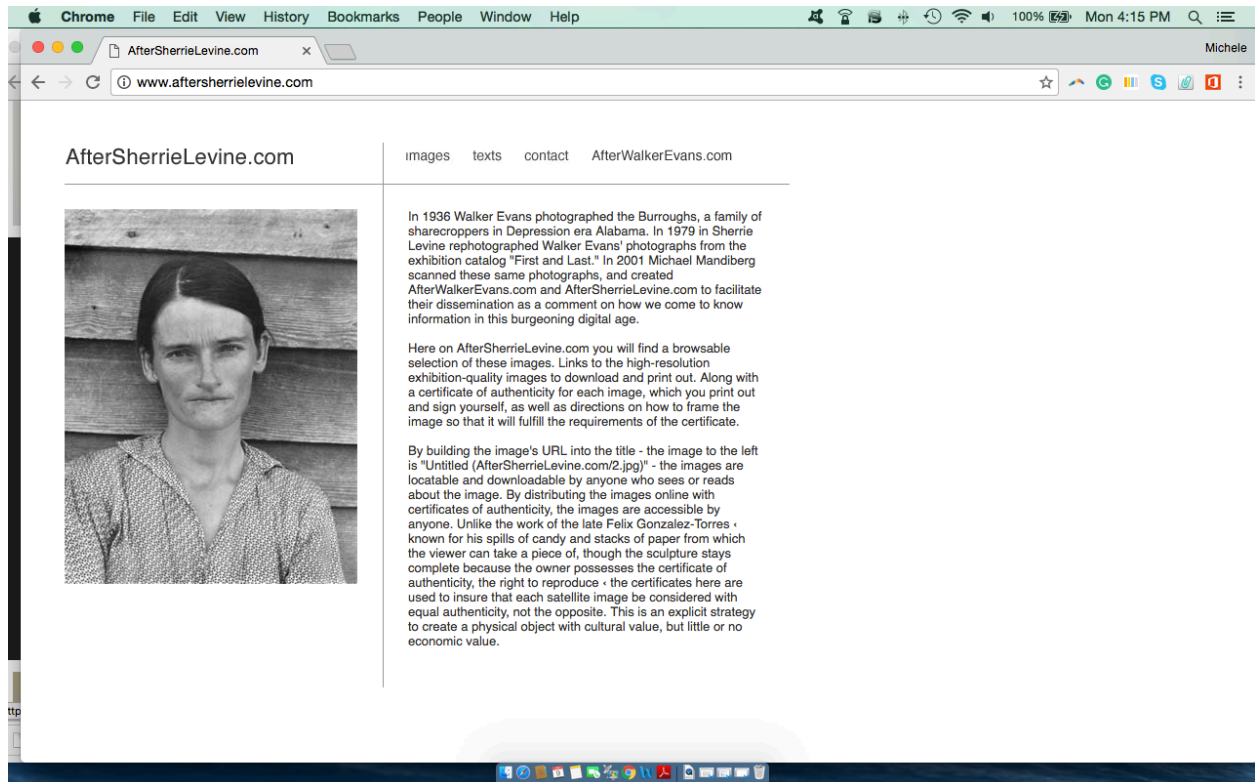
Though a bigger issue in Digital Art presents is authentication and unauthorized reproduction the value of art is partially based on scarcity and the ability to prove authenticity. When buying a piece of art the purchaser usually wants to know the piece is indeed original, if it is not unique than how many other copies are there, and that the work will not be endlessly reproduced.

Net Artist Michael Mandiberg illustrates issues pertaining to copyright, and authenticity in the digital age. He created AfterSherrieLevine.com to create this work the artist looked at 1936 Walker Evans photographs of the Burroughs, a family of sharecroppers in Depression era Alabama and Sherrie Levine photographed Walker Evans' photographs from the exhibition catalog "First and Last."1979 then he scanned these same photographs, and created AfterWalkerEvans.com and AfterSherrieLevine.com to facilitate their dissemination as a comment on how we come to know information in this burgeoning digital age.

Here on AfterSherrieLevine.com¹² you will find a browsable selection of these images. Links to the high-resolution exhibition-quality images to download and print out. Along with a certificate of authenticity for each image, which you print out and sign yourself, as well as directions on how to frame the image so that it will fulfill the requirements of the certificate, as the art object. Michael Mandiberg artwork shifts between idea and expression, and the website, the code are the art objects that can be copyrighted. The artist intent is in the concept as stated by Micheal Maniberg " A lot of conceptual art is an inside joke, and a lot of these jokes are one-liners. This site (like Sherrie Levine's work itself) is no different. Conceptual art positions itself within cultural theory and art history in order to "make a point" yet this point is often esoteric, inaccessible, and without real philosophical depth. In part, AfterWalkerEvans.com is this one-liner art prank, yet in part it attempts to negotiate this esotericism with the possibility of a wider audience afforded by the net."¹³ In keeping with the conversation about the effect of Copyright on practice, and appraisal, the question would be put forth what are we appraising – The website, or the populated authenticated print. In actuality the authenticated print is just ephemera from the expression, not copyrightable, and holds little value, the art is a concept, and the object is the design, the code making the web site that publishes the idea, as copyrightable. Here to is another joke, the idea of limiting copying in terms of expression on the computer – would deem the computer useless as the only way to share information digitally is to copy.

¹² <http://aftersherrielevine.com/> Michael Maniberg

¹³ <http://www.afterwalkerevans.com/texts.html> Michael Maniberg, Text and Statement, art plays



Screen Shot of Michael Mandiberg-aftersherrielevine.com

Digital Art is composed of many practices that are dependent on the user engagement – This actions challenges basis of copyright, and makes true the philosophies of dada artist and other post war contemporary philosophers ideas related to the long-standing question what is art? Duchamp states, “It is the spectators who make the pictures.” Heidegger also believed that a work of art is not only just an object, or not only just a representation, it is both. These philosophies are hinged in the valuation of art, and also question, the basis of copyright.

Copyright law like its history changes with the times, No copyright is fixed as technology change and industries change so will Copyright. It is obvious Copyrights built for an analog world differ from the needs of copyright in a digital world. It seems that copyright law now is not supporting its original incentive to create but the opposite, in the fear that the copyright will expire and all copyrighted information will enter the

public domain, before one is able to make a profit. In these observations it also can be said Copyright as it gives copyright owners the exclusive right to do certain things with their work, including making and selling copies of their work or authorizing others to do so. In that Copyright identifies -a product that has a basis for valuation, the appraiser must strike a balance between value of the art and how the art community values that art. Copyright Law and appraisal do not assess ideas, which are invaluable to the evolution of our culture at large.

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