

**INTELLECTUAL PROPERTY AND THE MANUFACTURE OF  
AURA**

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ABSTRACT

In his famous 1936 essay *The Work of Art in the Age of Mechanical Reproduction*, Frankfurt School theorist Walter Benjamin noted that the foundation of an artistic work’s authenticity and also much of its aesthetic power reside in a particular physical embodiment understood as original. This unique attribute of the art object, this halo of preciousness that marks it as authentic, is what Benjamin referred to as its “aura.” In this Article, we pursue Benjamin’s idea and consider how it applies in today’s digital environment where reproduction technologies have grown immensely more powerful. It turns out that ubiquitous reproduction, both mechanical and digital, has not led to the withering away of aura. It has, if anything, strengthened our desire for auratic experience and has also provoked new strategies to produce and sustain aura or some simulacrum of it.

We describe an environment in which artifacts are promiscuously reproduced but where aura persists or is even manufactured. We show that producers seek to create an auratic experience for works of artistic craftsmanship or even for more mundane consumer products — tables, chairs, shoes, automobiles, watches, bottles of wine, or salami. Strategies for producing auratic experience are not necessarily connected to the identification of an original or authentic copy. In fact, in today’s world where technology proliferates copies by design, we see efforts — most notably, perhaps, in the strange new market for NFTs — to produce aura without privileging any particular copy of a work.

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We outline several examples of the modern manufacture of aura. In all these cases, auratic experience is engineered through a combination of reproduction techniques, social norms, community building, and interlocking business and legal strategies. Most of these strategies leverage intellectual property (“IP”) protections in some way. We explore whether IP’s connection to the manufacture of auratic experience can serve as another consequentialist justification for IP — at least for copyrights, design patents (as opposed to utility patents), trademark rights in product design (often referred to as “trade dress”), and trademarks in general. We analyze what happens to the justification, scope, and boundaries of IP protection if the goal is not to incentivize the creation of products or services, but to instill products with meaning in a bid by producers to head off commodity competition in favor of differentiated markets in which products are reframed as cultural artifacts.

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“SOME COMPANY RECENTLY WAS INTERESTED IN BUYING MY ‘AURA’. THEY DIDN’T WANT MY PRODUCT. THEY KEPT SAYING, ‘WE WANT YOUR AURA’. I NEVER FIGURED OUT WHAT THEY WANTED. BUT THEY WERE WILLING TO PAY A LOT FOR IT. SO THEN I THOUGHT THAT IF SOMEBODY WAS WILLING TO PAY THAT MUCH FOR IT, I SHOULD TRY TO FIGURE OUT WHAT IT IS. I THINK ‘AURA’ IS SOMETHING THAT ONLY SOMEBODY ELSE CAN SEE, AND THEY ONLY SEE AS MUCH OF IT AS THEY WANT TO. IT’S ALL IN THE OTHER PERSON’S EYES.”

— ANDY WARHOL, *THE PHILOSOPHY OF ANDY WARHOL FROM A TO B AND BACK AGAIN* 77 (1975)

I. INTRODUCTION

In his famous 1936 essay, *The Work of Art in the Age of Mechanical Reproduction*,<sup>1</sup> Frankfurt School social theorist Walter Benjamin identified the authenticity of a work of art with the existence of an original art object: “The presence of the original,” Benjamin wrote, “is the prerequisite to the concept of authenticity.”<sup>2</sup>

By this Benjamin meant that the foundation of an artistic work’s authenticity and also much of its aesthetic power reside in a particular physical embodiment understood as original. “Even the most perfect

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1. WALTER BENJAMIN, *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (1935), reprinted in *ILLUMINATIONS* 217 (Hannah Arendt ed., 1969).

2. *Id.* at 220.

reproduction of a work of art,” Benjamin asserted, “is lacking in one element: its presence in time and space, its unique existence at the place where it happens to be.”<sup>3</sup> And that means that technology, like the camera, which permits artistic works to be extracted from that singular physical embodiment and then copied and distributed, dissolves a work’s authenticity and deprives it of much of its aesthetic authority.<sup>4</sup>

This unique attribute of the art object, this “halo of preciousness”<sup>5</sup> that marks it as authentic, is what Benjamin refers to as its “aura”:

The situations into which the product of mechanical reproduction can be brought may not touch the actual work of art, yet the quality of its presence is always depreciated . . . In the case of the art object, a most sensitive nucleus — namely, its authenticity — is interfered with whereas no natural object is vulnerable on that score. The authenticity of a thing is the essence of all that is transmissible from its beginning, ranging from its substantive duration to its testimony to the history which it has experienced. Since the historical testimony rests on the authenticity, the former, too, is jeopardized by reproduction when substantive duration ceases to matter. And what is really jeopardized when the historical testimony is affected is the authority of the object. One might subsume the eliminated element in the term “aura” and go on to say: that which withers in the age of mechanical reproduction is the aura of the work of art.<sup>6</sup>

Benjamin’s concept of aura has been immensely influential in contemporary art theory, even though (or perhaps in part, because) he left the concept half-formed. In this Article, we pursue Benjamin’s seminal idea and consider how it applies in today’s digital environment where reproduction technologies have grown immensely more powerful. Contrary to Benjamin’s expectations, it turns out that ubiquitous reproduction, both mechanical and digital, has not led to the withering away of

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3. *Id.*

4. *See id.* (noting that the “sphere of [artistic] authenticity is outside the technical [sphere]” of mechanized reproduction).

5. *See* Amanda Mantiach, *When Labor Shines*, CITY ARTS MAG., <https://www.cityartsmagazine.com/when-labor-shines/> [<https://perma.cc/2U8V-QW7E>] (“For Walter Benjamin, aura was the halo of preciousness that clings to an original, unique object and is absent or diminished in mechanical reproductions.”); *see also* MICHAEL E. ROSEN, ON VOLUNTARY SERVITUDE: FALSE CONSCIOUSNESS AND THE THEORY OF IDEOLOGY 224 (2016) (describing aura as a “quality of numinousness . . . traditionally thought to be characteristic of authentic (and original) works of art.”).

6. BENJAMIN, *supra* note 1, at 221 (citations omitted).

aura. It has, if anything, strengthened our desire for auratic experience and has also provoked new strategies to produce and sustain aura or some simulacrum of it.<sup>7</sup>

We describe an environment in which artifacts are promiscuously reproduced but where aura persists or is even manufactured. Moreover, we show that aura and strategies to produce it are not confined to works of fine art. Producers seek to create an auratic experience for works of artistic craftsmanship or even for more mundane consumer products — tables, chairs, shoes, automobiles, or bottles of wine. Nor are strategies for producing auratic experience necessarily connected to the identification of an original or authentic copy. In fact, in today’s world where technology proliferates copies by design, we (perhaps predictably) see efforts to produce aura without privileging any particular copy of a work.<sup>8</sup>

Perhaps the persistence of aura should not be surprising: It’s been more than a quarter-century now since cultural historian Hillel Schwartz pointed out in *The Culture of the Copy* that “[t]he more adept the West has become at the making of copies, the more we have exalted uniqueness. It is within an exuberant world of copies that we arrive at our experience of originality.”<sup>9</sup> And yet the extent to which this experience of “originality” has moved beyond singular- or limited-production works of art to works of craft and even mass-produced consumer products is noteworthy.

In Part II of this Article, we will outline several examples of the modern manufacture of aura. In all these cases, auratic experience is

7. For an early and excellent example of work employing the concept of aura beyond works of fine art, and connecting it to authenticity in consumer goods, see Laura Heymann, *Dialogues of Authenticity*, 58 *STUD. L. POL. & SOC’Y* 25, 29 (2015). For a more recent analysis of artificial intelligence, authenticity, and intellectual property, see generally Dan L. Burk, *Cheap Creativity and What It Will Do*, 57 *GA. L. REV.* (forthcoming 2023). For seminal contributions to the concept of authenticity, see generally LIONEL TRILLING, *SINCERITY AND AUTHENTICITY* (1972); CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991). For more recent analyses of the “enrichment culture,” see generally LUC BOLTANSKI & ARNAUD ESQUERRE, *ENRICHMENT* (2020); Luc Boltanski & Arnaud Esquerre, *The Economic Life of Things*, 98 *NEW LEFT REV.* 31 (2016) (analyzing how value and wealth are created in modern societies).

8. See Heymann, *supra* note 7, at 29 (defining different varieties of aura, including aura of exclusivity, aura of distinctiveness, and aura of inventiveness). Note that in this Article, we treat the production of auratic narratives at a general level — i.e., as a way of elevating a product out of mere commodity competition and consumption. We do not explore the particular uses to which auratic narratives may be put: for example, to create and reinforce class distinctions, which, Pierre Bourdieu argued, are “most marked in the ordinary choices of everyday existence, such as furniture, clothing, or cooking, which are particularly revealing of deep-rooted and long-standing dispositions because, lying outside the scope of the educational system, they have to be confronted, as it were, by naked taste.” PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 77 (Richard Nice trans., 1984).

9. HILLEL SCHWARTZ, *THE CULTURE OF THE COPY: STRIKING LIKENESSES, UNREASONABLE FACSIMILES* 175 (2d ed. 2014).

engineered through a combination of reproduction techniques, social norms, community building, and interlocking business and legal strategies. Most of these strategies leverage intellectual property (IP) protections in some way. This last point is important for our purposes here, for neither the connection between IP and the production of aura nor the implications of that connection for the justification of IP rights have been fully explored.

In Part III, we inquire whether IP's connection to auratic narratives can serve as another consequentialist justification for IP — at least for copyrights, design patents (as opposed to utility patents), trademark rights in product design (often referred to as “trade dress”), and trademarks in general.<sup>10</sup> In the case of patent and copyright, the consequentialist justification frames legal restrictions as the solution to the problem of underproduction of new inventions and creative works that unrestrained copying would otherwise (in theory) produce.<sup>11</sup> In the case of trademark, the consequentialist justification focuses on the provision of information to consumers: trademarks “help[] consumers identify goods and services that they wish to purchase, as well as those they want to avoid.”<sup>12</sup>

The Supreme Court made that point, with an added note of skepticism, in its 1942 decision in *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*<sup>13</sup> Trademarks, the *Mishawaka Rubber* Court said, are “a merchandising shortcut which induces a purchaser to select what he wants, or what he has been led to believe he wants.”<sup>14</sup> This notion — using trademarks “to induce a purchaser to select . . . what he has been led to believe he wants”<sup>15</sup> — is a faint echo of a debate (very much

10. There are deontic justificatory theories for copyright and patent based in Lockean arguments for ownership arising from labor (for a summary and critique, see Mala Chatterjee, *Lockean Copyright vs. Lockean Property*, 12 J. LEGAL ANALYSIS 136 (2020)), and also (mostly for copyrightable rather than patentable works) in Hegelian and Kantian arguments regarding ownership of artifacts manifesting an individual's personality, see generally Christopher S. Yoo, *Rethinking Copyright and Personhood*, 3 U. ILL. L. REV. 1039 (2019). But in the United States at least, copyright and patent rights are most often justified consequentially, and trademark justifications are exclusively consequentialist. See Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (And Don't)*, 55 HOUS. L. REV. 451, 454 (2017) (“The grounding justification for copyright is that granting exclusive rights in artistic and literary works will incentivize authors to invest in new creativity.”); Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597 (2003) (“To a greater extent than any other area of intellectual property, courts and commentators widely agree that the basic purpose of patent law is utilitarian: We grant patents in order to encourage invention.”).

11. A good deal of scholarship attacks the underproduction thesis. For a fascinating recent example, see Deven R. Desai & Mark A. Lemley, *Scarcity, Regulation, and the Abundance Society* (Stan. L. & Econ. Olin Working Paper No. 572, 2022), <https://ssrn.com/abstract=4150871> [<https://perma.cc/47ME-GQTG>].

12. *Matal v. Tam*, 582 U.S. 1, 2 (2017).

13. 316 U.S. 203 (1942).

14. *Id.* at 205.

15. *Id.* at 205 (emphasis added).

alive in 1942 but since mostly forgotten) between those who believed that trademarks are a pro-social tool for providing information to consumers (who would then act on their exogenous preferences with more certainty and dispatch),<sup>16</sup> and those who countered that trademarks are often used by producers to create preferences — specifically, preferences for elements of product differentiation, like branding or product design, used by producers to reduce competitive pressures in markets for a wide variety of goods.<sup>17</sup> A commentator writing in 1943 captures this producerist account of trademarks:

It can safely be said that trade-marks, like patents and copyrights, have their monopolistic aspects, because it is one of the functions of trade-marks to lift the product bearing a mark out of its general class and to place it into a class of its own, thus eliminating competition of other-goods, because the public believes that there is nothing “just as good.”<sup>18</sup>

The pro-social understanding of trademarks as a vessel for providing information to consumers has almost entirely eclipsed the darker producerist account,<sup>19</sup> although, as we shall see, it re-emerges in connection with the auratic use of IP.

Note that *aura*, as we use the term here, is not the same as *distinctiveness*, the quality that trademark law is meant to foster and protect, although the two concepts are importantly related. Trademark law considers an indicium (e.g., a word, symbol, or sound) distinctive when it is used by consumers to identify the source — i.e., the producer — of

16. See, e.g., *Qualitex Co. v. Jacobsen Prods. Co.*, 514 U.S. 159, 163–64 (1995) (citation omitted) (stating that trademark law “reduce[s] the customer’s costs of shopping and making purchasing decisions,” and “helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product”). See generally WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166–68 (2003) (arguing that trademark law protects the integrity of symbols that convey information about products and services, thereby reducing consumer search costs and making markets more efficient).

17. For an early statement of the view that trademarks function principally as a producerist strategy to reduce competition by creating artificial product differentiation and barriers to entry, see EDWARD H. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 204 (1st ed., 1933) (“[T]he protection of trade-marks from infringement and of business men generally from the imitation of their products known as ‘unfair trading’ is the production of monopoly . . . . To permit such infringements and imitations would be to purify competition by eliminating monopoly elements.”).

18. Kurt Borchardt, *Are Trademarks an Antitrust Problem?*, 31 *GEO. L.J.* 245, 246 (1943) (citations omitted). See generally Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 *TRADEMARK REP.* 305 (1979).

19. See Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 623–24 (2004) (“The Chicago School of law and economics has long offered a totalizing and, for many, quite definitive theory of American trademark law . . . . The influence of this analysis is now nearly total . . . . No alternative account of trademark doctrine currently exists.”).

a particular product or service.<sup>20</sup> Accordingly, the word “NIKE” or the “swoosh” symbol, identifies for consumers the producer of a particular athletic shoe. In this case, the mark identifies the shoe as “authentic” in that particular sense of connection to source. A mark may also come to stand for certain qualities that consumers associate with a product. The “MERCEDES” mark, for example, has strong connections in the minds of many consumers to qualities like luxury and wealth.<sup>21</sup> One way to think of the strategies to manufacture aura that we discuss here is as a merger of the distinctiveness function of trademark law with the concept of authorship that underlies copyright law. The result, if the merger is successful, is an alchemy that transforms a base object into a noble one by reinforcing a narrative that both distinguishes the product and elevates it by tying it to an author or, as we shall see, to a place, or by turning a mass-produced copy into a singular artifact.

In most (but not all) of the cases we will analyze here, IP is employed as a tool to help create and control a narrative about a product that is mass-produced and where copies are, in principle, indistinguishable.<sup>22</sup> The narrative is built as part of a bid to instill that product, in all its individual copies, with aura. For example, and as we shall discuss at greater length later, the Swiss furniture producer Vitra labors to remake mid-century modern furniture designs, previously understood as mass-produced works of artistic craftsmanship, as author-centered

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20. See Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *The Role of Consumer Uncertainty in Trademark Law: An Experimental and Theoretical Investigation*, 72 EMORY L.J. 489, 497 (2023) (citations omitted) (“The central purpose of trademark law is to preserve and promote the quality of information in the marketplace — specifically, information about the source and characteristics of products. It does so by providing exclusive rights in designations of the source of products. If consumers may rely on these designations of source to accurately identify the products they seek, then their search costs for those products are minimized. As for producers, those with a reputation for quality can use their trademarks to internalize the rewards from that reputation.”).

21. See Barton Beebe, Roy Germano, Christopher Jon Sprigman & Joel H. Steckel, *Testing for Trademark Dilution in Court and in the Lab*, 86 U. CHI. L. REV. 611, 625 (2019) (finding, as part of empirical tests inquiring into trademark dilution, that consumers made these associations with the MERCEDES mark).

22. This article focuses on protection by copyrights, designs, geographical indications, and trademarks. But it should be noted that aura production may also be supported by other areas of intellectual property law, including patents, see generally Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008), certification marks, see generally Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121 (2017), publicity rights, and the protection of traditional knowledge. The law may even support aura production at the country level: for examples on how market participants use linguistic means, social networks, corporate history, national art and history, cultural values, and the law to participate in the creation and consumption of authentic national brands (e.g., “Made in Italy”), see Gregory Kohler & Sabina Perrino, *Narrating “Made in Italy,”* 27 NARRATIVE INQUIRY 187, 187–88 (2017). See generally Sabina Perrino & Gregory Kohler, *Chronotopic Identities: Narrating Made in Italy Across Spatiotemporal Scales*, 70 LANGUAGE & COMMUN 94 (2020); KOLLEEN M. GUY, WHEN CHAMPAGNE BECAME FRENCH (2003); Natalie Corthésy, *Brand New IP: ‘Country Name Designation’ — From France with Love*, in THE FUTURE OF INTELLECTUAL PROPERTY (Daniel J. Gervais ed., 2021).



works of art — albeit works produced in many indistinguishable copies, with no copy privileged as original or authentic.<sup>23</sup> Similarly, Birkenstock has started to infuse an aesthetic and authorial dimension into its shoes by arguing that Karl Birkenstock, who developed most Birkenstock sandals in the second half of the 20th century, is their “author” under European copyright law.<sup>24</sup> In both cases, aura is found not in the artifact itself, but in the artifact’s relationship to a narrative that Vitra and Birkenstock labor to attach equally to all of the copies produced. Although Vitra and Birkenstock have leveraged IP rights to obtain exclusive control over certain designs, these companies focus on building an authorial pedigree for each product in the expectation that the consumer’s experience of the product is shaped, and arguably augmented, by reframing the product as a work of authorship, rather than as a comparatively utility-focused and anonymous work of craft.

Over a decade ago, Barton Beebe published a justly-celebrated article on what he called the “sumptuary” use of intellectual property — that is, the use of IP “to conserve . . . our system of consumption-based social distinction and the social structures and norms based upon it.”<sup>25</sup> Beebe expressed skepticism of IP’s capacity to perform this function over the long term. IP’s tendency to multiply varieties of distinction, Beebe argued, is likely to reach a congestion threshold: “At this limit, distinction itself becomes so abundant as to be perceived as indistinct; it becomes noise.”<sup>26</sup>

Although it may not appear so from our description so far, Beebe’s perspective was ultimately optimistic. The failure of IP’s sumptuary function, he argued, would free IP to perform what he called its “progressive” function — i.e., encouraging the production of distinction, rather than its consumption.<sup>27</sup> Our perspective is different. We focus on the role of IP in helping to produce an auratic experience tied to artifacts of consumption. This auratic use of IP is not simply a way of creating distinction in consumption but rather of deepening, and, not infrequently, inventing, our understanding of the social significance of an artifact of consumption. That is, the auratic use of IP is a technique for adding meaning to objects which may otherwise be treated more as commodities than as cultural artifacts.

This is not to suggest that auratic experience is always engineered deliberately, rather than by happenstance, but in many cases, the construction of aura and its connection to a particular product appears purposeful. Sometimes consumers desire aura, and producers figure out

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23. See *infra* Section II.B.

24. *Id.*

25. Barton Beebe, *Intellectual Property and the Sumptuary Code*, 123 HARV. L. REV. 809, 814 (2010).

26. *Id.* at 829.

27. *Id.* at 885–86.

ways to manufacture it. Sometimes producers work to create aura in order to differentiate their goods and change market conditions in their favor — i.e., from commodity competition to “monopolistic competition” between suppliers offering differentiated products (a situation much more congenial to producers).<sup>28</sup> And sometimes it seems like producers engage in rent-seeking by manufacturing aura, because IP allows or even encourages them to do so. As we will see, all these things are possible and indeed, appear to be happening for particular products.

Importantly, because it does more than actuate distinction, we doubt that the auratic use of IP is always likely to reach the congestion threshold Beebe predicts.<sup>29</sup> In Part III of this Article, we argue that there is a market for the auratic use of IP, and that market is likely to find an equilibrium. The role IP plays in this market for aura is not very different, at least in concept, from the role it plays in markets for products or services: IP provides incentives to create auratic narratives, which, given their public good characteristics, may otherwise be underproduced. At its core, our argument follows a consequentialist path and expands the standard justification for IP from product and service markets to the market for the production and consumption of auratic experience.

To apply a market rationale to the manufacture of aura does not mean that using IP in this market is always the right decision. We are interested in how the forces of supply and demand shape the emergence of aura in equilibrium. However, whether such equilibrium is socially beneficial is a separate question. As is true of IP rights generally, auratic uses of IP are likely to create both positive and negative effects for social welfare. On the one hand, auratic IP strategies are motivated by producers’ interest in softening competition through product differentiation — precisely the objection to trademark that we see the Supreme Court hinting at in *Mishawaka Rubber*,<sup>30</sup> but now using IP strategies not limited to trademark law. Additionally, the auratic use of IP could have regressive distributive consequences: firms work to create aura because they expect to be able to charge for it. On the other hand, the

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28. In markets where producers sell largely interchangeable commodity products, competition tends to force prices down toward the marginal cost of production. In contrast, in monopolistically competitive markets where producers’ products are differentiated, each producer is likely to possess some degree of market power, and their product to command a price in excess of marginal cost, allowing the producer to reap economic rents. See Benjamin Klein & John Shepard Wiley Jr., *Competitive Price Discrimination as an Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599, 629 (2003) (“Once firms produce unique products, an individual firm’s own-price elasticity of demand and profit-maximizing price relative to marginal cost does not tell us the extent of its antitrust market power, that is, its ability to restrict market output and raise market prices above the competitive level.”).

29. See Beebe, *supra* note 25, at 824–25.

30. See *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

use of IP to embed artifacts in a narrative about authenticity benefits the consumers who are able to access and enjoy this additional dimension of a product. Under some circumstances, the creation of social meaning may also benefit those who *do not* consume the product: as with other public goods, it's possible that providing auratic experience to certain consumers willing and able to pay for it will create "spillovers" that benefit those who will not or cannot.<sup>31</sup>

## II. THE PRODUCTION OF AURA

### *A. Benjamin's Concept of Aura*

Benjamin's account of aura is connected principally to historical artifacts, and especially artworks, that have passed down through time. Benjamin ties aura directly to the "cult value" of an artwork, which he opposes to the work's "exhibition value."<sup>32</sup> The aura of these objects, Benjamin states, was at first an aspect of their ritual function.<sup>33</sup> At some point artistic practice separated from ritual, with art objects repurposed for exhibition. And yet the cultic quality of the objects remained until extracted by photography, which removes "the reproduced object from the domain of tradition":<sup>34</sup>

[F]or the first time in world history, mechanical reproduction emancipates the work of art from its parasitical dependence on ritual. To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility. From a photographic negative, for example, one can make any number of prints; to ask for the "authentic" print makes no sense. But the instant the criterion of authenticity ceases to be applicable to artistic production, the total function of art is reversed. Instead of being based on ritual, it begins to be based on another practice — politics.<sup>35</sup>

That final sentence is a marker of the political program underlying Benjamin's ideas about aura. Benjamin saw aura's decline as a

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31. For example, if Eames chairs are marketed using a rich authorial narrative about Charles and Ray Eames, even those who do not consume the chair may consume the narrative and may as a consequence enjoy a richer understanding and appreciation of mid-century design aesthetics. *See generally* Mark A. Lemley & Brett M. Frischmann, *Spillovers*, 107 COLUM. L. REV. 257 (2007) (discussing how IP rules encourage spillovers, and how spillovers encourage innovation).

32. BENJAMIN, *supra* note 1, at 225.

33. *See id.* at 224–26.

34. *Id.* at 221.

35. *Id.* at 224 (citation omitted).

desirable “revolutionary liquidation of tradition,” as opposed to “a fascism that is heir to that tradition.”<sup>36</sup> For our purposes here, however, we focus not on Benjamin’s ideas as enmeshed in the political struggle of his times, but instead more abstractly as a theory about the relationship of art and technology. Benjamin describes aura as a quality that is “prerequisite to the concept of authenticity” and central to the aesthetic experience the artifact provokes — a framing that suggests a relationship where aura is the signifier and authenticity the thing signified.<sup>37</sup> And while authenticity is a concept that is relevant, although perhaps not quite central, to intellectual property theory,<sup>38</sup> our focus is on the broader concept of aura as the *cult value* of objects.

Benjamin’s articulation of the concept of aura is oracular, and also, we believe, incomplete.<sup>39</sup> He never states definitively whether aura is connected to some quality of a unique artifact, or is rather an experience that, as Warhol put it, is “all in the other person’s eyes.”<sup>40</sup> The former

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36. Jonathan Davis, *Questioning ‘The Work of Art in the Age of Mechanical Reproduction’: A Stroll Around the Louvre After Reading Benjamin*, 6 CONTEMP. AESTHETICS (Jan. 11, 2008), <https://hdl.handle.net/2027/spo.7523862.0006.015> [<https://perma.cc/E6BU-9WA9>]. Benjamin’s friend and benefactor, Theodor Adorno, objected to Benjamin’s liberatory framing of the death of art’s auratic qualities, and wrote in his *Aesthetic Theory* that nothing in Benjamin’s theory could distinguish art from propaganda: “The failure of Benjamin’s grandly conceived theory of reproduction remains that its bipolar categories make it impossible to distinguish between a conception of art that is free of ideology to its core and the misuse of aesthetic rationality for mass exploitation and mass domination, a possibility he hardly touches upon.” THEODOR ADORNO, *AESTHETIC THEORY* 56 (R. Hullot-Kentor ed. & trans., 1998) (1970); see also ROSEN, *supra* note 5, at 225 (“[T]he objection is that Benjamin’s dismissal of the aura is too extreme: open as the traditional work of art is to criticism, to sweep aside its auratic qualities entirely leaves no basis for any distinction between art and propaganda.”).

37. BENJAMIN, *supra* note 1, at 220. On the relationship between aura and authenticity, see also Heymann, *supra* note 7, at 29.

38. *Id.* at 25 (describing how malleable and contextual the concept of authenticity is).

39. Benjamin’s friend Bertolt Brecht recorded in his working diary his reaction to reading Benjamin’s essay: “All mysticism, from an attitude against mysticism. This is how the materialist view of history is adapted! It is quite dreadful.” MICHAEL ROSEN, *ON VOLUNTARY SERVITUDE: FALSE CONSCIOUSNESS AND THE THEORY OF IDEOLOGY* 235 (2016) (quoting Bertolt Brecht, *ARBEITSJOURNAL* (1938)).

Whatever its gaps and frustrations, Benjamin’s essay has catalyzed a rich literature, including mostly admiring work placing Benjamin’s ideas in historical and philosophical context. See, e.g., RICHARD WOLIN, *WALTER BENJAMIN: AN AESTHETIC OF REDEMPTION* 183–97 (1982); Miriam Bratu Hansen, *Room-for-Play: Benjamin’s Gamble with Cinema*, 109 OCTOBER 3 (2004); ESTHER LESLIE, *WALTER BENJAMIN: OVERPOWERING CONFORMISM* 130–48 (2000). For philosophical critiques, including critiques of Benjamin’s central concept of aura and its vulnerability to mechanical reproduction, see, for example, RICHARD A. ETLIN, *IN DEFENSE OF HUMANISM: VALUE IN THE ARTS AND LETTERS* 124–26 (1996); Jerome Stolnitz, *On the Apparent Demise of Really High Art*, 43 J. AESTHETICS & ART CRITICISM 345–46 (1985); Ian Knizek, *Walter Benjamin and the Mechanical Reproduction of Artworks Revisited*, 33 BRIT. J. AESTHETICS 357 (1993). For a wide-ranging collection of Benjamin scholarship, see generally HANS ULRICH GUMBRECHT & MICHAEL J. MARRINAN, *MAPPING BENJAMIN: THE WORK OF ART IN THE DIGITAL AGE* (2003).

40. ANDY WARHOL, *THE PHILOSOPHY OF ANDY WARHOL: FROM A TO B AND BACK AGAIN* 77 (1975). Similarly, as Laura Heymann points out, authenticity is a multi-faceted and contextual concept. See Heymann, *supra* note 7, at 26–27.

account of aura fits better with Benjamin's idea that mechanical reproduction, by severing the connection between an image and its history, deprecates aura. So too does a passage that first appeared in his 1931 essay *Little History of Photography*,<sup>41</sup> and that reappears almost verbatim in *The Work of Art in the Age of Mechanical Reproduction*. Here is the passage, as it appears in the later work:

We define the aura . . . as the unique phenomenon of a distance, however close it may be. If, while resting on a summer afternoon, you follow with your eyes a mountain range on the horizon or a branch which casts its shadow over you, you experience the aura of those mountains, of that branch. This image makes it easy to comprehend the social bases of the contemporary decay of the aura. It rests on two circumstances, both of which are related to the increasing significance of the masses in contemporary life. Namely, the desire of contemporary masses to bring things "closer" spatially and humanly, which is just as ardent as their bent toward overcoming the uniqueness of every reality by accepting its reproduction . . . . Unmistakably, reproduction as offered by picture magazines and newsreels differs from the image seen by the unarmed eye. Uniqueness and permanence are as closely linked in the latter as are transitoriness and reproducibility in the former. To pry an object from its shell, to destroy its aura, is the mark of a perception whose "sense of the universal equality of things" has increased to such a degree that it extracts it even from a unique object by means of reproduction.<sup>42</sup>

Benjamin juxtaposes with historical and natural objects manifesting "[u]niqueness and permanence"<sup>43</sup> the images of these objects characterized by "transitoriness and reproducibility."<sup>44</sup> The image is incapable, in Benjamin's account, of transmitting the auratic experience of the artifact or the natural object. Indeed, the existence of the image seems to reach back and drain the auratic experience from its

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41. WALTER BENJAMIN, *LITTLE HISTORY OF PHOTOGRAPHY*, reprinted in WALTER BENJAMIN, 2 *SELECTED WRITINGS* 515 (Michael W. Jennings, Howard Eiland & Gary Smith eds., Rodney Livingston et al. trans., Harvard Univ. Press 1999).

42. BENJAMIN, *supra* note 1, at 222–23.

43. *Id.* at 223.

44. *Id.*

source.<sup>45</sup> That the image would alter our perception of the original is far from self-evident.

It is important, in considering how aura might be extracted from a unique object, to keep in mind that Benjamin wrote during a particular technological transition — the popularization of photography and motion pictures. Although cameras were in wide circulation beginning with the Kodak Brownie in 1900,<sup>46</sup> and color photographic processes had been available since the Lumière brothers introduced the Autochrome plate in 1907,<sup>47</sup> it was not until film-based Autochrome in 1932,<sup>48</sup> followed the next year by Dufaycolor film for motion pictures and still photography (1935)<sup>49</sup> and then Kodachrome (1935),<sup>50</sup> that color photography became widely used and available to the public. Benjamin's essay thus appeared at the moment when photography's truth claim — the idea that photographs accurately depict reality in a way that is free, as André Bazin put it, of the “sin” of subjectivity<sup>51</sup> — was at its zenith. For Bazin, “[t]he photographic image is the object itself, the object freed from the conditions of time and space that govern it.”<sup>52</sup> Charles Sanders Peirce's earlier (1894) essay *Logic as Semiotic: The Theory of Signs* advances a similar view of what photography could do:

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45. Benjamin's notion that mechanical reproduction destroys aura has not remained uncontested. Others argue that the constant reproduction and (re-)interpretation of canonical masterpieces by different players in the art world has enhanced, not diminished the aura of artwork. See Monica Kjellman-Chapin, *Manufacturing “Masterpieces” for the Market: Thomas Kinkade and the Rhetoric of High Art*, in THOMAS KINKADE: THE ARTIST IN THE MALL 206, 221 (Alexis Boylan ed., 2011); Jacquelynn Baas, *Reconsidering Walter Benjamin: “The Age of Mechanical Reproduction,” in Retrospect*, in THE DOCUMENTED IMAGE: VISIONS IN ART HISTORY 337, 346 (Gabriel Weisberg & Laurinda Dixon eds., 1987); see also Beebe, *supra* note 25, at 868 (“A common — and probably valid — criticism of Benjamin's *Work of Art* essay is that it failed to recognize one important consequence of the emergence of mimetic technology: in producing ever more copies, ‘mechanical reproduction’ only amplifies all the more the distinctive ‘aura’ of those things that are perceived not as mechanically reproduced copies, but rather as authentic originals.”).

46. See Kodak Brownie Camera, FRANKLIN INST., <https://www.fi.edu/history-resources/kodak-brownie-camera> [<https://perma.cc/N3VH-STGT>].

47. See *History of the Autochrome: The Dawn of Colour Photography*, U.K. NAT'L SCI. & MEDIA MUSEUM (June 5, 2009), <https://blog.scienceandmuseum.org.uk/autochromes-the-dawn-of-colour-photography/> [<https://perma.cc/ELK5-JH42>].

48. See *id.*

49. See Barbara Flueckiger, *Dufaycolor | Timeline of Historical Film Colors*, UNIV. ZURICH DEP'T FILM STUD., <https://filmcolors.org/timeline-entry/1257/> [<https://perma.cc/TB7W-EAJG>].

50. See Barbara Flueckiger, *Kodachrome | Timeline of Historical Film Colors*, UNIV. ZURICH DEP'T FILM STUD., <https://filmcolors.org/timeline-entry/1277/> [<https://perma.cc/EEK9-HNNJ>].

51. André Bazin, *The Ontology of the Photographic Image*, 13 *FILM Q.*, no. 4, 1960, at 4, 7.

52. *Id.* at 8.

Photographs, especially instantaneous photographs, are very instructive, because we know that they are in certain respects exactly like the objects they represent. But this resemblance is due to the photographs having been produced under such circumstances that they were physically forced to correspond point by point to nature.<sup>53</sup>

Of course, there were means of mechanical reproduction of visual images before the camera; artworks, in particular, had long been mass-reproduced by woodcuts and then lithography. But the camera was qualitatively different, especially after the introduction of color film.<sup>54</sup> Unlike lithography, photography could reproduce the image of an artwork precisely. It could, Benjamin thought, efface entirely the visual difference between original and reproduction, thereby introducing into the world a “sense of the universal equality of things”<sup>55</sup> which denies authority to the original artifact.

Mostly we don’t think about photography this way anymore; our understanding of the medium is more skeptical of truth claims. Susan Sontag’s widely read 1977 book *On Photography* is as good an example of the modern approach as any.<sup>56</sup> Sontag rejects the “presumption of veracity” — photographs, Sontag argues, are “as much an interpretation of the world as paintings and drawings are.”<sup>57</sup>

Perhaps that is overstated: the interpretive content of a flat, evenly lit, unadorned reproduction of a public domain painting of the sort that a museum might feature on its website is so scant that even copyright’s low originality bar will not permit such a reproduction to qualify as a copyrightable work in itself.<sup>58</sup> But set aside the question of interpretation versus representation. Artworks in their physical form have a presence that cannot be captured precisely in an image. And yet, whether

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53. CHARLES SANDERS PEIRCE, LOGIC AS SEMIOTIC: THE THEORY OF SIGNS, *reprinted in PHILOSOPHICAL WRITINGS OF PEIRCE* 98, 106 (Justus Buchler ed., 1955).

54. Indeed, Benjamin conceded that black-and-white photographs could themselves have aura, as in this famous passage from Benjamin’s *Little History of Photography* (1931) describing a black-and-white photographic portrait of German philosopher Friedrich Wilhelm Joseph von Schelling: “Everything about these early pictures was built to last . . . [T]he very creases in people’s clothes have an air of permanence. Just consider Schelling’s coat: It will surely pass into immortality along with him: the shape it has borrowed from its wearer is not unworthy of the creases in his face.” BENJAMIN, *supra* note 41, at 507, 514.

55. BENJAMIN, *supra* note 1, at 223.

56. SUSAN SONTAG, *ON PHOTOGRAPHY* (1977).

57. *Id.* at 6–7.

58. *See, e.g.*, Bridgeman Art Libr. v. Corel Corp., 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (“In this case, plaintiff by its own admission has labored to create ‘slavish copies’ of public domain works of art. While it may be assumed that this required both skill and effort, there was no spark of originality — indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances.”).

photography “depreciate[s]” the presence (as Benjamin claims)<sup>59</sup> of the original depends on the centrality to the experience of the viewer in contact with the original of what is *not* captured in a photograph. So even before the erosion of photography’s truth claim, Benjamin’s theory about the death of aura, and photography’s introduction of “the universal equality of things,”<sup>60</sup> made a leap in logic.

That last point takes us back to Vitra.<sup>61</sup> Vitra is in the business of disproving the death of aura, of undermining Benjamin’s expectation that mechanical reproduction would erase privilege and benefit the masses. Vitra deals in objects that have no original; every Eames chair Vitra distributes is a copy. And yet Vitra instills each of those copies with a kind of aura; specifically, an *authorial narrative*.<sup>62</sup> And Vitra does this not to erase privilege, but to reinforce it.

### *B. Authorial Narratives: Vitra, Birkenstock, and Giacometti*

Vitra is a family-owned company near Basel, Switzerland, founded in 1957 as the exclusive licensee of furniture from the Herman Miller Collection for the European market — primarily designs by American designers Charles and Ray Eames and George Nelson.<sup>63</sup> In the decades since its founding, Vitra has sold chairs, sofas, tables, and lamps designed in the 1950s and 1960s, while also expanding its offerings to more contemporary designs. Many of the designs are widely knocked off in the United States, as illustrated in Figure 1, which shows one of many U.S. replicas of the Eames lounge chair.<sup>64</sup>

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59. See BENJAMIN, *supra* note 1, at 221.

60. *Id.* at 223.

61. See *supra* Part I.

62. In the following, we will focus on authorial, place, and originality narratives. This is arguably not the only way to slice strategies of aura production. Laura Heymann has introduced, for example, an aura of exclusivity, distinctiveness, and inventiveness. See Heymann, *supra* note 7, at 29.

63. Rolf Fehlbaum, *Public, Office, Home*, in PROJECT VITRA 101, 118 (Cornel Windlin & Rolf Fehlbaum eds., 2008).

64. Mary Frances Knapp, *Where To Find the Best Eames Chair Lookalikes (That Don’t Cost \$10K)*, VICE (Dec. 19, 2022, 7:12 PM), <https://www.vice.com/en/article/jgp9y7/herman-miller-eames-lounge-chair-replica> [<https://perma.cc/KY6E-H7UG>].



### Amazon

We couldn't help but Eamesdrop and hear that you, too, are not flush with rubies/have a more modest budget in your quest for an Eames-inspired chair. Luckily, [Amazon](#) is filled with plenty of affordable Eames lounge chair alternatives with similar vibes, including this 4-star average rated *chaise* that comes in seven different colorways, including one with white leather (the Almas Beluga caviar of leathers). Swag.

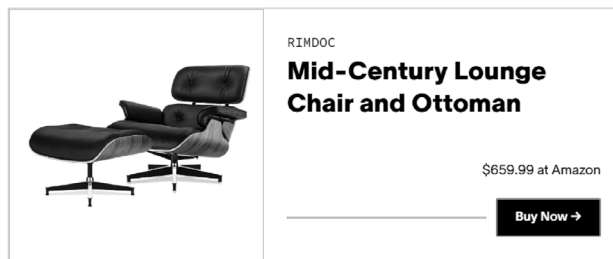


Figure 1: Replica of Eames Lounge Chair<sup>65</sup>

It is not surprising that knock-offs of furniture designs are widely available in the United States. Copying and imitating designs is a common and long-standing practice in an industry where furniture designs are revealed at trade shows (such as the annual High Point Market in North Carolina)<sup>66</sup> and designers solicit new designs with explicit references to existing articles.<sup>67</sup> U.S. intellectual property law, which grants protection to furniture only in limited circumstances, is a close fit with that culture of imitation in the U.S. furniture design industry. Furniture may be protected by design patents, but that protection expires quickly relative to the commercial life of many furniture designs.<sup>68</sup> In fact, some (although not all) of the American mid-century furniture designs that Vitra markets in Europe were originally protected in the United States by design patents, but those expired long ago. Furthermore, furniture can be categorized as product configuration or design protected

65. *Id.*

66. HIGH POINT MARKET, <https://www.highpointmarket.org> [<https://perma.cc/79M4-A6ZJ>].

67. *See, e.g.*, *Bush Indus. v. O'Sullivan Indus.*, 772 F. Supp. 1442, 1467–58 (D. Del. 1991) (counterdefendant submitted a design order for a “knock-off Sauder unit” in reference to a different designer, with both parties agreeing it was a normal practice).

68. U.S. design patents currently have a term of fifteen years from the date the patent is granted. 35 U.S.C. § 173. U.S. design patents resulting from applications filed before May 13, 2015 (as would be the case for virtually all the designs Vitra markets) have a fourteen-year term from the date of grant and so would have expired long ago. 35 U.S.C. § 173; *see also* Katia Alcantar, *You Can't Sit with Us: Furniture's Future in Fighting Phonies*, 56 IDEA 359, 364–65 (2016).

by trade dress. For example, consider the trade dress registration by furniture company Knoll of the design for the “Barcelona” chair designed in 1929 by Mies van der Rohe and Lily Reich.<sup>69</sup> That said, courts are generally skeptical about protecting claimed trade dress, based both on competition concerns and doubt about whether the shape of products is likely to be used by consumers to distinguish source.<sup>70</sup> Indeed, because courts refuse to treat product design as inherently distinctive, litigation of furniture design trade dress registrations requires proof of secondary meaning,<sup>71</sup> at least if litigation is commenced before those registrations are permitted to become incontestable.<sup>72</sup> This is difficult and expensive, even for established brands.<sup>73</sup>

Moreover, the functionality doctrine,<sup>74</sup> which prohibits registration of functional product features and is intended to encourage legitimate competition by maintaining a proper balance between trademark law and patent law, further limits protection.<sup>75</sup> If a furniture design is functional — meaning that it is “essential to the use or purpose of the article or if it affects the cost or quality of the article”<sup>76</sup> — it will not be eligible for trade dress protection. These factors may help explain why even registered designs like the Barcelona chair are widely knocked off<sup>77</sup> — the USPTO may grant trade dress rights for those designs, but they are weak and likely to be invalidated if asserted in litigation. Those rights

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69. *See* The mark consists of a configuration of a chair with a metal frame and leather cushions, Registration No. 2,893,025.

70. *See, e.g.,* *Yurman Design v. PAJ, Inc.*, 262 F.3d 101, 116–17 (2d Cir. 2001); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 16 cmt. b (AM. L. INST. 1995).

71. *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 216 (2000) (holding that trade dress in the design of a product is distinctive, and therefore protectable, only upon a showing of secondary meaning).

72. *See* 15 U.S.C. § 1065 (authorizing trademark owner to file an affidavit seeking incontestable status after five years of continuous use provided certain conditions apply, including the absence of a proceeding either at the USPTO or in court regarding the validity of the mark).

73. *See Herman Miller, Inc. v. Palazzetti Imps. and Exps.*, 270 F.3d 298, 312–14 (6th Cir. 2001) (finding Herman Miller established sufficient evidence via direct testimony, advertising, sales figures, and proof of intentional copying to create factual dispute as to a secondary meaning of the Eames chair).

74. 15 U.S.C. § 1052(e)(5) (prohibiting registration of a mark that “comprises any matter that, as a whole, is functional”).

75. *See Qualitex Co. v. Jacobson Prods.*, 514 U.S. 159, 164–65 (1995) (explaining that the functionality limitation prevents trademark law from “inhibiting legitimate competition by allowing a producer to control a useful product feature”).

76. U.S. PAT. & TRADEMARK OFF., TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.02a (2022).

77. *See, e.g., The Best Barcelona Chair Replica 2022 – Buyer’s Guide and Reviews*, MID CENTURY CENT., <https://www.midcenturycentral.com/post/the-best-barcelona-chair-replica> [<https://perma.cc/6VQR-2N7P>].

are useful mostly as leverage against smaller competitors who cannot afford to defend against a trade dress lawsuit.<sup>78</sup>

U.S. copyright law does not provide a panacea to furniture manufacturers either. Under the two-prong separability test developed by the Supreme Court in *Star Athletica v. Varsity Brands*, the aesthetic elements of “useful articles” are copyrightable only if they can be separately identified from the article or a utilitarian feature of the article and if they qualify as copyrightable works if expressed in any medium (i.e., if they are original).<sup>79</sup> While *Star Athletica* may have expanded the opportunities for useful articles to become copyrighted in general,<sup>80</sup> furniture design is unlikely to surpass this threshold in most cases. Many furniture designs (and especially modern furniture designs) are unitary forms — that is, they are defined by their overall shape, and not by pieces and parts of that shape. For designs like these, U.S. copyright law tends to withhold protection: *Star Athletica* makes clear that the overall shape of a useful article is not protected and that copyright protection is instead limited to “separable” pictorial, graphic, and sculptural elements of such articles, such as a carving of a face in the back of a chair.<sup>81</sup> Therefore, while U.S. copyright, design patent, and trade dress protection could apply to furniture in theory, all three regimes impose significant hurdles for furniture designers looking to benefit from intellectual property protection.

Compared to the United States, furniture designers in Europe enjoy more protection, primarily because of European copyright law.<sup>82</sup> Similar to design patents in the United States, the role of analogous European sui generis design protection for furniture design is limited (it

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78. Courts are divided on whether the existence of alternative designs counts as evidence of non-functionality. See Alcantar, *supra* note 68, at 379. In *Heptagon Creations, Ltd. v. Core Grp. Mktg.*, No. 11-CV-01794, 2011 WL 6600267 (S.D.N.Y. Dec. 22, 2011), *aff'd*, 507 F. App'x 74 (2d Cir. 2013), the Southern District of New York denied trade dress protection to a chair with a seat and armrest textured to resemble a carved tree trunk. It found that the claimed elements “comprise[d]” the total piece, and so were “essential to the use or purpose” or affected cost/quality. *Id.* And in *Specialized Seating, Inc. v. Greenwich Industries*, 616 F.3d 722, 727 (7th Cir. 2010), Judge Easterbrook arrived at the same conclusion, but with a holistic analysis — the back of a folding chair, though not utilized by competitors, was sufficiently functional that it was essential to the use or purpose of the chair as a whole. *But see* Blumenthal Distrib., Inc., v. Herman Miller, Inc., 963 F.3d 859, 867 (9th Cir. 2020) (holding that the overall appearance of the Eames chair resulted from non-utilitarian design choices, thereby affirming in favor of Herman Miller that Blumenthal had infringed Eames trade dress rights).

79. See *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 414–16 (2017).

80. See Mark McKenna, *Knowing Separability When We See It*, 166 U. PA. L. REV. ONLINE 127, 127 (2017).

81. See *Star Athletica*, 580 U.S. at 417.

82. For a comprehensive treatment of the copyright/design interface in various European legal systems, see generally THE COPYRIGHT/DESIGN INTERFACE (Estelle Derclaye ed., 2018). For a comparison on how U.S. and European law protect designs, see generally Lena Schickl, *Protection of Industrial Design in the United States and in the EU: Different Concepts or Different Labels?*, 16 J. WORLD INTELL. PROP. 15 (2013).

expires twenty-five years after registration at the latest),<sup>83</sup> and protecting furniture design through three-dimensional trademarks — the functional equivalent to U.S. trade dress protection — is challenging due to distinctiveness and non-functionality requirements.<sup>84</sup> However, European copyright law has become less hostile toward protecting furniture design over the last few decades. Traditionally, copyright’s originality standard was not harmonized at the level of the European Union but was a matter of the copyright laws of individual EU member states.<sup>85</sup> The copyright systems of various European countries were traditionally hostile to granting copyright protection to works of applied art (i.e., similar to the approach in the United States).<sup>86</sup> For example, until 2014 German copyright law applied a stricter originality standard to works of applied art. Roughly speaking, German courts applied a “museum test”: an object that would be acquired by the Pinakothek der Moderne (Munich’s modern art museum) for their design collection could be copyrightable, but everyday furniture would not qualify,<sup>87</sup> making it challenging for ordinary furniture design to meet the substantial originality bar.<sup>88</sup> Similarly, Italian copyright law until 2001 reserved copyright protection to “unique” works of art, granting copyrights to designs

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83. Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community Designs, art. 12, 2002 O.J. (L 3) 1, 4. In addition, a common European design right was only established with the European Design Regulation in 2002, and national design protection laws were only harmonized by the European Design Directive in 1998. See DAVID STONE, EUROPEAN DESIGN LAW: A PRACTITIONER’S GUIDE 1.02–1.65 (2d ed. 2016). At that time, mid-twentieth-century furniture lacked novelty, and therefore European design protection was not available to Vitra. See Michael Ritscher & Robin Landolt, *Shift of Paradigm for Copyright Protection of the Design of Products*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT INTERNATIONALER TEIL 125, 127 (2019).

84. Article 7(1)(e) of the European Trademark Regulation holds that signs consisting exclusively of the shape of goods cannot be registered as trademarks if the shape results from the nature of the goods, is necessary to obtain a technical result, or gives substantial value to the goods. See Regulation (EU) 2017/1001, of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark, art. 7(1)(e), 2017 O.J. (L 154) 1, 8.

85. Christina Angelopoulos, *The Myth of European Term Harmonisation: 27 Public Domains for 27 Member States*, 43 INT’L REV. INTELL. PROP. & COMPETITION L. 567, 569 (2012).

86. Ritscher & Landolt, *supra* note 83, at 127–29.

87. Ansgar Ohly, *The Case for Partial Cumulation in Germany*, in THE COPYRIGHT/DESIGN INTERFACE 128, 154 (Estelle Derclaye ed., 2018). Relatedly, the Ninth Circuit recently held that even though the Eames lounge chair has been exhibited at museums such as New York City’s Museum of Modern Art and was heavily featured in the TV show “Mad Men,” that was not sufficient for the Eames trade dress to be famous. *Blumenthal Distrib., Inc., v. Herman Miller, Inc.*, 963 F.3d 859, 871 (9th Cir. 2020).

88. Nevertheless, German courts acknowledged the copyrightability of Charles Eames’s lounge chair (in 1981) and of “Le Corbusier” chairs (in 1987). Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 1986, *Neue Juristische Wochenschrift* [NJW] 2687 (1987) (Ger.) (Le Corbusier); Oberlandesgericht Frankfurt [OLG] [Court of Appeals Frankfurt] Mar. 19, 1981, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 739 (1981) (Ger.) (Eames lounge chair).

only if they could be separated from their intended use.<sup>89</sup> This separability doctrine (“scindibilità”) de facto excluded all three-dimensional designs from the protection.<sup>90</sup> That is why Florence’s Court of Appeal denied copyright protection to “Le Corbusier” chairs designed by the famous architect.<sup>91</sup> This situation made it possible for the Italian furniture industry to cheaply produce and distribute imitations of virtually any furniture design without having to pay royalties.<sup>92</sup>

It was through the harmonization of European copyright law that originality standards across work categories were aligned<sup>93</sup> and, for works of applied art, in some cases lowered. The European Design Directive of 1998 stated that designs can benefit from concurrent protection by both design and copyright law,<sup>94</sup> which triggered extensive changes in the copyright laws of various member states, including Germany and Italy.<sup>95</sup> In U.K. copyright law, copyright protection for artistic works that are “industrially manufactured” was extended in 2016 from twenty-five years after the first marketing of the product to seventy years after the death of the author.<sup>96</sup> And in the 2019 *Cofemel* decision, the European Court of Justice extended the harmonized originality standard to works of applied art and clarified that such works

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89. See Estelle Derclaye, *The Copyright/Design Interface in Italy*, in *THE COPYRIGHT/DESIGN INTERFACE* 269, 278–90 (Estelle Derclaye ed., 2018); Ritscher & Landolt, *supra* note 83, at 127.

90. Marco Bellia, *Comment on “Metalco” — “Top-Tier Design”, Copyright Protection, and the Assessment of the “Artistic Value” Requirement Under Italian Law*, *INT’L REV. INTELL. PROP. & COMPETITION L.* 875, 875–76 (2016).

91. Corte di Appello di Firenze [Court of Appeal Florence], Feb. 4, 1989, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* [GRUR] 743, 745 (1991) (“Le Corbusier”).

92. In 2008, the European Court of Justice held that the mere display of Le Corbusier armchairs and sofas, which were produced by an Italian manufacturer (where this furniture was not protected by copyright), in a German department store (where the furniture was protected by copyright) was not a violation of the distribution right. See Case C-456/06, *Peek & Cloppenburg KG v. Cassina SpA*, 2008 E.C.R. I-02731.

93. Over time, various European copyright directives and the European Court of Justice settled on the author’s “own intellectual creation” as the originality standard. See Matthias Leistner, *Copyright at the Interface Between EU Law and National Law: Definition of “Work” and “Right of Communication to the Public,”* 10 *J. INTELL. PROP. L. & PRACT.* 626, 626 (2015).

94. Directive 98/71/EC of the European Parliament and of the Council of Oct. 13, 1998 on the Legal Protection of Designs, art. 17, 1998 O.J. (L 289) 28, 28.

95. For details, see Ohly, *supra* note 87; Ritscher & Landolt, *supra* note 83, at 127–28; Derclaye, *supra* note 89, at 290–91; Bellia, *supra* note 90, at 876.

96. *INTELL. PROP. OFF., REPEAL OF SECTION 52 OF THE COPYRIGHT, DESIGNS AND PATENTS ACT 1988* (2017), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/606207/160408\\_guidance\\_s52\\_final\\_web\\_accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/606207/160408_guidance_s52_final_web_accessible.pdf) [<https://perma.cc/K2CQ-W5D8>]; Rima Aouf, *10 Popular Furniture Replicas that Are Now Outlawed by UK Copyright*, *DEZEEN* (Aug. 4, 2016), <https://www.dezeen.com/2016/08/04/10-popular-furniture-replicas-outlawed-uk-copyright-eames-hans-wegner-arne-jacobsen> [<https://perma.cc/26Y8-M349>]; see also Lionel Bently, *The Design/Copyright Conflict in the United Kingdom: A History*, in *THE COPYRIGHT/DESIGN INTERFACE* 171, 222–25 (Estelle Derclaye ed., 2018).

can be protected by both design and copyright law if they “over and above their practical purpose . . . generate a specific, aesthetically significant visual effect.”<sup>97</sup> In general, as European copyright law got rid of clear separability requirements and harmonized originality standards across all work categories, it has become easier for producers of applied art to claim copyright protection for their products.<sup>98</sup>

Not surprisingly, Vitra is an active IP litigator in Europe, bringing copyright, design, and unfair competition lawsuits against European sellers of Eames designs, as well as other designs it controls in the EU. Vitra has used copyright law to proceed against distributors of Eames replicas in various European countries,<sup>99</sup> and it owns hundreds of registered European design rights on furniture designs.<sup>100</sup> But Vitra’s primary strategy is not legal, it is cultural. Vitra makes furniture and also *stories* about furniture. Stories about the origin of the furniture they sell, and, especially, about the lives, relationships, personalities, achievements, and cultural significance of the furniture designers they promote. Although the furniture designs Vitra deals in historically have been understood, and presented to the public, as attractive but principally functional works of craft, Vitra labors to re-situate these artifacts

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97. Case C-638/17, *Cofemel vs. G-Star Raw*, ECLI:EU:C:2019:721 ¶ 58 (Sept. 12, 2019). In its *Brompton* decision, the court held in addition that the shape of a bicycle whose patent had expired can still be protected by copyright if the product shape fulfills copyright’s originality standard, in particular if the “author expresses his creative ability in an original manner by making free and creative choices in such a way that that shape reflects his personality.” Case C-833/18, *SI, Brompton Bicycle Ltd. v. Chedech/Get2Get*, ECLI:EU:C:2020:461 ¶ 38 (June 11, 2020).

98. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 13, 2013, 199 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], 52 (2013) (Ger.) (holding that German copyright law does not distinguish between works of applied and purpose-free art, which can lead to the copyrightability of a toy train). *But see* Ohly, *supra* note 87, at 163 (noting some uncertainties created by this decision). Note that even if a furniture design is copyrightable in Europe, this does not necessarily mean that a U.S. producer can benefit from such protection if its products are sold in Europe. In 2020, the French Supreme Court held that the Tulip chair, designed by Eero Saarinen and sold by Knoll, is not copyrightable under French law due to the reciprocity rule set under Art. 2(7) of the Berne Convention. *See* Brad Spitz, *The French Supreme Court Rules that Knoll ‘Tulip’ Chair Is Not Protected by Copyright*, KLUWER COPYRIGHT BLOG (Feb. 8, 2021), <https://copyrightblog.kluweriplaw.com/2021/02/08/the-french-supreme-court-rules-that-knoll-tulip-chair-is-not-protected-by-copyright> [<https://perma.cc/87G6-SRYT>].

99. For a Dutch decision holding that Vitra’s Eames Plastic Side Chair is copyrightable, see *Vitra Collections AG v. Kwantum Netherlands BV* [Court of Appeals the Hague], ECLI:NL:GHDHA:2020:1218 (July 14, 2020), <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2020:1218> [<https://perma.cc/84UC-YZVH>].

100. A search on Design View showed 286 registered EU design rights for Vitra and its subsidiaries, available at <https://www.tmdn.org/tmdsview-web/#/dsview/results?page=1&pageSize=20&criteria=W&offices=EM&territories=AT,BE,BG,HR,CY,CZ,DK,EE,FI,FR,DE,GR,HU,IE,IT,LV,LT,LU,MT,NL,PL,PT,RO,SK,SI,ES,SE&applicantName=VITRA%20PATENTE%20AG,vitra%20ag> [<https://perma.cc/FV7D-K5F4>]. Again, note that designs need to be novel upon registration, and expire twenty-five years after registration at the latest. By contrast, Vitra only owns a handful of EU three-dimensional trademarks on its furniture, most likely due to the challenge to achieve distinctiveness for furniture.

as works of art. It does so by constructing and relentlessly reinforcing a rich authorial narrative around the furniture it sells — the kind of narrative that dominates in painting, sculpture, literature, and other traditional forms of “high art” but which has been peripheral in the distinct category of “artistic craftsmanship” into which furniture, home decor, fabric designs, and other functional works have historically been classed. For these works, authorial identity has been submerged: the designer of a table, or a lamp, or a piece of fabric has been, until quite recently, only rarely the focus of attention.

Vitra works to boost furniture design into the world of high art by harnessing the powerful and overlapping regimes of IP rights in Europe to assert exclusive control over these designs, and, just as importantly, control over the *authorial narratives* that Vitra creates and labors to attach to these designs. The Vitra Factory store and Design Museum are full of stories about the lives of Charles and Ray Eames, George Nelson, Verner Panton, and the other designers whose furniture Vitra markets.<sup>101</sup> Vitra is eager to associate itself with the designers, and to cast what it does in stewarding the designs as a fulfillment of the authorial narrative. In fact, the Vitra Design Museum is located on Charles-Eames-Strasse outside the small town of Weil am Rhein.<sup>102</sup> Vitra maintains the property estate of Charles and Ray Eames (over 1,000 material studies, prototypes, tools, and other items), and Vitra features a reconstruction of their original workplace as part of a showroom in the Vitra museum.<sup>103</sup>

In Vitra’s telling, this narrative about authorship, about the connection between the author and the artifact is, above all, what makes a chair or a table or a lamp *authentic*. The authorial narrative is the prerequisite to the authenticity of any copy of an Eames design, and that narrative also shapes and arguably enriches the consumer’s aesthetic response to the artifact — the consumer will experience the artifact in the framework of the narrative, which includes information about the author’s intention, and about the aesthetic and sociological context in which the design took shape. Rolf Fehlbaum, Vitra’s former CEO, has in fact argued not only that the Eames Plywood chairs produced by Charles and Ray Eames in 1946 are “originals,” but that the Plywood chairs produced by Vitra today are “originals” as well.<sup>104</sup> He argues that

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101. See Alice Rawsthorn, *Vitra Museum’s New Space Takes Design Classics Out of Storage*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/arts/design/vitra-museums-new-space-takes-design-classics-out-of-storage.html> [https://perma.cc/5K2G-CXBV]; PROJECT VITRA, *supra* note 63.

102. VITRA DESIGN MUSEUM, <https://www.design-museum.de/en/about-us/the-vitra-design-museum.html> [https://perma.cc/6FL2-YAWW].

103. Alexander van Vegesack, *Origins and Holdings of the Vitra Design Museum Collections*, in PROJECT VITRA, *supra* note 63, at 299, 301, 306.

104. Rolf Fehlbaum, *The Original*, VITRA (Jan. 2, 2009), <https://www.vitra.com/en-ch/magazine/details/the-original> [https://perma.cc/8WBQ-9RVC].

production methods of furniture change over the years, and that the status of an original is determined “by the relationship between the designer (or rightful heirs) and the manufacturer of the designer’s products. There is not only a legal component to this relationship, but also an immaterial one based on shared ideals and mutual cooperation.”<sup>105</sup> Vitra practices a design management process which puts independent “authors” at its center and which can accompany the development of a product over decades, even after the original author has passed away:

Vitra sees designers not simply as contractors but as authors. The relationship of trust between these authors from all corners of the world and Vitra, who shares their ambitions, is at the very heart of the company’s product development process. Collaborations are always a subtle synthesis of artistic freedom, production know-how and industry knowledge. This philosophy has shaped the company’s culture since its early partnerships with seminal designers like Charles & Ray Eames and George Nelson.<sup>106</sup>

Vitra’s curatorial approach toward product development, its relational understanding of originality, and its narrative strategy are not disconnected from the law. As was described above, German courts have sometimes applied a “museum test” when deciding whether an object of applied art meets copyright’s originality standard.<sup>107</sup> In fact, when the German Federal Court of Justice dealt with the copyrightability of Le Corbusier’s LC2 chair, it noted that the exhibition of the chair in museums and art exhibits can be an important input for copyrightability analysis.<sup>108</sup> Similarly, an Italian court held in 2016 that designer Giancarlo Zanatta’s “Moon Boots” are protected by Italian copyright, noting that the Louvre museum in Paris included the shoes in its ranking

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105. *Id.*; see also Alex Coles, *Designart: The Kernel of Product Design*, in PROJECT VITRA, *supra* note 63, at 357, 360 (stressing how Vitra furniture is continuously pushing the boundaries between design and art).

106. PROJECT VITRA, *supra* note 63, at 139; see also Rolf Fehlbaum, *Design Processes: Individual Authorship at Vitra*, in PROJECT VITRA, *supra* note 63, at 223 (“Vitra works with independent ‘authors’ — primarily with designers, but also with architects and graphic artists. What distinguishes the work of these people from that of other designers is the fact that their personal imprint and outlook is reflected in every one of their products. In contrast, designers in fixed employment must adapt their personal interpretation to the requirements of the client. We do not define our roles in terms of client and contractor. Two business partners — the designer and Vitra — embark on a common quest for an optimal solution . . . . This understanding, and the ability to carefully channel it, is the art of design management.”).

107. See *supra* note 88 and accompanying text.

108. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 10, 1986, *Neue Juristische Wochenschrift* [NJW] 2687, 2679 (1986) (Ger.).



of the hundred most important designs in recent history.<sup>109</sup> Arguably, Vitra is doing its part to make sure that the Eames designs, and others it markets, are recognized: it has built its own museum on its premises close to Basel, Switzerland, honoring Eames and other furniture designers.<sup>110</sup> This exemplifies how closely the manufacture of aura can be interwoven with copyright protection and litigation.

Vitra's strategy raises a lot of questions. It is neither natural nor inevitable that we should approach the question of "authenticity" of a table or chair in the way that Vitra would prefer. Why would we focus the authenticity inquiry on authorship, and not shape or construction? The knock-off Eames lounge chair pictured in Figure 1 follows the Eames design precisely.<sup>111</sup> And if you pay a high-enough price for a replica, it can also mimic the construction techniques used by the design's original or canonical builder. It is perfectly coherent to identify the faithful knock-off as an "Eames chair." In fact, this view is widespread in the United States, where the design patents that originally protected many Eames and other popular mid-century designs have long since expired,<sup>112</sup> and where neither copyright nor (in most cases) trademark is available to step in.<sup>113</sup>

Mid-century furniture is not the only product for which a prominent market player is engaging in aura production. German shoemaker Birkenstock has started to follow a similar path. Founded in the 18th century in a small German town, Birkenstock became an important producer of orthopedic shoes and insoles in the early 20th century.<sup>114</sup> In 1963, Karl Birkenstock developed the first athletic sandal with a flexible footbed, the "Madrid."<sup>115</sup> Birkenstock became tremendously successful in the American hippie culture of the 1960s and 1970s, and in the 2010s, the shoes (as well as some knock-offs) reappeared on fashion runways, with fashion houses such as Givenchy and Valentino collaborating with Birkenstock and designers such as Giambattista Valli and Rick Owens creating their own non-Birkenstock-branded

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109. Ritscher & Landolt, *supra* note 83, at 129 (referring to decision 8628/2016 of the Tribunale Milano from July 12, 2016).

110. *Information*, VITRA DESIGN MUSEUM, <https://www.design-museum.de/en/information.html> [<https://perma.cc/56AP-LRX6>].

111. *See supra* note 64.

112. *See supra* note 68 and accompanying text.

113. *See supra* notes 68–81 and accompanying text.

114. *See History and Heritage*, BIRKENSTOCK, <https://birkenstock.com/us/us-about-history.html> [<https://perma.cc/J4ZN-ZZR7>]; Helen Jennings, *The Secret to Birkenstock's Enduring Success*, CNN STYLE (Aug. 14, 2020), <https://edition.cnn.com/style/article/birkenstocks-history-comfortable-shoes-sandals/index.html> [<https://perma.cc/6AW5-Q6PQ>]; *Birkenstock*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Birkenstock> [<https://perma.cc/X24V-6B55>].

115. *See sources cited supra* note 114.

interpretations of Birkenstock designs.<sup>116</sup> In 2019, Birkenstock sold nearly 24 million shoes;<sup>117</sup> in 2021, the French family behind Louis Vuitton and Christian Dior bought Birkenstock for nearly \$5 billion;<sup>118</sup> and today, Instagram features nearly 1.5 million #birkenstock posts.<sup>119</sup>

When Karl Birkenstock developed the Madrid sandal in the 1960s, he was not interested in fashion.<sup>120</sup> However, as Birkenstock shoes increasingly became fashionable items, the company began to be more concerned about imitation of their designs. In 2017, the CEO of Birkenstock USA accused Amazon of enabling modern-day piracy; Birkenstock stopped selling its shoes on Amazon,<sup>121</sup> and it has remained an active enforcer of IP rights in the United States — mostly trademarks, but also some design patents — ever since.<sup>122</sup> In Europe, Birkenstock’s attempts to use German unfair competition law or European trademark law against close competitors were not successful.<sup>123</sup> But Birkenstock had apparently noticed that European copyright law has become more amenable to protecting applied art. In October 2021,

116. Cathy Horyn, *The Dwarf, The Prince, and the Diamond in the Mountain*, THE CUT (Aug. 20, 2018), <https://www.thecut.com/2018/08/cathy-horyn-on-birkenstocks-unlikely-rise.html> [<https://perma.cc/ZK8A-EGTR>]; Rebecca Mead, *Sole Cycle*, NEW YORKER (Mar. 16, 2015), <https://newyorker.com/magazine/2015/03/23/sole-cycle-rebecca-mead> [<https://perma.cc/ZH24-X6XD>].

117. Jonathan Heaf, *Birkenstock: Inside a \$5bn Brand*, FIN. TIMES (Mar. 7, 2022), <https://www.ft.com/content/64c71db0-dd59-450d-94c6-5dea111dc752> [<https://perma.cc/NT9J-FMSH>].

118. *L Catterton Strikes \$4.8B Deal for Birkenstock*, PITCHBOOK (Mar. 1, 2021), <https://pitchbook.com/newsletter/l-catterton-strikes-48b-deal-for-birkenstock-xiy> [<https://perma.cc/RX5P-5Q42>].

119. Instagram Search Results for #birkenstock, INSTAGRAM, <https://www.instagram.com/explore/tags/birkenstock/> [<https://perma.cc/4XBV-C7VN>].

120. Nike Breyer, “*Man trug so was nicht!*”, TAZ AM WOCHENENDE (Apr. 15, 2000), <https://taz.de/Man-trug-so-was-nicht!/1238046/> [<https://perma.cc/5VKC-AB96>]; Silvia Irhing, *Birkenstock: Der ehemalige Gesundheitsschuh ist in der Modewelt begehrt wie nie*, NZZ BELLEVUE (June 13, 2021), <https://bellevue.nzz.ch/mode-beauty/birkenstock-vom-gesundheitsschuh-zum-begehrten-fashion-item-ld.1629958> [<https://perma.cc/2CEM-N78N>] (“The CEO of the company, Karl Birkenstock, was not interested in decorative chichi but in function and the solid craftsmanship that had turned his sandals into a kind of portable tool for nurses and spa tourists.”).

121. Abha Bhattarai, *Birkenstock CEO Accuses Amazon of ‘Modern-Day Piracy,’* WASH. POST (July 25, 2017), [https://www.washingtonpost.com/business/economy/birkenstock-ceo-accuses-amazon-of-modern-day-piracy/2017/07/25/24fa7644-7086-11e7-8f39-eeb7d3a2d304\\_story.html](https://www.washingtonpost.com/business/economy/birkenstock-ceo-accuses-amazon-of-modern-day-piracy/2017/07/25/24fa7644-7086-11e7-8f39-eeb7d3a2d304_story.html) [<https://perma.cc/HTX3-867Z>].

122. See Suzanne Kapner, *Birkenstock Pressures Retailers to Stop Selling Copycat Sandals*, WALL ST. J. (Apr. 24, 2022), <https://www.wsj.com/articles/birkenstock-wants-to-keep-ri-val-sandals-off-shelves-at-nordstrom-zappos-other-retailers-11649070000> [<https://perma.cc/5RAG-FN3X>].

123. Landgericht Köln [LG] [Court of First Instance Cologne] Nov. 16, 2017, Case 81 O 49/17 BECKRS 159606 (2017) (Ger.) (holding that Birkenstock could not use unfair competition law against a competing shoe producer); Case C-26/17 P, *Birkenstock Sales GmbH v. Eur. Union Intell. Prop. Off.*, ECLI:EU:C:2018:714 (Sept. 13, 2018) (holding that a figurative mark representing a pattern of wavy, crisscrossing lines from the sole of a Birkenstock sandal could not be registered as a European trademark); see also Case T-365/20, *Birkenstock Sales GmbH v. Eur. Union Intell. Prop. Off.*, ECLI:EU:T:2021:319 (June 2, 2021).

a German court of appeals issued a preliminary injunction affirming that the Birkenstock Madrid sandal is protected by German copyright law.<sup>124</sup> The court noted that Karl Birkenstock’s design was not only driven by his desire to create a comfortable shoe.<sup>125</sup> Rather, the court noted that Karl Birkenstock made various aesthetic design choices that were not dictated by the intended functionality of the sandal. The court held that the “overall impression is one of clear minimalist form and sculptural design.”<sup>126</sup> Observing that there was no model for the aesthetic impression of the sandal in the 1960s, the court noted that Karl Birkenstock had “departed far from the spirit of his times.”<sup>127</sup> The court also stressed that the Madrid sandal had become a classic, “which in the field of applied art and, in particular, in fashion can usually only be achieved by objects of considerable originality.”<sup>128</sup> The court also indicated that Karl Birkenstock had later created an entire line of shoe designs that carry the same personal signature of the author.<sup>129</sup> Other German courts have issued similar preliminary injunctions for Birkenstock.<sup>130</sup>

It is interesting to observe how Birkenstock is using litigation and marketing strategies to establish the foundations of an authorial narrative around its sandals that focuses on its creator, Karl Birkenstock, and uses copyright protection to imbue such narrative with a legal basis. In the summer of 2022, Birkenstock, in partnership with the content studio of New York Times Advertising, produced a global brand campaign “Ugly for a Reason.”<sup>131</sup> Part three of this campaign features various fashion historians and design experts.<sup>132</sup> It focuses on three themes that are not only important to position Birkenstock as a global fashion brand, but also to convince courts that Birkenstock sandals share features of other objects of art: First, Birkenstock sandals are aesthetic objects, rather than functional footwear.<sup>133</sup> The object’s aesthetic appeal

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124. Oberlandesgericht Hamburg [OLG] [Court of Appeals Hamburg] Oct. 14, 2021, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 565 (2022) (Ger.).

125. *Id.* at 567.

126. *Id.*

127. *Id.*

128. *Id.* at 567–68.

129. *Id.* at 568 (referring to the later models “Arizona,” “Boston,” “Florida,” and “Gizeh”).

130. See Landgericht Köln [LG] [Court of First Instance Cologne] Mar. 3, 2022, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 2022, 4196 (2022) (Ger.).

131. *Ugly for a Reason*, BIRKENSTOCK (Nov. 18, 2022), <https://www.birkenstock.com/us/ugly-for-a-reason> [<https://perma.cc/2VZU-JPMX>].

132. *Id.*

133. *Id.* (quoting Stefano Pilati: “It might not be evidently tasteful, but there are so many elements perfectly in balance in the design process of that object, it cannot be ugly in the end.”); see also *id.* (quoting Fabio Piras: “I don’t think that a product designed solely for functionality would actually appeal to anyone. It’s a way of being yourself. That is why, today, a sandal like Birkenstock becomes a fashion statement more than ever.”).

lies in its simplicity.<sup>134</sup> Second, Karl Birkenstock created original shoes that deviated from everything the world had known about shoes before.<sup>135</sup> Third, the campaign suggests that Karl Birkenstock was inspired by Brutalism, a minimalist architectural style that emerged in the 1950s.<sup>136</sup> It is intriguing to observe how building blocks of an authorial narrative emerge from this campaign: Karl Birkenstock was a creator who threw all conventions of his time overboard; he created a minimalist piece of art that rivals the achievements of an important architectural movement after the Second World War; he created an aesthetic object; and the fact that Karl Birkenstock himself stated that he was not interested in fashion<sup>137</sup> does not diminish but rather reinforces the sandal's aesthetic appeal.<sup>138</sup>

Overall, Birkenstock — or, perhaps more accurately, its current owner, French luxury producer LVMH — uses branding campaigns to stress the aesthetic aspects of its products and to valorize their “author.”<sup>139</sup> And it has started to argue in front of European courts that such authorial narrative should translate into copyright protection for its sandals.<sup>140</sup> Compared to Birkenstock, Vitra has of course made much more progress; copyright protection for high-end furniture has been recognized for years across Europe. But the point in both cases is the same: If firms like Vitra and Birkenstock succeed in establishing recognized authorship as the prerequisite to the authenticity of a piece of furniture or a leather-and-cork sandal, and if that artifact's association with a creator is framed as an important aspect of its aesthetic appeal, then the producers may succeed in providing consumers of these designs with an auratic experience without the presence of an original. That is, the experience would attach to an artifact produced in many copies, a notion directly at odds with Benjamin's account of aura as a

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134. *Id.* (quoting Kristina Blahnik: “Birkenstock is all about design, because that shape is ergonomic perfection. . . . I think Birkenstock has found its voice in the world of glamor. This is the future — readdressing glamor and the extreme of comfort and casual into a new hybrid aesthetic.”).

135. *Id.* (quoting Liz Tregenza: “In the 1950s and 1960s, really design was heavily based on aesthetics over necessarily the function of the shoes. It was really about this look and creating a total look. And I think comfort had a secondary place.”); *id.* (quoting Kristina Blahnik: “[The Birkenstock footbed] is the absolute simplest form to achieve the maximum impact of comfort and use and function. And it is the perfect shoe, especially in the context of that era.”).

136. *Id.* (quoting Nike Breyer: “At that time, it was a new approach that had a lot in common with . . . Brutalist architecture, which was all about architecture needing to be honest and about the construction and the function of a building needing to be showcased. And this concept inspired Karl Birkenstock in the development of the shoe.”).

137. *See supra* note 120 and accompanying text.

138. *See Ugly for a Reason, supra* note 131 (“Taking a modern and brutalist approach, [Karl Birkenstock's] design was more inspired by the functional architecture of the time than by fashion trends. This rule-breaking approach created a form that remains timeless to this day and a philosophy that continues to define the Birkenstock brand.”).

139. *See sources cited supra* note 118.

140. *See sources cited supra* notes 123–30 and accompanying text.

quality attaching to a particular, original, and usually highly valued artifact.

Perhaps this plasticity in both aesthetic experience and the understanding of authenticity should not be surprising within the particular creative field (functional works of artistic craft) to which furniture and shoes belong — that field, after all, has long marginalized the importance of the singular, original, or canonical artifact. What may be more surprising is that the same transformation in the foundations of authenticity has been prefigured in the world of *fine art*, where identification of the original is usually all-important in every conversation about authenticity.

In 2014, Sotheby's auctioned for over \$100 million a sculpture, *Chariot*, by Alberto Giacometti shown in Figure 2 below.<sup>141</sup>



Figure 2: Sotheby's *Chariot*<sup>142</sup>

The catalog copy for the Sotheby's auction touts the sculpture as a singular artistic achievement:

Giacometti's extraordinary 'Chariot' is his masterpiece and ranks among the definitive achievements of 20th century art. With its painted surface and rich,

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141. Felix Salmon, *The Not So Special Hundred-Million Dollar Giacometti*, NEW YORKER (Nov. 5, 2014), <https://www.newyorker.com/business/currency/the-hundred-million-dollar-giacometti> [<https://perma.cc/WA92-TXN4>].

142. *Alberto Giacometti. The Chariot. 1950*, THE MUSEUM OF MOD. ART, <https://www.moma.org/collection/works/80790> [<https://perma.cc/ZZ3M-RY3B>].

golden patina, the present sculpture is perhaps the most important bronze that the artist created.<sup>143</sup>

But *Chariot* is not one sculpture: Giacometti actually created six “original” copies.<sup>144</sup> One of the six has now changed hands for more than \$100 million.<sup>145</sup> That sale suggests, at least as a first cut, that each copy, and all of them, are apparently Giacometti’s “masterpiece” and worth something close to the same enormous sum.<sup>146</sup> That fact, as Felix Salmon pointed out in an insightful article in the *New Yorker*, is not as surprising as it may at first seem:

It’s entirely rational to think that value goes down as edition size goes up — that if a sculpture is in an edition of six, then it will be worth less than if it were unique or in an edition of two. But the art market is weird, and doesn’t work like that — or, at least, it doesn’t work like that anymore, since it has become an extension of the luxury-goods market. In order for an artist to have value as a brand, he has to have a certain level of recognizability — and for that he needs a critical mass of work. Artists with low levels of output (Morandi, say) generally sell for lower prices than artists with high levels of output — the prime example being Andy Warhol. The more squeegee paintings that Gerhard Richter makes, the more they’re worth.<sup>147</sup>

The other copies of *Chariot*, Salmon concludes, “don’t dilute the value of the art so much as ratify it,” especially given that a few of them are held in the collections of famous museums (New York’s Museum of Modern Art and the National Gallery in Washington, D.C., both own one).<sup>148</sup>

We should note that in the Giacometti example and in fine arts generally (as opposed to artisanal goods like high-end furniture), IP rights are conspicuously absent from the construction of authorial narrative. Amy Adler has explained why: Visual art, she observes, “is fundamentally different from other kinds of copyrightable creations; unlike books or music or other core realms of copyright protection, copies play

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143. (#25) *Alberto Giacometti*, SOTHEBY’S, <https://www.sothebys.com/en/auctions/ecatalogue/2014/impressionist-modern-art-evening-sale-n09219/lot.25.html> [<https://perma.cc/XWY9-QGVF>].

144. Salmon, *supra* note 141.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

almost no economic role in the art market, and when they do, the role is trivial.”<sup>149</sup> Copyright, Adler argues (persuasively, in our view), provides virtually no incentive to create for visual artists.<sup>150</sup> What does? A norm of authenticity, which, Adler explains, “leads the market to value (in most cases) unique, original works, not copies,”<sup>151</sup> and, as a consequence, “a visual artist can recover the fixed costs necessary for the first production of her work only (if at all) through the first sale of the work, not through sales of copies or derivative works.”<sup>152</sup>

Although copyright, for the reasons Adler explains, plays only a minor role, the construction of authorial narrative is central to the creation of value in the markets for fine art. It is artworld gatekeepers — critics, galleries, auction houses, art historians, and other experts who provide authentication services — who provide the prerequisite for the authenticity of a work of fine art, which is provenance tracing back to the artist.<sup>153</sup> While Adler focuses on fine art, our focus differs. We are interested principally in cases where the market values copies, not original works, and where the producer of these copies uses intellectual property and other tools to manufacture an aura around the copies, not the original. In the cases we are interested in, products are typically mass-produced, and copies are typically indistinguishable from each other.<sup>154</sup>

Vitra is competing in such a market, but it seems that Vitra is betting that something like the Giacometti phenomenon can be engineered for mid-century modern furniture, albeit on a scale that is simultaneously both far smaller (in terms of value per copy) and far larger (in terms of the sheer number of copies produced). To accomplish that, Vitra must work to make sure that our understanding of the prerequisite to authenticity for high-end furniture design is situated not in fidelity to a shape, but in an authorial pedigree. The term “pedigree” here is meant to capture both the origination in the author of rights to the design and continuation of those rights in an approved successor to the author, i.e., Vitra. If Vitra proves successful, this rejects Benjamin’s notion that the aura of an artifact can only be mediated through its original. Similarly, if Birkenstock is successful, each of the millions of Birkenstock sandals sold each year would possess an aura mediated through an authorial narrative. In these cases, an authorial narrative manufactured to create

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149. Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 322–23 (2018).

150. *See id.*

151. *Id.* at 329.

152. *Id.*

153. *Id.* at 347 (“Art’s market value, increasingly divorced from aesthetics, resides to a large extent in the identity and reputation of the artist to whom it is attributed. This emphasis on authorship explains the consummate value placed on authenticity by the art market; an authentic work is one that is properly attributed to its author.”).

154. *See supra* text accompanying note 22.

aura elevates a copy, any copy, until it eclipses the experience of the original.

Vitra's efforts have depended heavily on intellectual property protections. In particular, in the EU markets in which it does the bulk of its business, Vitra has leaned mostly on copyright and design protection.<sup>155</sup> In contrast, U.S. mid-century modern furniture producers like Knoll and Emeco (which markets the Navy Chair and has a registered trademark in the design<sup>156</sup>) operate with far less powerful IP protections.<sup>157</sup> As we have already seen, U.S. design patents expire after a relatively short term,<sup>158</sup> and copyright law is, for the most part, unavailable for useful articles like tables or chairs.<sup>159</sup> Knoll and other U.S. furniture distributors have trademark registrations on some older designs — for example, Knoll filed a 2017 application claiming trademark rights in the shape of the famous (and ubiquitous) “tulip table” designed by Eero Saarinen in the mid-1950s.<sup>160</sup> That said, many of these registrations are of dubious value. Saarinen tulip table replicas are available from dozens of sources in the United States.<sup>161</sup> As a consequence, any trademark claim Knoll makes in that design faces a serious barrier if litigated to judgment. For a trademark owner to prevail in an infringement action, it must show that consumers are likely to be confused about the source of products put out by the defendant — i.e., the trademark owner must prove that a significant number of consumers are likely to believe mistakenly that those products are produced or otherwise connected (by affiliation, sponsorship, or licensing) to the trademark owner.<sup>162</sup> But if consumers observe a marketplace in which many firms are producing the design, they are unlikely to be confused about the source of tables either at the point of sale or afterward — they likely have no expectation that a tulip table emanates from a single source.

The same is likely to be true of many mid-century designs in which firms like Knoll and Emeco have registered marks. Knoll and Emeco do occasionally file lawsuits, and the expense of litigation can yield settlements favorable to the putative mark owner — evidenced by Restoration Hardware's agreement to stop selling a Navy Chair replica as

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155. See *supra* text accompanying notes 82–100.

156. For the Navy Chair design mark, see Registration No. 2,511,360.

157. See *supra* note 69 and accompanying text.

158. See *supra* text accompanying note 68.

159. See *supra* text accompanying notes 79–80.

160. See Three-dimensional configuration of the tapered stand and base of a single-legged table, Registration No. 6,886,737.

161. See *Google Search Results for Saarinen Tulip Table*, GOOGLE, <https://www.google.com/search?q=saarinen+tulip+table> [<https://perma.cc/5QH4-8M98>].

162. 15 U.S.C. § 1125(a)(1) (2012).



part of the settlement of a lawsuit filed by Emeco.<sup>163</sup> But the ultimate weakness of the IP rights in these designs limits this intimidation strategy. The U.S. market is full of replicas of mid-century modern furniture and U.S. trademark owners face substantial risk of their IP claims failing if they overstep in trying to use IP rights to drive competitors out.

So far, our examples have focused on copyright and design protection. Yet, trademark law can also be of assistance in authorial aura production. Think of the automobile industry. In 2002, Mercedes-Benz Group (known as DaimlerChrysler at the time) revived Maybach — a German producer of ultra-luxury cars between 1921 and 1940 — as a brand name for its own ultra-luxury car line.<sup>164</sup> DaimlerChrysler thereby honored Wilhelm Maybach, who developed, together with Gottlieb Daimler, internal combustion engines in the late 19th century.<sup>165</sup> This brand revival not only built upon the original firm logo,<sup>166</sup> but also engaged the grandson and great-grandson of the original Maybach engineers as brand ambassadors.<sup>167</sup> Bugatti, a French-Italian car manufacturer of high-performance automobiles, was founded in 1909, enjoyed great success in many motor races in the 1920s and 1930s, but ceased production in 1956 after a long decline.<sup>168</sup> The car brand was revived in 1987 and ultimately acquired by Volkswagen in 1998, which sells the Bugatti Chiron at a price of almost \$3 million.<sup>169</sup> Volkswagen acquired Ettore Bugatti's guest house, a mid-19th century château in northeastern France, refurbished it as the subsidiary's headquarters, and built a new modern atelier at Bugatti's original automobile manufacturing plant nearby.<sup>170</sup>

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163. See Branden Klayco, *Emeco Sinks Restoration Hardware's Battleship: Navy Chair Dispute Settled*, ARCHITECT'S NEWSPAPER (Jan. 29, 2013), <https://www.archpaper.com/2013/01/emeco-sinks-restoration-hardwares-battleship-navy-chair-dispute-settled/> [https://perma.cc/96YR-MY9X].

164. *Wilhelm Maybach: 175th Anniversary of the "King of Designers,"* MERCEDES-BENZ, <https://mercedes-benz.com/en/innovation/milestones/wilhelm-maybach-king-of-designers> [https://perma.cc/PB28-ZGQC]. See generally DAIMLERCHRYSLER, ANNUAL REPORT 2002 (2003), <https://group.mercedes-benz.com/documents/investors/berichte/geschaeftsberichte/daimlerchrysler/daimler-ir-annualreport-2002.pdf> [https://perma.cc/49S4-RUXE].

165. *Wilhelm Maybach*, MERCEDES-BENZ, <https://www.mercedes-benz.com/en/innovation/milestones/wilhelm-maybach/> [https://perma.cc/9D9S-K59T].

166. Adina Achim, *This Is the Real Meaning Behind the Maybach Logo*, HOTCARS (Nov. 30, 2022), <https://www.hotcars.com/real-meaning-behind-maybach-logo> [https://perma.cc/FCV7-CSLR].

167. Sam Whiting, *Ulrich Schmid-Maybach on Putting Mercedes Money to Use Mentoring Doctors in Developing Countries*, SFGATE (Dec. 2, 2007), <https://www.sfgate.com/magazine/article/Ulrich-Schmid-Maybach-on-putting-Mercedes-money-3235620.php> [https://perma.cc/2FST-SUC8]; *Ulrich Schmid-Maybach*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Ulrich\\_Schmid-Maybach](https://en.wikipedia.org/wiki/Ulrich_Schmid-Maybach) [https://perma.cc/5PH7-HDCM].

168. *Chronicles*, BUGATTI, <https://www.bugatti.com/brand/history/chronicles> [https://perma.cc/2NU7-AD4Q].

169. *Id.*

170. *Inside Château Bugatti*, CAR & DRIVER (May 1, 2005), <https://www.caranddriver.com/features/a15386365/inside-chateau-bugatti> [https://perma.cc/2NZV-J94F].

In these cases, any links between the historic figures (Wilhelm Maybach and Ettore Bugatti) and the contemporary product are faint, to put it mildly.<sup>171</sup> Neither luxury car directly uses the original engineers' inventions. Still, Daimler and Volkswagen use historical figures in order to engarland their products with an auratic experience that distinguishes these products from competing products. Such auratic experience is closely interwoven with an intellectual property strategy: trademark distinctiveness depends on authorial narratives, and these narratives benefit from the legal protection of key signs.

*C. Place-Narratives: Geographical Indications in the Production of Food, Wine, and Spirits*

Turning mass-produced works of artistic craftsmanship into works of art that have an authorial pedigree is only one of many ways to link artifacts to an auratic experience. An artifact's relationship to place is another element that can be manipulated to produce aura. For example, a study of twenty-six luxury wine producers from various countries found that creating a sincere story which stresses relationship to certain

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171. In the case of Maybach and Bugatti, the respective car manufacturers have actively shaped an authorial narrative around these names. In other cases, car manufacturers have used names of historical figures as brands, without enriching the name with a product-specific narrative. Examples from the car industry, which are not the focus of this article, include Tesla — named after Nikola Tesla who contributed to the design of the modern alternating current (“AC”) electricity supply system — or the “Citroën Xsara Picasso” — a French minivan named after Pablo Picasso in 1999. There is neither a link between Tesla, the firm, and Tesla, the engineer, nor between Citroën and Picasso. See Alex Davies, *Here's Why Tesla Motors Is Named for a Famous Serbian Inventor*, BUS. INSIDER (Aug. 8, 2013), <https://www.businessinsider.com/who-is-tesla-named-for-2013-8> [<https://perma.cc/T5PN-6RL3>]; Albert M. Jr. Muniz, Toby Norris & Gary Alan Fine, *Marketing Artistic Careers: Pablo Picasso as Brand Manager*, 48 EUR. J. MKTG. 68, 82 (2012).

In other industries, firms are using historical figures as brands without manufacturing elaborate authorial narratives around them. An example from the watch industry is the “Tribute to Pallweber” watch which Swiss luxury watch manufacturer IWC Schaffhausen produced in a 250-piece edition at the occasion of the company's 150<sup>th</sup> anniversary in 2018, at \$36,600 a piece. *SIHH 2018: A Mechanical Wristwatch with Digital Time Display*, IWC SCHAFFHAUSEN (Jan. 15, 2018), <https://www.iwc.com/us/en/articles/journal/a-mechanical-wristwatch-with-digital-time-display.html> [<https://perma.cc/W6A3-BSHC>]; Jack Forster, *Introducing the IWC Tribute to Pallweber Edition '150 Years' (Live Pics & Pricing)*, HODINKEE (Nov. 30, 2017), <https://www.hodinkee.com/articles/iwc-tribute-to-pallweber-edition-150-years-introducing> [<https://perma.cc/RX3K-Y322>]. Josef Pallweber was an Austrian watchmaker who patented a watch mechanism with a “jumping” hour and minutes display in 1883 — this precursor to the first digital watch display was revolutionary at that time. See Elisabeth Gründer, *Super Vintage Watch*, IWC SCHAFFHAUSEN: THE J., <https://www.iwc.com/se/en/articles/journal/digital-pocket-watch-1887.html> [<https://perma.cc/L7VL-352E>]. The historic links between IWC Schaffhausen and Josef Pallweber are limited in that IWC Schaffhausen licensed Pallweber's patent and sold Pallweber watches between 1885 and 1887. *Id.*; Jack Forster, *supra*. Another example includes Jaquet Droz, a luxury watch manufacturer owned by the Swatch Group which is named after a famous 18th-century watchmaker. *Jaquet Droz*, SWATCH GROUP, <https://www.swatchgroup.com/en/companies-brands/watches-jewelry/jaquet-droz> [<https://perma.cc/7GUR-SQ8G>].

places, as well as attributes such as hand-crafted techniques, uniqueness, and passion for wine production (while disavowing commercial motives), was an important contributor to the firms' success.<sup>172</sup> An empirical study found that consumers view a pair of Levi jeans produced in the company's home base — San Francisco — as more authentic than the same jeans produced outside the United States.<sup>173</sup> And in his book *Real Pigs*, Brad Weiss describes how the producers of pasture-raised pork in the North Carolina Piedmont region have imbued their marketing strategies with coordinated stories about historical legacy and authentic breeding practices, as well as training chefs and consumers in the taste of and the narrative attached to the region's pork products — all of which contributes to a construction of authenticity, rooted in geography, which produces consumer connection to the product.<sup>174</sup> Importantly, Weiss refutes the simple utilitarian motive that the craft pork producers he studied were simply looking for an effective marketing strategy to boost their sales.<sup>175</sup> Rather, Weiss notes that craft pork is a niche market in which product qualities are difficult to portray and observe.<sup>176</sup> In such an environment, creating an aura around the product can establish a connection between the consumer and a product that overrides attachment to production, distribution, or exchange intermediaries.<sup>177</sup> The various actors involved in the local food production chain are united in their search for connections to the sources of food, their desire to achieve authenticity through coordinated action, and their aspiration for the *real* as a veritable entity.<sup>178</sup>

More generally, creating a place-narrative has long been an important component of marketing high-quality food, wine, and spirits products,<sup>179</sup> and local food production communities labor to create a sense of place and time around particular products.<sup>180</sup> These narratives are inevitably highly constructed; they are not “history” but rather

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172. Michael B. Beverland, *Crafting Brand Authenticity: The Case of Luxury Wines*, 42 J. MGMT. STUD. 1003, 1003 (2005).

173. See George E. Newman & Ravi Dahr, *Authenticity Is Contagious: Brand Essence and the Original Source of Production*, 51 J. MKTG. RSCH. 371, 377 (2014).

174. See BRAD WEISS, REAL PIGS: SHIFTING VALUES IN THE FIELD OF LOCAL PORK 83, 244–45, 248 (2016) (noting that a local restaurant kept local pork on the menu even though this was not profitable, in order to cultivate an appreciation of good food among its customers).

175. See *id.* at 246.

176. See *id.* at x–xi.

177. Cf. *id.* at 180.

178. See *id.* at xi, 4, 17, 180, 221, 239, 244, 247–48.

179. See Elisa A. G. Arfini & Roberta Sassatelli, *Not a Matter of Fame: Constructing the Local as Brand Value*, in ITALIANS AND FOOD 181, 185, 197–98 (R. Sassatelli ed., 2019); David Beriss, *Food: Location, Location, Location*, 48 ANN. REV. ANTHROPOLOGY 61 (2019).

180. Jillian R. Cavanaugh & Shalini Shankar, *Producing Authenticity in Global Capitalism: Language, Materiality, and Value*, 116 AM. ANTHROPOLOGIST 51, 52 (2014) (“Italian food producers attempt to create an image of cultural heritage anchored in a particular town and province in Italy as emerging out of unbroken links to the past.”).

narrative with historical elements drawn together into “chronotopes,” a concept elucidated by Russian literary scholar Mikhail Bakhti, in which events at different times (and sometimes different places) are merged in order to create a continuous narrative and to construct a temporospatial setting in which an activity or an artifact can be understood.<sup>181</sup> Such “construct[ed] authenticity”<sup>182</sup> leads to what has been called “linguistic materiality”<sup>183</sup> — i.e., language is given new social meaning. In the context of food, wine, and spirits production, this process ultimately contributes to heritage and culture being commodified and consumed.

Intellectual property protections are critical in both the construction and preservation of place-narratives. A prominent example is wine. Prerequisite to our understanding of whether a particular bottle of Bordeaux wine is authentic is association with a defined producing region. The integrity of that concept — of that species of aura — is what the law governing so-called “geographical indications” (“GIs”) is there to foster and protect.<sup>184</sup>

The conceptual foundations of GIs are blurry. Anthropological and sociological studies of local food production in Europe and the United States have demonstrated how GIs establish the link between food products and their production location and how GIs help establish and stabilize narratives about how place — or *terroir*, as the French put it<sup>185</sup> — is essential in the making of foods, wines, and spirits.<sup>186</sup> Certainly in French agricultural policy, but also more generally in the international law governing GIs, the discourse on terroir involves a “conscious and active social construction of the present,”<sup>187</sup> building on tradition, history, and local development.<sup>188</sup>

It is important to note that a place-based understanding of authenticity is, like Benjamin’s temporal account of aura, a *cultic* quality — i.e., a form of mysticism that attaches to the concept of authenticity.<sup>189</sup> We can read that off the content of the legal rule enforcing rights in terroir. For wine and spirits GIs, in particular, the legal prohibition is

181. *Id.* at 54–55.

182. *Id.* at 51.

183. *Id.* at 54.

184. While this part focuses on geographical indications, it is even conceivable that place-narratives play a role in technical inventions and patent law. See Burk, *supra* note 7, at 9 (pointing out that designations such as “German engineering” or “Yankee ingenuity” may indicate a particular technical quality of inventions).

185. Amy Trubek, Kolleen M. Guy & Sarah Bowen, *Terroir: A French Conversation with a Transnational Future*, 14 CONTEMP. FRENCH & FRANCOPHONE STUD. 139, 139 (2010) (“*Terroir* is a powerful cultural concept that cannot be easily translated into English. . . . [T]raditionally *terroir* is understood as the holistic combination of soil, climate, topography, and the ‘soul’ of the cultivator.”).

186. Beriss, *supra* note 179, at 63–64.

187. Trubek et al., *supra* note 185, at 142.

188. See Sarah Bowen, *Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy*, 75 RURAL SOCIO. 209, 226 (2010).

189. See *supra* text accompanying notes 32–34.

not simply against consumer confusion — i.e., against false identification of the geographic origin of the wine in the bottle. The prohibition may even extend to *comparison* or *reference*. It is forbidden under the rules implementing the 2006 U.S./EU Agreement on Trade in Wine, for example, for a Californian producer of red wine made from the Pinot Noir grape to refer to the wine as “Burgundy-style,” even if the producer uses the grapes and the methods traditional to that region of France.<sup>190</sup> The broad scope of the prohibition is no doubt tied to the desire of the traditional producers to limit competition. But the most prominent justification for the rule focuses on the interest of consumers and maintains that even comparison or reference is a form of consumer deception.<sup>191</sup> The restrictive GI wine and spirits rules are necessary, this argument states, because it is nonsense to say that a California Pinot Noir is “like” a Burgundy wine.<sup>192</sup> Those wines are irreducibly different because Burgundy’s *gout de terroir* (“taste of the soil”) is, at least

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190. See *Wine Appellations of Origin*, U.S. DEP’T OF THE TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Mar. 12, 2020), <https://www.ttb.gov/appellations-of-origin#requirement> [<https://perma.cc/8F82-CNUV>] (listing previously unprotected appellations of origin and stating that pursuant to the 2006 U.S./EU Agreement on Trade in Wine, as implemented in the Tax Relief and Health Care Act of 2006 (enacted Dec. 20, 2006), use of those appellations by U.S. producers was now forbidden except for certain producers whose labels had used those terms and had received a certificate of label approval or certificate of exemption before March 10, 2006); see also *Industry Circular No. 2006-01*, U.S. DEP’T OF THE TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU (Mar. 10, 2006), [https://www.ttb.gov/images/industry\\_circulars/archives/2006/06-01.html](https://www.ttb.gov/images/industry_circulars/archives/2006/06-01.html) [<https://perma.cc/AA9L-XBJB>] (describing post-U.S./EU wine agreement rules); Kal Raustiala & Stephen Munzer, *The Global Struggle over Geographic Indications*, 18 EUR. J. INT’L L. 337, 362 (2007) (describing how “Product of Australia: Burgundy-style wine” violates Art. 23(1) of the TRIPS Agreement); Molly Torson, *Apples and Oranges: French and American Models of Geographic Indications Policies Demonstrate an International Lack of Consensus*, 95 TRADEMARK REP. 1415, 1431 (2005) (describing in more detail how semi-generic designations such as “California Burgundy” are allowed, while designations such as “Burgundy style” that do not directly indicate the true origin of the wine are not); Brian Rose, *No More Whining About Geographical Indications: Assessing the 2005 Agreement Between the United States and the European Community on the Trade in Wine*, 29 HOUS. J. INT’L L. 731, 744–46 (2007); Michael Maher, *On Vino Veritas? Clarifying the Use of Geographic References on American Wine Labels*, 89 CALIF. L. REV. 1881, 1898–99, 1904–05 (2001) (both describing the U.S. system of semi-generic designations of origin); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) art. 23(1), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Apr. 15, 1994, 1867 U.N.T.S. 154; 27 C.F.R. § 4.24(b) (2006); 26 U.S.C. § 5388(c) (2006); Agreement Between the United States and the European Community on Trade in Wine, U.S.-EC, Mar. 10, 2006, <https://www.ttb.gov/agreements/us-ec-wine-trade-agreement> [<https://perma.cc/VSE4-FNUG>]. In Europe, referring to a geographical indication as a style or method is illegal. Regulation (EU) No. 1151/2012, of the European Parliament and of the Council of 21 November 2012 on Quality Schemes for Agricultural Products and Foodstuffs, art. 13(1)(b), 2012 O.J. (L 343) 11.

191. See Rose, *supra* note 190, at 767; Raustiala & Munzer, *supra* note 190, at 361–63.

192. See Raustiala & Munzer, *supra* note 190, at 361–63.

according to the place-narrative that serves as the prerequisite to authenticity in this field, irreplicable.<sup>193</sup>

Whether any particular style of wine is in fact inextricably linked to an irreplicable terroir is a proposition for which there is (to be charitable) only thin empirical evidence. But whether terroir is in some sense a “true” understanding of what makes a wine authentic is mostly beside the point. Terroir is a way that people have been encouraged to experience authenticity. That experience in turn shapes consumers’ aesthetic experience: both what the consumer expects to taste, and what the consumer in fact tastes.

Of course, the manufacture of an auratic experience for wine, or for any product linked to a place-narrative, is not achieved by GI protection alone. Rather, intellectual property protection is interwoven with a carefully crafted spatial and temporal narrative that contributes to the cultic aspect of the product. In a study on French Bordeaux wines, for example, Erica Farmer has analyzed how producers, brokers, syndicates, and merchants have built social networks over centuries to guarantee the quality and reputation of particular wine makers in the Bordeaux region; and how protection by GIs for wine has complemented these social tools to assert rules regulating what constitutes authentic regional wine production.<sup>194</sup> Spatiotemporal narratives and legal rules are mutually reinforcing: the legal protection of terroir depends on a social construction of locale as terroir, and cultural norms that contribute to such construction can be used as evidence to justify protection through geographical indications.<sup>195</sup> The concept of GIs for wine in France emerged from regional conversations about local identities and foodways, and “always served to certify and protect the collective patrimony, believed to be rooted in soil and history, connected with place and transcending time, offering a genuine experience of France.”<sup>196</sup> The combination of cultural norms, social coordination, and legal protection can lead to an emergence and stabilization of cultural identities at a communal level that both preserve and commodify those identities.<sup>197</sup>

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193. *Id.* Note that such strong protection of the place-narrative does not exist for all food products. For a decision on the more limited protection for gruyere cheese, see *Interprofession du Gruyere v. U.S. Dairy Exp. Council*, 61 F.4th 407 (4th Cir. 2023) (noting that although the FDA has issued a standard of identity for “gruyere cheese,” this term cannot be registered as a certification mark, as it is generic in the United States).

194. Erica A. Farmer, “*Local, Loyal and Constant*”: *The Legal Construction of Wine in Bordeaux*, in *WINE AND CULTURE: VINEYARD TO GLASS* 145, 152 (Rachel E. Black & Robert C. Ulin eds., 2013).

195. *Id.* at 158.

196. Trubek et al., *supra* note 185, at 142.

197. See Bowen, *supra* note 188, at 227 (“Certain villages have a way of feeding their cows, and almost all of the producers in the village do it the same way, in a way that is different from the neighboring village, and it is this that determines the taste of the cheese.”).

Constructing the aura of wine around a legally reinforced place-narrative is not the only conceivable way to understand the prerequisite of authenticity for that product. In the case of Vitra, we already pointed out that the authenticity of furniture does not have to focus on authorship; it could also focus on shape.<sup>198</sup> Similarly, we could imagine rival conceptions of authenticity for wine, even for wines like Bordeaux that we so strongly associate with place. We could understand “authentic” Bordeaux as wine that hews to a particular style of winemaking — that is, as red wine made from a particular blend of grapes (Cabernet Sauvignon, Cabernet Franc, Merlot, Petit Verdot, and Malbec) and using methods traditional to the Bordeaux region.<sup>199</sup> In fact, some oenophiles place emphasis on these characteristics when they are present in wines produced outside of Bordeaux (for example, in California) that mimic the flavor profile generally associated with Bordeaux wines.

As with the authorial narrative Vitra attaches to furniture designs, the dominance of a place-narrative as the prerequisite for the authenticity of Bordeaux wines is neither natural nor inevitable. It is a socio-legal construct that serves particular interests and disfavors others. And it has served particular interests very well. Wines protected by high-end geographical indications can be up to 200% more expensive than otherwise comparable-quality wines from adjacent regions with geographical indications of lesser repute.<sup>200</sup> If our understanding of the aura of a Burgundy would focus on a style, rather than geographic origin, then if we were determined to enforce that narrative with a legal rule, we could no longer rely on GIs but would have to engineer a right that applied either to a distinctive flavor profile, or a particular wine-making recipe process.<sup>201</sup> It would be much more difficult to protect any of these qualities under current forms of IP law, whether as individual property rights (as most IP rights are structured) or as collective or community rights (the model that GIs follow).

Bordeaux wine is not the only gourmet food with an aura manufactured through a combination of place-narrative and GI protection. In a detailed ethnographic study of the production of salami in Bergamo, a town and province in Northern Italy, Jillian Cavanaugh has shown how the protection of Bergamasco salami as a protected geographical indication has been an important driver for the local salami production community. By interacting with local, national, and international markets as well as legislators, Bergamo farmers succeeded in linking salami production to a specific territory, to local production processes, as well as to the territory’s history and its social, economic, and cultural

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198. See *supra* text accompanying notes 111–13.

199. See Heymann, *supra* note 7, at 32–33.

200. Farmer, *supra* note 194, at 153.

201. See Heymann, *supra* note 7, at 47–48.

traditions.<sup>202</sup> They achieved this by creating social networks for the distribution and circulation of Bergamasco products, by seeking legal protections, and thereby achieving status and prestige for their product.<sup>203</sup>

And so what is the aura of a salami? As a local Bergamasco puts it: “It must not just be another salami among many, but must taste like, give the sensation of Bergamo — of the Upper City [a particularly scenic part of Bergamo], of the mountains, of all the great things about Bergamasco culture.”<sup>204</sup> Creating a place-narrative linked to their product has allowed Bergamasco producers to seek legal protection through GIs, thereby “transforming local tastes and experiences into replicable commodities.”<sup>205</sup> Arguably, this has also shifted the object of consumption — rather than just consuming a salami, the buyer of a Bergamasco salami consumes a narrative about Bergamasco culture and the particular means of production.<sup>206</sup> Cavanaugh’s detailed anthropological study of one particular Italian salami exemplifies how local cultures and ways of life get recontextualized through place-narrative and through intellectual property protection as commodified objects of consumption.<sup>207</sup> And similar to Vitra’s mid-century furniture designs, where an authorial narrative takes over the role of the original as the vessel for transmitting aura, with respect to food, manufactured place-narratives can create an aura that exists for products produced in many copies.

#### *D. Originality Narratives: Thomas Kinkade’s Art, and NFTs*

We turn now to a third and final species of manufactured aura, the *originality narrative*. With such a narrative, a replicable artifact is infused with a record of provenance tracing back to an originator, thereby making the artifact singular even if it exists in copies.

Let us first focus on Thomas Kinkade. While artworld grandees faulted his works for being low-value *kitsch*, Kinkade’s glowing paintings of popular pastoral and idyllic themes made him immensely popular and successful.<sup>208</sup> At one point, one in every twenty American households owned some of Kinkade’s artwork, and Kinkade’s annual

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202. Jillian R. Cavanaugh, *Making Salami, Producing Bergamo: The Transformation of Value*, 72 *ETHNOS* 149, 151, 153, 156–61 (2007).

203. *Id.*

204. *Id.* at 159.

205. *Id.* at 159–60.

206. *Id.* at 164, 166.

207. *Id.* at 166.

208. See Susan Orlean, *Art for Everybody*, *NEW YORKER*, Oct. 15, 2001, at 124 (describing his style as “smooth and warm and romantic, not quite fantastical but not quite real, more of a wishful and inaccurate rendering of what the world looks like, as if painted by someone who hadn’t been outside in a long time”).



turnover exceeded \$100 million.<sup>209</sup> And “[a]t the time of his death in 2012, he was viewed as America’s most collected living artist.”<sup>210</sup>

Kinkade is not the first artist to engage in mass-reproduction of his artwork. In fact, Kinkade was an admirer of Andy Warhol, who pioneered the practice.<sup>211</sup> But Kinkade pushed the commodification of his work to the extreme. Described as a “paragon of a for-profit mentality spun to epic proportions,”<sup>212</sup> Kinkade “produces paintings by the container load. And he is to art what Henry Ford was to automobiles.”<sup>213</sup> By 2002, Kinkade’s 500,000-square-foot production facility in Morgan Hill, CA, produced 500 replica paintings a day, selling for between \$1,200 and \$10,000 a piece.<sup>214</sup> Kinkade sold reproductions of his paintings not only on canvas, but also on greeting cards, mugs, calendars, bedsheets, and jewelry via the QVC network.<sup>215</sup> Kinkade even licensed his name and artistic vision to a gated community development project: the “Village at Hiddenbrooke,” north of Berkeley, CA, was envisioned as a valley filled with custom Kinkade homes and marketed as a “vision of simpler times.”<sup>216</sup> Kinkade was a regular talk show guest, his company was listed on the New York Stock Exchange, and over 140 books have been written about or by him.<sup>217</sup>

Thomas Kinkade achieved all this although he never sold his original paintings.<sup>218</sup> Rather, he sold millions of replicas instilled with the aura of an original. His machine for manufacturing aura was built on a combination of innovative printing technologies, choice of topics, marketing techniques, and legal strategies. Kinkade created an entire

209. Jonathan E. Schroeder, *Aesthetics Awry: The Painter of Light™ and the Commodification of Artistic Values*, 9 CONSUMPTION, MKTS. & CULTURE 87, 90 (2006); see also Orlean, *supra* note 208, at 125.

210. Ian Fillis, *The Production and Consumption Activities Relating to the Celebrity Artist*, 31 J. MKTG. MGMT. 646, 650 (2015).

211. Christopher E. M. Pearson, *Repetition, Exclusion, and the Urbanism of Nostalgia: The Architecture of Thomas Kinkade*, in THOMAS KINKADE: THE ARTIST IN THE MALL 143, 144 (Alexis L. Boylan ed., 2011); Caroline A. Jones, *Andy Warhol’s “Factory”*: The Production Site, Its Context and Its Impact on the Work of Art, 4 SCI. IN CONTEXT 101, 128 (1990).

212. Kjellman-Chapin, *supra* note 45, at 206.

213. Rebecca Leung, *Thomas Kinkade: A Success*, CBS NEWS (Nov. 21, 2001, 11:18 AM), <https://www.cbsnews.com/news/thomas-kinkade-a-success/> [<https://perma.cc/GK8E-GHNX>].

214. Eric Kuskey, BILLION DOLLAR PAINTER: THE TRIUMPH AND TRAGEDY OF THOMAS KINKADE, PAINTER OF LIGHT 149 (2014).

215. *Id.* at 167–68. He also developed a furniture line in collaboration with La-Z-Boy, *id.* at 64, and Lionsgate Studios released a movie about his life, Thomas Kinkade’s Christmas Cottage, *id.* at 224.

216. Schroeder, *supra* note 209, at 94–95 (also describing the ways in which “Village at Hiddenbrooke” failed at implementing Kinkade’s aesthetic vision); see Kuskey, *supra* note 214, at 174–79; Karal A. Marling, *Brand-Name Living from the Painter of Light*, in THOMAS KINKADE: THE ARTIST IN THE MALL 107, 118–20 (Alexis L. Boylan ed., 2011); Pearson, *supra* note 211, at 154–56.

217. Fillis, *supra* note 210, at 649; Schroeder, *supra* note 207, at 90.

218. Fillis, *supra* note 210, at 649.

“editions pyramid”<sup>219</sup> that ranged from simple digital images of his paintings to reproductions transferred onto canvas, thereby creating the look and feel of a real painting, without capacity limits.<sup>220</sup> The canvas transfers would either be sold as is, or they could be accented by a “Master Highlighter,”<sup>221</sup> a group of “talented artists who hand embellish Limited Edition Canvases with paint to achieve the luminous effect that Thomas Kinkade Studios paintings are known for.”<sup>222</sup> These Kinkade prints with daubs of paint applied were sold as “Studio Proofs,” “Renaissance Editions,” or, if Kinkade retouched the prints himself, as “Masters Editions.”<sup>223</sup> These “authentic reproductions” differed not only in the degrees of “original” retouches, but also in price: the finishing touch by the master himself could add about \$20,000 to the price tag<sup>224</sup> and constituted, according to the Kinkade marketing machinery, “the ultimate expression of detail, artist involvement, and collectability.”<sup>225</sup>

Kinkade’s edition pyramids could reach staggering size. While the canvas transfer edition of a particular painting typically was capped at 2,750 copies, the same painting was replicated in so many different sizes and versions that the total edition size could reach over 200,000 copies<sup>226</sup> — so many that Kinkade used a machine to place his signature on most of them.<sup>227</sup> Note, however, that in each machine-applied signature, a tiny drop of Kinkade’s *blood* was mixed into the ink, thereby linking the master’s DNA to each copy: “It only took a drop of blood to mix enough paint for a thousand canvas transfer paintings, but it almost made him into a martyr, a Christ-like figure. Here he was giving his blood for his art. And the public ate it up.”<sup>228</sup>

Kinkade viewed himself as a “multi-dimensional lifestyle brand, similar to Martha Stewart or Ralph Lauren.”<sup>229</sup> He believed that “the

219. Orlean, *supra* note 208, at 125; Kjellman-Chapin, *supra* note 45, at 211.

220. Kuskey, *supra* note 214, at 46, 49 (“[Thomas Kinkade] asked whether we could make a product that looked and felt like an original work of art, but wasn’t an original. Dan [Byrne] confirmed this was true. Thom then asked how many we could make. Dan said we could make as many as we wanted. They knew what it meant in that moment. They had stumbled onto the Holy Grail.”).

221. The concept of “Master Highlighter” appears to be Kinkade’s creation. See *Enhanced Master Hand Highlighting*, THOMAS KINKADE STUDIOS, <https://thomaskinkade.com/shop/limited-edition-art/master-highlighting/master-highlighting-special-personal-session/> [<https://perma.cc/556V-Q64T>].

222. *Id.*

223. *Art Editions*, THOMAS KINKADE STUDIOS (July 28, 2014), <https://thomaskinkade.com/education/editions/> [<https://perma.cc/C5YB-HSG5>].

224. Skot Armstrong, *Books: Billion Dollar Painter*, ARTILLERY (Sept. 2, 2014), <https://artillerymag.com/books-billion-dollar-painter> [<https://perma.cc/VC96-QZHS>].

225. *Id.*

226. Kuskey, *supra* note 214, at 186.

227. *Id.* at 106–07.

228. *Id.* at 107; see Kjellman-Chapin, *supra* note 45, at 211.

229. Leung, *supra* note 213 (quoting Thomas Kinkade).

walls of the home are the new frontiers for branding.”<sup>230</sup> By infusing replicas with a manufactured aura, he met a demand that would not necessarily focus on the physical painting itself;<sup>231</sup> owning the reproduction was a means to access the aura enshrined in it.<sup>232</sup> Owners of Kinkade paintings would often use the paintings for their own meditation, projecting themselves into a rural life as it is depicted in the paintings.<sup>233</sup> Or, as Susan Orlean put it in the *New Yorker*: “What Thomas Kinkade’s fans will tell you about his paintings is that they are much more than just *paintings* — overlooking, of course, the irony that they are also much less than paintings, since they are really just reproductions. Anyway, they will tell you that Kinkade pictures are an emotional experience.”<sup>234</sup> Similar to gourmets who consume a narrative about Bergamasco culture when eating a salami,<sup>235</sup> the owner of a Kinkade painting enjoys the auratic experience embedded in the replica.

In a sense, Thomas Kinkade super-sized the Renaissance tradition of an artist’s workshop and also innovated on that model, making it more public-facing in a bid to create auratic experience at large scale.<sup>236</sup> For example, in “Master Highlighter Events,” assistants who had been personally trained by Kinkade highlighted paintings bought during the event: The assistant dappled tiny dots of paint on the painting in order to create glow and enhance its texture.<sup>237</sup> The customer could watch this process and request particular retouches to the painting, thereby personalizing it.<sup>238</sup>

Other features of Kinkade’s model were directed at giving copies some of the aura of originals.<sup>239</sup> Kinkade sold his copies through a

230. Schroeder, *supra* note 209, at 90; *see also* Orlean, *supra* note 208, at 128 (quoting Craig Fleming, then-CEO of Thomas Kinkade’s Media Arts company, as saying “Thom always says that there are forty walls in the average home. Our job is to fill them.”).

231. *See* Kjellman-Chapin, *supra* note 45, at 222.

232. *See* Fillis, *supra* note 210, at 659; Kuskey, *supra* note 214, at 139–40 (“People who collected canvas transfers . . . were there for other reasons than we usually associate with a typical art collector. The admiring public of Thomas Kinkade was there for the new *image*, the newest incarnation in a series of images, like an audience lining up for a sequel to a blockbuster movie.”).

233. Pearson, *supra* note 211, at 147 (“By concentrating on particular details in order to project themselves into a given scene, they create first-person narratives of what it would be like to experience the sights and sounds of a sublime nature, to walk down a country road, to dwell in an attractive cottage.”).

234. Orlean, *supra* note 208, at 125.

235. *See supra* text accompanying notes 204–06.

236. Kjellman-Chapin, *supra* note 45, at 208, 218–19, 227. For a few years, Thomas Kinkade even produced works under a French-sounding pseudonym (Robert Girrard) where not only the aura of a particular copy of an artwork was manufactured, but the artist himself became an artifact. *See id.* at 223–24 (noting that Thomas Kinkade chose the pseudonym Girrard because it was a French-sounding name, which would resonate well with the impressionistic works created by Girrard).

237. Kuskey, *supra* note 214, at 49.

238. Orlean, *supra* note 208, at 124.

239. Kuskey, *supra* note 214, at 49 (quoting Thomas Kinkade: “We’ll hire some artists to retouch every painting and make it original.”).

chain of 350 “Signature Galleries,” whose owners were trained at “Thomas Kinkade University” in Monterey, CA.<sup>240</sup> And he actively participated in manufacturing a mythological life story of a precocious genius that resembles the vita of Giotto and other great artists of the past.<sup>241</sup> Through this model, Kinkade made copies of his artwork available to the American middle class, without turning those copies into worthless commodities.<sup>242</sup>

With respect to the subject matter of his paintings, Kinkade constructed authenticity around his replicas by using a style that would remain remarkably stable over time<sup>243</sup> and would rely on repetition and imitation<sup>244</sup> in a manner analogous to the repetitive use of language to create a sense of place and time around food products.<sup>245</sup> Kinkade often included biblical messages and portrayed traditional American historical landscapes. Specifically, he worked obsessively around three themes — the house as a symbol of family, faith in God, and the beauty of nature<sup>246</sup> — designed to evoke a rural America of some known but distant past.<sup>247</sup> In this way, Kinkade rooted his work in a place-narrative about the United States, one which, in a rapidly changing country, evoked a “vision of nostalgic nationalism bathed in God’s light [that] is widely representative of the suburban, racial, sexual, and economic politics of the Right . . . promoting whiteness, normative heterosexuality, Christianity, middle-class aspirations, and free-market radicalism as the core of ‘American values.’”<sup>248</sup> He evoked a nostalgic feeling that would create long-lasting loyalties among his customers.<sup>249</sup>

Both formal intellectual property protections and informal “para-IP” strategies played an important part in the manufacture of Kinkadian aura. Kinkade registered as a trademark both his name and his slogan

240. Kuskey, *supra* note 214, at 127–31. The gallery chain was at some point transformed into a franchise system. See Orlean, *supra* note 208, at 128.

241. Kjellman-Chapin, *supra* note 45, at 217–18 (linking the way in which Thomas Kinkade’s life is told to Giorgio Vasari’s “Lives of the Most Excellent Painters, Sculptors, and Architects,” first published in the middle of the sixteenth century).

242. See Orlean, *supra* note 208, at 128 (quoting Thomas Kinkade: “I created a system of marketing compatible with American Art . . . I believe in ‘aspire to’ art. I want my work to be available but not common. I want it to be a dignified component of everyday life. It’s good to dream about things. It’s like dreaming of owning a Rolex — instead, you dream about owning a seventy-five-thousand-dollar print.”).

243. In fact, it is sometimes even difficult to distinguish Kinkade original paintings from each other. Orlean, *supra* note 208, at 124.

244. Fillis, *supra* note 210, at 655.

245. For a discussion on the concept of “chronotopes,” see *supra* text accompanying notes 180–81.

246. Pearson, *supra* note 211, at 145.

247. *Id.* at 144, 146, 148.

248. Micki McElya, *Painter of the Right: Thomas Kinkade’s Political Art*, in THOMAS KINKADE: THE ARTIST IN THE MALL 54, 57 (Alexis L. Boylan ed., 2011).

249. Fillis, *supra* note 210, at 649.

“Painter of Light”<sup>250</sup> — a term used originally to describe English 19th century artist William Turner.<sup>251</sup> Kinkade used the marks for both his paintings and his merchandising products, and his company used both copyright and trademark rights to fight against unauthorized reproduction of his artworks — reproduction that posed a more direct threat to Kinkade’s business model, which focused on the sale of copies, as opposed to the typical sale of originals in markets for fine arts.<sup>252</sup> Kinkade also took an active role in alerting potential purchasers of the risk of acquiring worthless fake Kinkade copies, issuing “Certificate[s] of Authenticity” that would vouch for the provenance of Kinkade copies, and encouraging purchasers to refer to authorized Kinkade galleries as preferred sellers of his art.<sup>253</sup>

Overall, Kinkade engaged in a set of inventive production and marketing practices, including the use of a deliberately chosen set of images and icons, designed to instill each of many thousands of reproductions of his paintings with the aura of an original.<sup>254</sup> Kinkade found a way to provide for each reproduction of his artwork a sense of provenance and authenticity that would mask the mass-production process that yielded this reproduction.<sup>255</sup> Or, as art historian Monica Kjellman-Chapin put it: “[T]he Kinkadian machine smoothly transforms print into painting, reproduction into original, multiplicity into singularity, and customer into collector.”<sup>256</sup>

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Thomas Kinkade poses an interesting challenge to Walter Benjamin’s notion of the aura of an original. In Benjamin’s view,

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250. THOMAS KINKADE, Registration No. 4,606,486; PAINTER OF LIGHT, Registration No. 1,988,294.

251. Kuskey, *supra* note 214, at 41.

252. See *supra* text accompanying notes 218–20.

253. Kjellman-Chapin, *supra* note 45, at 211; *Thomas Kinkade Fraud-What You Should Know Before Purchasing*, THOMAS KINKADE ONLINE (Apr. 13, 2011), <https://web.archive.org/web/20120409164734/http://www.thomaskinkadeonline.com/blog/2011/04/13/thomas-kinkade-fraud/> [<https://perma.cc/SAX5-4LU8>] (“[U]nderstand that you are putting your investment at great risk if you choose to purchase outside from an authorized Thomas Kinkade Signature Gallery and you really should ask yourself if it is worth it. We believe that if you are going to invest in essentially a family heirloom . . . , you really need to do it right and buy from an authorized Thomas Kinkade Signature Gallery.”).

254. See Fillis, *supra* note 210, at 647; Marling, *supra* note 216, at 114 (“One of Kinkade’s business partners put the firm’s philosophy this way: ‘We created a brand — a faith and family brand — around a painter . . . . He creates a world, and that world makes people feel a certain way. So we saw it as a great opportunity to create products around those worlds — collectible products, books, calendars, home decor items — furniture likely to be found in Thomas Kinkade’s world.’ ‘We’re not in the art business,’ says another associate. ‘We’re in the hope and inspiration business.’”).

255. Kjellman-Chapin, *supra* note 45, at 211.

256. *Id.* at 225.

reproduction destroys aura.<sup>257</sup> In Kinkadee’s universe, reproduction enables and enhances aura: the original is not important.<sup>258</sup> It is aura itself, transmitted and reinforced through countless replicas, which is the object of consumption by a mass audience.<sup>259</sup>

Let us now move forward to more recent innovations in the manufacture of auratic experience. Back in March 2021, Christie’s auctioned for \$69 million a “nonfungible token,” or NFT, linked to the digital collage *Everydays: The First 5000 Days* by a little-known artist named Beeple (see Figure 3).<sup>260</sup> That auction made Beeple the third-highest selling living artist — despite the fact that the buyer does not own *Everydays*, but merely one of countless indistinguishable copies floating around on the Internet.<sup>261</sup>

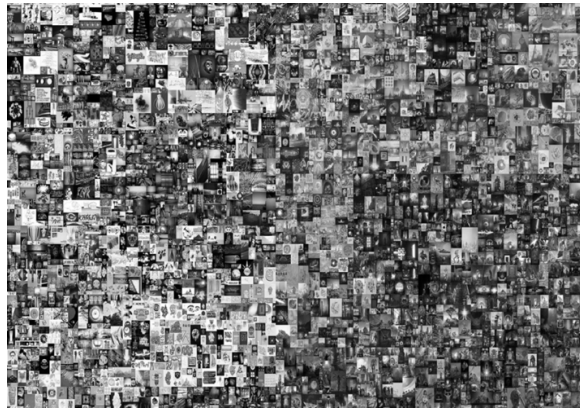


Figure 3: *Everydays: The First 5000 Days*<sup>262</sup>

Any discussion of NFTs must immediately confront an unscalable wall of misinformation and hype. But the anxiety about authenticity

257. Fillis, *supra* note 210, at 650, 655.

258. *Id.* at 655.

259. *See id.*

260. *See Beeple (b. 1981), EVERYDAYS: THE FIRST 5000 DAYS*, CHRISTIE’S, <https://onlineonly.christies.com/s/beeple-first-5000-days/beeple-b-1981-1/112924> [<https://perma.cc/4WNI-KFGA>].

261. Chris Williams, *Beeple NFT Now World’s 3rd Most Expensive Auctioned Piece by Living Artist*, CRYPTO BRIEFING (Mar. 11, 2021), <https://cryptobriefing.com/beeple-nft-now-worlds-third-most-expensive-auctioned-piece-living-artist/> [<https://perma.cc/Y7XG-RNG3>]; Jacob Kastrenakes, *Beeple Sold an NFT for \$69 million*, VERGE (Mar. 11, 2021, 10:09 AM EST), <https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million> [<https://perma.cc/9FEY-79LU>]. In fact, the very technology used to store the work, the peer-to-peer “InterPlanetary File System,” creates many copies of the file containing *Everydays* and distributes them to many computers connected to the network as a form of distributed storage. Kal Raustiala & Christopher Jon Sprigman, *The One Redeeming Quality of NFTs Might Not Even Exist*, SLATE (Apr. 14, 2021), <https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html> [<https://perma.cc/KQ7A-2EBZ>].

262. *See Beeple, supra* note 260.

that has led to their use is straightforward enough. The hallmark of any digital work is that it can be replicated perfectly, endlessly, and virtually without cost. One major selling point for NFTs is that if you bundle one with a digital artwork, then you have a way of making digital works scarce, because the NFT allows you to identify the owner of the “authentic” copy.<sup>263</sup> That seems to be the claim that Christie’s was making when it auctioned *Everydays*, as this extract from the Christie’s auction page describing the auction suggests:

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Beeple (b. 1981)
EVERYDAYS: THE FIRST 5000 DAYS
token ID: 40913
wallet address: 0xc6b0562605D35eE710138402B878ffe6F2E23807
smart contract address: 0x2a46f2ffd99e19a89476e2f62270e0a35bbf0756
non-fungible token (jpg)
21,069 x 21,069 pixels (319,168,313 bytes)
Minted on 16 February 2021. This work is unique.
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Figure 4: *Everydays* NFT<sup>264</sup>

“This work,” Christie’s claimed, “is unique.”<sup>265</sup> Most readers will understand “this work” to refer to Beeple’s *Everydays* image. That is how the *New Yorker* recently put it in a story about the auction: “Imagine digital Beanie Babies, but with only one existing copy of each.”<sup>266</sup> That supposed rarity helps make sense of the lofty price tag for *Everydays*, as well as for the many other digital works ranging from tweets to basketball game highlights to music videos that have been linked to NFTs.

But do NFTs actually function as a token of authenticity, or as a signifier that a work is “unique?” The answer is no, or, perhaps more precisely, at least not in the way we might ordinarily expect. The “non-fungible” in “nonfungible token” refers not to the artwork but to the block of code that makes up the NFT. NFTs are often shorthanded as “linking” to an artwork, or “pointing to” or “representing” it. But those characterizations are misleading. NFTs identify a particular digital artwork only in the most general way: They contain a “hash” of the artwork as part of the code that makes up the NFT, and some contain a link to an Internet address that displays a copy of the artwork.<sup>267</sup> The artwork itself (more precisely, the digital code from which the artwork

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263. See Raustiala & Sprigman, *supra* note 261 (“The hallmark of any digital work is that it can be replicated — perfectly, endlessly, and virtually without cost. But if you bundle the artwork with an NFT, then you have a way, some argue, of identifying the ‘authentic’ copy.”).

264. See Beeple, *supra* note 260.

265. *Id.*

266. Kyle Chayka, *How Beeple Crashed the Art World*, *NEW YORKER* (Mar. 22, 2021), <https://www.newyorker.com/tech/annals-of-technology/how-beeple-crashed-the-art-world> [<https://perma.cc/YHA9-SZXD>].

267. See Raustiala & Sprigman, *supra* note 261.

can be rendered by a computer) is, except in rare cases involving very crude and small 8-bit art like “Cryptopunks” (see Figure 5), *not* part of the code of the NFT.<sup>268</sup>



Figure 5: “Cryptopunks”<sup>269</sup>

What is stored on blockchain is not the work itself but a “hash” of the work. A hash is a code that is generated by passing all the data in a digital file through an algorithm that outputs a short alphanumeric “signature.”<sup>270</sup> Here is the hash for *Everydays*:<sup>271</sup>

6314b55cc6ff34f67a18e1ccc977234b803f7a5497b94  
flf994ac9d1b896a017

For all practical purposes, no two files that contain different data, even if the differences are small, can have the same hash. However — and this is the most important point — if the same hashing algorithm is used, every file containing the same data has *the same hash*. (Note that you cannot use an NFT’s hash to actually create the artwork. Hashing works in only one direction.)<sup>272</sup>

268. See *On-Chain Cryptopunks: The Cryptopunk Images and Their Attributes Now Live On-chain!*, LARVA LABS, <https://www.larvalabs.com/blog/2021-8-18-0/on-chain-cryptopunks> [<https://perma.cc/NBL7-GZPJ>].

269. See *LARVA LABS (EST. 2005)*, CHRISTIE’S, <https://www.christies.com/lot/lot-larvalabs-est-2005-9-cryptopunks-2-6316969/?from=salesummary&intObjectID=6316969> [<https://perma.cc/C4BJ-2YUX>].

270. See Sarah Rothrie, *How Cryptographic Algorithms and Hashing Keep Blockchain Secure*, DEVMIO BLOG (Sept. 26, 2018), <https://devm.io/blockchain/cryptographic-hashing-secure-blockchain-149464> [<https://perma.cc/Y58S-FEDH>].

271. Collin Starkweather, Izzy Nelken & Sam Miller, *How Intellectual Property Rights Can Complicate NFT Market*, LAW360 (Aug. 17, 2021, 5:26 PM EDT), <https://www.law360.com/articles/1412858/how-intellectual-property-rights-can-complicate-nft-market> [<https://perma.cc/YB3D-C8B9>].

272. See Raustiala & Sprigman, *supra* note 261.



The code of the NFT associated with *Everydays* contains the hash for the *Everydays* file, Beeple's cryptocurrency wallet address,<sup>273</sup> and the address for a smart contract<sup>274</sup> that governs how transactions in the token will take place. The NFT does not contain any content that authenticates a particular copy of *Everydays*. In fact, the NFT Christie's auctioned is useless to identify an authentic copy of *Everydays*, at least if "authentic" is understood, as is usual in the artworld, as "original" or as the copy that can be identified as having been first produced by the artist.<sup>275</sup> All that the *Everydays* NFT can tell you is whether any particular putative copy of *Everydays* contains the same data as the file from which the hash was originally generated. In other words, the NFT tells you whether you have a copy. It does not tell you whether you have *the* copy.

The question, then, is what NFTs do, and why people apparently value them. One of us (Sprigman, writing with Kal Raustiala) has proposed that the best understanding of NFTs is perhaps that they function as "virtual Veblen goods."<sup>276</sup> A Veblen good is a thing that is consumed for its ability to (supposedly) confer status through conspicuous consumption.<sup>277</sup> The cost is the point. Viewed through this lens, an NFT is a status good, relevant mostly within a crypto-aware subculture, which references an artwork as a signal of connoisseurship but actually dematerializes the act of consumption.

Brian Frye thinks that while the "virtual Veblen goods" idea may capture what NFTs are, it is important not to downplay the importance of this shift in the artworld:

Kal Raustiala and Chris Sprigman observed that NFTs are just "virtual Veblen goods." They were probably right. But maybe that's enough? After all, Veblen goods have proven quite persistent. The conventional art market is Veblen goods all the way down, but shows no signs of waning. Art is a convenient investment that also increases your status. What's not to

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273. See *id.*; see also *The Key to Your Digital Future*, ETHEREUM, <https://ethereum.org/en/wallets/> [<https://perma.cc/URS7-GCPQ>].

274. See Raustiala & Sprigman, *supra* note 261; see also *Introduction to Smart Contracts*, ETHEREUM (Sept. 1, 2022), <https://ethereum.org/en/developers/docs/smart-contracts/> [<https://perma.cc/2UMD-HE2P>].

275. Perhaps it's the copy that Beeple generated originally, which is probably not the copy that the Beeple delivered to the Christie's auction buyer, unless Beeple also delivered the storage media originally used when the image was created.

276. Raustiala & Sprigman, *supra* note 261.

277. *Id.*

love? NFTs are the same, just for a slightly different market.<sup>278</sup>

We agree with Frye’s assessment of the significance of virtual Veblen goods: if NFTs are the beginning of a process of untethering status consumption from material goods, that alone would make them noteworthy. It is too early yet to know for sure, but the introduction of NFTs may presage a deeper shift in our conception of authenticity in art. The technology may represent an attempt to supplant the aura of the original copy of the work as the foundation of a work’s authenticity, in favor of the aura of a singular place-holder for the work — i.e., the token. If the non-replicable NFT can supply the foundation for the authenticity of a work of digital art, then the inherent replicability of works in the digital medium would be irrelevant (or at least less relevant) to the value of the work. Copies would remain promiscuously available, but the work’s aura, the prerequisite for its authenticity, would be transferred from work to token, which is scarce and, given the technological barriers to copying an NFT’s code, likely to remain so.<sup>279</sup>

We see here another instance of the manufacture and manipulation of auratic experience. Vitra replaced the original in Benjamin’s framework with an authorial narrative to create aura in a mass-produced artifact. The producers of Bordeaux wines and Bergamasco salamis replaced the original in Benjamin’s framework with a place-narrative to create aura in their products. Thomas Kinkade used originality narratives to transfer aura from original to replica. We understand NFTs as leveraging an originality narrative — i.e., a record of provenance tracing back to an originator — to transfer aura from original to token. If the strategy is successful, no one will care whether the buyer of *Everydays* possesses the copy that Beppe transferred to him. They will care that he possesses the original NFT.

This understanding raises the question of whether the concept of authenticity has any internal content or is rather simply a set of conventions we have made up and can re-make to suit changing conditions. That is the story, Amy Adler argues, in the realm of fine arts.<sup>280</sup> And in particular, the notion that authenticity can be relocated from a work to

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278. Brian L. Frye, *How to Sell NFTs Without Really Trying*, 13 HARV. J. SPORTS. & ENT. L. 113, 136 (2022).

279. Frye asserts that NFTs represent a sort of purification of the art market, one which removes the actual art, which has become inconvenient, and replaces it with tokens of pure ownership — ownership being the point of the art market anyway. *See id.* at 131 (citation omitted) (“Everything would be so much easier if the art market could just dispense with art, and trade only its value. NFTs could make that possible, by liberating art from its value and enabling people who care about money to focus on the art of investing.”).

280. *See* Amy Adler, *Artificial Authenticity: Art, NFTs, and the Death of Copyright*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 20), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4222455](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222455) [<https://perma.cc/W52C-98VY>].

a token for the work is presaged, Adler argues, in the art world.<sup>281</sup> Consider the case of Sol LeWitt's wall drawings.<sup>282</sup> LeWitt famously broke new ground by selling instructions explaining how to make a drawing, along with the right to create the drawing the instructions described. (The drawings are usually executed by draftsmen, and not the artist himself.)<sup>283</sup> Although a handful of the more than 1,250 LeWitt wall drawings have been produced in permanent installations, most are executed serially and ephemerally; they are produced at the site of an exhibition, destroyed at that exhibition's conclusion, and then re-created later in another location. For these LeWitt works, no particular copy is canonical — only the instructions are.<sup>284</sup> In other words, the instructions are the prerequisite for the authenticity of any particular copy of the work; it is the instructions, rather than any particular copy, that transmit the work's aura.<sup>285</sup>

LeWitt's instructions are not the same as an NFT — for one thing, an NFT does not tell you how to produce the work to which it is linked — it only tells you where to find it. The NFT's real instructions are about *ownership* of the work. The person whose cryptocurrency wallet address appears in the NFT code recorded in the blockchain is the owner, both of the particular copy, and of that copy's auratic content. This is mysticism taken to the next level, and it remains to be seen whether NFTs will succeed in transforming our concept of authenticity.<sup>286</sup> Their ability to do so may depend on the development of formal

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281. *See id.* at 47–52.

282. *See generally* *Why Are Sol LeWitt's Wall Drawings So Influential?*, PUB. DELIVERY (Feb. 12, 2023), <https://publicdelivery.org/sol-lewitt-wall-drawings/> [<https://perma.cc/3H8S-9TLY>].

283. *See* Raustiala & Sprigman, *supra* note 261.

284. *See* *Why Are Sol LeWitt's Wall Drawings So Influential?*, *supra* note 282.

285. As has already been noted, you cannot reproduce the work that an NFT “references” or “points to” from any of the code contained in the NFT itself. Some NFTs contain a link to a website containing code that can reproduce a copy of the work: although again, a copy, and not the copy.

286. It is important to acknowledge that some of the complexities about what, precisely, the owner of an NFT owns also attend transactions in physical works, like paintings. If you buy a painting, you own that particular physical embodiment of the work, but you do not, absent a separate transaction transferring ownership of the work's copyright (which must be in writing), own the “work,” which is an intangible good. *See* 17 U.S.C. § 202 (ownership of copyright in work is distinct from ownership of material object embodying work); § 204 (requiring that transfers of copyright ownership must be “in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent”). That is, unless you also negotiate for and receive a written transfer of the work's copyright, the copyright owner (usually the painter or his or her transferee) retains the exclusive right to make and distribute copies of the work, to create derivative works based on it, or to make public displays of the work beyond the limited rights granted by U.S. copyright law to the owners of particular copies. The owner of an NFT similarly does not own the copyright of the work the NFT references (at least not absent separate written agreement transferring the copyright). The owner of the NFT also may not own a copy of the work that the NFT points to, although in many NFT transactions, ownership of a copy is transferred. In the case of the physical work, ownership

or informal<sup>287</sup> IP rules that govern NFT transactions and are designed to protect the integrity of the token as a vessel for aura. What would happen, for example, if Beeple creates another copy of *Everydays*, generates a new NFT, and Christie's auctions that? Or, to take what may be a more interesting example, what if Beeple *doesn't* create a new copy of *Everydays* but rather simply mints a second NFT (or a third, a fourth, etc.) that contains the same URL as the "original" NFT pointing to the same copy of the work? There is no technical barrier preventing Beeple from doing either thing — nothing in the code of any particular NFT prevents another NFT from being "minted" for the same work or even for the same copy. The terms of the Christie's auction (at least judging by the information that the auction house has made public) do not appear to explicitly prohibit it either. And the same is true of the current rules of copyright law: in fact, copyright law explicitly reserves to the artist the exclusive right to make copies of her work, and as has just been explained, an artist who sells an NFT that references a work does not also transfer the copyright absent a separate written agreement to do so.<sup>288</sup>

That said, if NFTs are indeed serving to convey a work's auratic content to a particular owner, we might expect rules to develop to protect that ownership interest. Those rules might be in the form of new copyright law, but more likely they would originate as forms of state misappropriation or unfair competition law, which is mostly judicially developed and therefore more flexible. Assuming, for the moment, that the minting of multiple NFTs for the same work does not lead to the same unexpected reinforcement of the work's value that we see in the Giacometti example,<sup>289</sup> we might see the development of unfair competition rules that would restrict the artist from minting new NFTs of a particular work following the sale of the first NFT of that work, at least unless the artist had specifically disclosed in advance an intent to mint NFTs in a series. Such rules would back the claim that the owner of that first NFT has a singular token in which the work's auratic experience has now been relocated. Such rules would also confirm that the owner's

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of the artifact is backed by the legal rules and social conventions that surround sales transactions. In the case of the NFT, something new is required: the imaginative leap to identify ownership of the NFT with a claim to ownership of the auratic experience of the work associated with it.

287. "Informal" IP rules are those rules about the ownership of intangible goods that are formulated and enforced by a particular community, rather than via formal law. For an example involving the stand-up comedy community's informal IP rules in jokes, see Dotan Oliar & Christopher J. Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1791 (2008).

288. The auction page for *Everydays, Beeple*, *supra* note 260, refers to *Conditions of Sale for Christie's Inc.*, CHRISTIE'S (Feb. 12, 2023, 2:50 PM), <https://christies.com/pdf/onlineonly/EcommerceConditionsOfSale-NewYork-02SEP22.pdf> [<https://perma.cc/R22F-TRZK>].

289. See *supra* notes 147–48 and accompanying text.

right to advance that claim is what undergirds the value of the NFT transaction.

There is also the question of third parties minting NFTs to works they do not own.<sup>290</sup> Unauthorized third-party minting does not necessarily involve copying, distributing, or displaying a copy of the artwork itself (again, an NFT contains only a hash of the work, and perhaps also a link to it), and so copyright law is not implicated so long as the person minting the NFT does not make a new copy of the work. The unauthorized NFT minter might avoid doing so by including in the NFT a URL pointing to a copy of the work that is already made available on the web. Again, it is possible that we might see the introduction of IP or quasi-IP rules based in unfair competition law to regulate such unauthorized third-party minting. But it is also possible that the auratic experience that an authorized NFT conveys is not threatened by unauthorized third-party minting. The chain of title of an NFT minted by a third party will lead back to that person's cryptocurrency wallet, and not to the artist or the artist's representative. And so it might be that the market is indifferent to the presence of these unauthorized NFTs — except, perhaps, for a few which might stand on their own as works of conceptual art interrogating the concept of authenticity.

### III. AURA AND THE PROGRESS OF SCIENCE AND USEFUL ARTS

#### *A. Aura and Enriched Objects*

In the examples we have explored in the preceding Part, a common theme has emerged: an artifact that exists in many copies is linked to a narrative about authorship, place, or originality in a bid to infuse aura into the artifact (or, in the case of NFTs, a token for the artifact) and thereby to mark it as authentic. One of Walter Benjamin's accounts of aura suggested, but did not explicitly state, that auratic experience requires a unique or original artifact.<sup>291</sup> We show here that narratives are used to manufacture an auratic dimension of artifacts of consumption produced in many copies. The narratives used to manufacture aura differ. Sometimes, they construct authorial pedigree, as we have seen, for example, with respect to the furniture Vitra markets or the Birkenstock sandals.<sup>292</sup> Sometimes, they link the product to a particular location or history, as we have seen for Bordeaux wine or Bergamo salami.<sup>293</sup> And

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290. Ben Munster, *People Are Stealing Art and Turning It Into NFTs*, VICE (Mar. 15, 2021, 9:39 AM), <https://www.vice.com/en/article/n7vxe7/people-are-stealing-art-and-turning-it-into-nfts> [<https://perma.cc/L5T2-LMRA>]; Aaron Mark, *How To Troll an NFT Owner*, SLATE (Nov. 18, 2021, 2:08 PM), <https://slate.com/technology/2021/11/nft-image-ownership-right-clicking-saving-copying-trolling.html> [<https://perma.cc/8SE6-QUQ3>].

291. See *supra* text accompanying notes 3–6.

292. See *supra* Section II.B.

293. See *supra* Section II.C.

sometimes, the narrative identifies particular artifacts as “original” (e.g., the Kinkade reproduction or the NFT) and separates them from a number of otherwise indistinguishable artifacts (i.e., the other countless reproductions of a Kinkade original or copies of the digital artwork to which an NFT may “refer”).<sup>294</sup>

These accounts of aura differ from what Benjamin originally described.<sup>295</sup> We should note, however, that even within Benjamin’s framework, originality should not be construed too literally: Roman copies of Greek statues are not “originals” in a strict sense but are nonetheless richly auratic. In our account, the place-association and authorial-narrative versions of aura do not depend on association with original artifacts.

In most of these examples (though not all), the narratives through which market actors manufacture aura are interwoven with intellectual property protection; indeed, the two elements are mutually supportive. The authorial and place-narratives, in particular, help to meet protection thresholds: the existence of a place-narrative for wine, for example, is a prerequisite to the recognition and enforcement of a GI for wine originating from that place.<sup>296</sup> The authorial narrative is a prerequisite for copyright protection: the table must be recognized as a “work of authorship” before copyright law will protect it.

In the other direction, IP rights reinforce the narratives linked to the artifacts. Perhaps most notably, IP rights centralize incentives in a particular producer or group of producers to invest in the production of narrative. For example, European copyright law gives Vitra control over Eames chairs and allows Vitra to capture much of the benefit of investment in the manufacture of aura through authorial narrative.<sup>297</sup> The law of geographical indications does much the same, collectively, for the producers of Bergamo salami or Bordeaux wine: the GI protection allows the in-region producers to capture much of the benefit of investment in the manufacture of aura through place-narrative, which in turn induces investment by the in-region producers in the elaboration and dissemination of that narrative.

IP rights also give producers power to stabilize narratives. For example, GIs reinforce the Bordeaux producers’ efforts to focus the

294. *See supra* Section II.D.

295. *See supra* text accompanying note 2 (describing how Walter Benjamin linked the aura of an artifact to its original).

296. Article 93(1)(a) of the EU Common Organization of Agricultural Markets (“CMO”) Regulation states, e.g., that a wine can only be protected by a EU designation of origin if every part of the preparation, production, and processing takes place in the region of origin. This means, *inter alia*, that the grapes have to come exclusively from that region. Regulation (EU) No. 1308/2013, of the European Parliament and of the Council of 17 December 2013 Establishing a Common Organization of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007, art. 93(1)(a), 2013 O.J. (L 347) 361.

297. *See supra* text accompanying notes 106–10.

narrative that grounds the authenticity of Bordeaux wine on supposedly irreplicable terroir rather than the blend of grapes characteristic of the region's wines or the techniques used in vinification (elements that can be replicated in many places). In this way, it is the expressive power of the GI rule — that is, the law's alignment with and support for a particular conception of authenticity — that is most salient for both producers and consumers. And, finally, IP rights also shape the kind of narratives that can be told. While copyright is particularly conducive to single-author or joint-author authorial narratives, geographical indications are focused on what can be understood as collective-author authorial narratives. The place-narrative is the work of a community over time, and therefore in a market, like wine, where IP built around place-narrative dominates, producers face the incentive to contribute to the construction and preservation of the place-narrative as opposed to investing in a more traditional Romantic narrative of the individual winemaker as author.

This is not to say that we do not see narratives of the latter variety in the wine industry. It is, however, not the dominant narrative and the winemaker/author narrative is almost certainly far less prominent than it would be if GIs were not pushing producers toward investment in place-narrative. This may explain why, for example, American cheese producers have expressed less interest in GI protection than their European counterparts, as their branding strategies may focus more on individual entrepreneurship and individual authorial narratives and less on collective-author place-narratives.

Through the manufacture of auratic narrative, artifacts are instilled with social meaning, which becomes an additional element of the product and can substantially alter the experience of consuming it. We can see this effect at work in a study of consumers of cola beverages. In the study, control subjects were served Coke and Pepsi in containers without branding, while treatment subjects were served the drinks with their branding revealed.<sup>298</sup> Revealing the branding changed the preferences (Coke vs. Pepsi) of a significant number of subjects.<sup>299</sup> But perhaps more significant were changes in the neurological response of subjects in the treatment arm — i.e., consumers of the “cola+branding.” Functional MRI scans of subjects' brains while consuming the cola+branding revealed activation — much more for subjects consuming Coke rather than Pepsi — of distinct areas of the brain linked to recalling cultural information.<sup>300</sup> Such recall, the study argues, has a strong impact on expressed behavioral preferences. Subjects consuming

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298. Samuel M. McClure, Jian Li, Damon Tomlin, Kim S. Cypert, Latané M. Montague & P. Read Montague, *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 *NEURON* 379, 379 (2004).

299. *Id.* at 383, 385.

300. *Id.*

Coke+branding are not merely tasting Coca-Cola. They are engaged in the cultural narrative that Coke's relentless advertising, anchored in Coke's branding, has created and sustained.<sup>301</sup> We argue that the same is true of a wide range of artifacts infused with narrative aura. A Bergamasco salami is not merely delicious. It is *Bergamasco*, a product made partly of pork and partly of narrative which fixes the consumption experience to a particular place and history. The narrative transforms what might be a pleasing sensory experience into a cultural experience.

But what does it mean for the intellectual property system when it is used not to incentivize new inventions and literary works, but as a spur to innovating narratives and creating social meaning for existing artifacts of consumption? Will the future epicenter of intellectual property theories shift from incentives to certification and authenticity?<sup>302</sup> And do we want to live in a world in which intellectual property law is used to infuse objects with social meaning? Over a decade ago, Barton Beebe took an incisive first cut at such questions. In a world in which powerful copying technologies have eradicated the authenticity of artifacts, Beebe argued that intellectual property rules increasingly would be employed to reinforce systems of social distinction and to suppress the potentially liberatory implications of copying. In Beebe's view, intellectual property was taking a "sumptuary turn" — i.e., a pivot away from promoting innovation as such and toward creating and defending opportunities for both rarity and social distinction, sometimes between classes in a hierarchical sense, sometimes between groups without regard for class distinctions.<sup>303</sup> In all cases, the effect of IP is to serve consumer preferences for *relative* utility, i.e., an individual's welfare measured in relation to the welfare of others.<sup>304</sup>

Beebe laments this development.<sup>305</sup> He suggests, however, that the sumptuary use of IP has a limit. By multiplying so many new forms of distinction, in the end sumptuary IP will collapse into a "hell of the same"<sup>306</sup> where consumption is no longer capable of providing

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301. *Id.* at 385. In another study, whether a Rembrandt painting was portrayed as an original or a forgery appeared to change activation in pleasure centers of the human brain. Mengfei Huang, Holly Bridge, Martin J. Kemp & Andrew J. Parker, *Human Cortical Activity Evoked by the Assignment of Authenticity When Viewing Works of Art*, 5 FRONTIERS NEUROSCIENCE 1, 6 (2011) (finding an activation of the orbitofrontal cortex, which has been associated with reward, monetary gain, and pleasure); see also George E. Newman, *The Psychology of Authenticity*, 23 REV. GEN. PSYCH. 8, 8 (2019).

302. See Burk, *supra* note 7, at 2, 27 (arguing that in a world where production costs are falling, intellectual property debates should shift their focus from fighting against unauthorized reproduction to protecting authenticity).

303. Beebe, *supra* note 25, at 813.

304. *Id.* at 833.

305. See *id.* at 888.

306. *Id.* at 884.



distinction: “At this limit, distinction itself becomes so abundant as to be perceived as indistinct; it becomes noise.”<sup>307</sup>

We are less concerned (or perhaps, less hopeful) than Beebe that intellectual property’s path is likely to terminate in the dilution of distinction.<sup>308</sup> Unlike Beebe, we doubt that consumers’ demand for distinction is threatened by copying, now or in the future. It is true that digital artifacts are, as a rule, freely reproducible at low cost (except, as we have seen, in the case of NFTs, where technology makes reproduction of the token exceedingly difficult). With respect to physical goods, developments in technology and the growth of offshore manufacturing have made copying both cheaper and more difficult to police, but these changes are a matter of degree. We do not see the merging of the digital and physical worlds which some, enchanted by technologies like 3-D printing, have predicted.<sup>309</sup> Copying in the physical world is still difficult and expensive, and seems likely to remain so for some time.

There is also the fact that some copying does not destroy distinction but may reinforce it. Think, for example, of the affluent women who continue to spend \$10,000 or more — up to \$200,000 for some materials — for a Hermes Birkin bag despite the wide availability of much cheaper and sometimes quite persuasive counterfeits.<sup>310</sup> Most potential Birkin bag owners measure their relative utility against people who do not usually consume fakes, so for these people fakes may be irrelevant.<sup>311</sup> The fakes may even reinforce the distinctiveness of the authentic Birkin by reinforcing its desirability — the prolific knocking-off of a luxury good sends a signal that it is desired.<sup>312</sup>

If that is correct, then the imperatives driving IP to proliferate new forms of distinction, at least outside the digital domain, are correspondingly less powerful than some have imagined. But the questions about the social implications of copying are deeper than that. If we focus on copying’s relationship to distinction, with distinction defined as relative utility vis-à-vis other consumers, then it is easy to see how copying could be a threat — at least if relative utility is measured against all consumers, including those who consume copies, rather than some

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307. *Id.* at 829; *see also id.* at 825.

308. *Id.* at 883.

309. *See, e.g.*, Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460 (2015) (arguing that, as the Internet has reduced production and distribution for information to zero, technological changes may end scarcity for a variety of physical goods and services as well).

310. *See The 2023 Hermes Birkin Bag Price List*, BAGOVER, <https://www.bagover.com/hermes-birkin-bag-price-list> [<https://perma.cc/VP37-22ZS>].

311. *Cf.* Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1388–90 (2005).

312. *See* Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881, 886–87 (2018) (stating that harm from trademark-infringing copies is uncertain); *see also* Barnett, *supra* note 311, at 1390, 1399–1400.

subset which tends to consume only authentic articles. However, if we frame the question in terms not of distinction, but the relationship between copying and auratic experience, the implications are not so clear.

It is true that if material characteristics of goods can no longer reliably signal authenticity, producers will turn to manufacturing aura and elaborating signals of authenticity.<sup>313</sup> This is related to the notion of an “enrichment economy”: French sociologists Luc Boltanski and Arnaud Esquerre have argued that, in a world where large-scale factory production has moved to East Asia, the former industrial powers are moving toward an economic model in which value creation does not focus on physical attributes of objects anymore.<sup>314</sup> Rather, the value of “enriched objects” can be increased through cultural narratives that highlight certain qualities of the objects.<sup>315</sup> The price of an enriched object is then not only determined by its inherent properties, but is also influenced by accompanying narratives,<sup>316</sup> invented heritage,<sup>317</sup> and fabricated scarcity.<sup>318</sup> These aspects of value creation can be protected by intellectual property rights.<sup>319</sup>

However, whether the emergence of an enrichment society means necessarily that producers will “over-enrich” objects is not clear to us. We suspect that auratic use of IP is, to a large degree, self-regulating. The market for auratic experience is just another market. We see no reason why the use of IP to create aura is not disciplined by the same forces that shape markets for more conventional products. These self-regulatory forces may have limits, but we observe this in many other markets as well.

### *B. Aura and Market Forces*

Let us start with demand. There is demand for aura, not least because it can alter the experience of consumption.<sup>320</sup> Studies have shown how narratives can increase the valuation of objects and experiences.<sup>321</sup> In an age where some traditional sources of authenticity seem to have less salience, efforts to recreate authenticity through auratic

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313. See Raustiala & Sprigman, *supra* note 312, at 898; see also Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 774 (2012) (describing how trademark law rations access to symbols of status).

314. Boltanski & Esquerre, *The Economic Life of Things*, *supra* note 7, at 35, 41, 52. See generally BOLTANSKI & ESQUERRE, ENRICHMENT, *supra* note 7.

315. *Id.*

316. *Id.* at 44.

317. BOLTANSKI & ESQUERRE, ENRICHMENT, *supra* note 7, at 22–25.

318. *Id.* at 122–24, 193–97.

319. Boltanski & Esquerre, *The Economic Life of Things*, *supra* note 7, at 35; BOLTANSKI & ESQUERRE, ENRICHMENT, *supra* note 7, at 76, 273, 292–300.

320. See Newman, *supra* note 301; Heymann, *supra* note 7, at 32; Burk, *supra* note 7, at 8.

321. George E. Newman, *Bringing Narratives to Life: Animism, Totems, and Intangible Value*, 3 J. ASSOC. CONSUMER RES. 514, 515 (2018).

consumption may be particularly attractive.<sup>322</sup> As a result, it is not surprising that auratic narrative has not only become an important component of marketing many luxury products,<sup>323</sup> but has influenced mass consumer products as well.<sup>324</sup> It seems that consumers have a demand for aura, and that there is an intricate relationship between preference formation and the manufacture of aura. From Barton Beebe's perspective, auratic strategies appear anti-progressive.<sup>325</sup> Walter Benjamin's take seems to align in part with Beebe's: Benjamin expects that the copy will destroy aura.<sup>326</sup> But that's only part of the story. What if, contrary to Benjamin and modern IP scholars like Mark Lemley,<sup>327</sup> people *value* scarcity, not because of some affliction of false consciousness, and not just as a way of achieving distinction in consumption or of signaling status (the interests served by the sumptuary use of IP), but as a marker of authenticity and a source of social meaning? If, for example, the proliferation of narrative about wine adds to the experience of consuming wine, then consumers benefit from something else other than exclusion or relative utility, even if the narrative defines authenticity in a way that makes the relevant product scarce. And if consumers have a preference for consuming Bergamasco culture over eating a random salami, then the manufacture of an auratic experience through IP (in the case of the salami, the GI protection) may ultimately benefit consumers, even if authenticity makes the product scarce relative to salami competing as an undifferentiated commodity. The auratic use of IP is unlike the sumptuary use in that it is not focused, at least not primarily, on exclusion or distinction *simpliciter*.

Of course, demand signals might be distorted by market failures, such as incentives for engaging in excessive product differentiation.<sup>328</sup> But such market failures should not be presumed. That applies to the possibility of congestion as well. Different auratic narratives may compete within the same product market without necessarily leading to a market failure: in the market for furniture, the Eames narrative competes with narratives about other notable mid-century designers — i.e., the Florence Knoll, Hans Wegner, Isamu Noguchi, Edward Wormley, and Eero Saarinen narratives, among many others. Demand calls forth auratic narrative, but it also sets limits. The market for social meaning is mediated by demand: if, for example, Vitra realizes that further

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322. See Beriss, *supra* note 179, at 63–67.

323. On the food sector, see Arfini & Sassatelli, *supra* note 179, 181, 185, 197–98; Beriss, *supra* note 179, at 63.

324. See generally Eeva Solja, Veronica Liljander & Magnus Söderlund, *Short Brand Stories on Packaging: An Examination of Consumer Responses*, 35 PSYCH. MKTG. 294 (2018).

325. Beebe, *supra* note 25, at 844.

326. See *supra* text accompanying notes 42, 257.

327. See generally Lemley, *supra* note 309.

328. See Richard Schmalensee, *Entry Deterrence in the Ready-to-Eat Breakfast Cereal Industry*, 9 BELL J. ECON. 305, 316 (1978).

investment in auratic narrative will not increase its profits, it will likely not increase those investments.

In theory there could be a point where the use of mid-twentieth century authorial narratives by furniture manufacturers becomes ubiquitous, thereby impairing the narratives' auratic power. That sort of depletion does not appear to have happened to the Eames narrative in the United States, which many manufacturers are entitled to exploit. But if it did, what of it? The death of the Eames narrative doesn't lead ineluctably to the "hell of the same."<sup>329</sup> It more likely would presage investment in a new auratic narrative, one protected by IP rights — temporarily in the case of copyright, design patent, or industrial design rights, or potentially perpetually by trademark.

Respecting supply, the manufacture of auratic narrative features characteristics similar in some ways to a public good. Public goods are non-excludable in use and non-rival in consumption. IP rights for public goods are typically justified as a way to prevent undersupply. And the model seems also to fit the production of auratic narratives. In the absence of IP rights, if a furniture manufacturer creates an auratic narrative for his products, the narrative is at least "boundedly" non-excludable. That is, little prevents a competing producer from attempting to free-ride on that narrative by linking her products to it. So, for example, any furniture producer that makes chairs faithful to the Eames designs likely can join the Eames authorial narrative and seek to exploit it. It is Vitra's copyrights that prevent this, at least for now. Similarly, any winemaker cherishing Bordeaux-style winemaking could join the place-based Bordeaux narrative (subject to limits on available acreage) and seek to benefit from it. It is geographical indications that provide excludability to the place-based narrative for Bordeaux region wine makers only.<sup>330</sup>

This is not to suggest that out-of-region producers are shut out entirely: they can seek to join the narrative by altering it. For example, perhaps Californian producers who make Bordeaux-style wines and who use grape recipes and techniques typical of Bordeaux could work to push those replicable elements to the center of the narrative, displacing terroir. Or perhaps the Californians could attempt to dilute the terroir concept by arguing that terroir is replicable in places with geological and climatic conditions similar to Bordeaux's. It is the Bordeaux GI that stands in the way of out-of-region rivals who may seek to destabilize the terroir-based Bordeaux narrative. The current rule for wine GIs prohibits out-of-region producers from making comparisons

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329. See *supra* notes 306–07 and accompanying text.

330. On the notion of IP-protected goods as club goods that are excludable, see Christopher Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 683 (2007).

or references to the protected term.<sup>331</sup> That removes most if not all of the incentive to attempt to re-center the narrative, and thus the auratic experience, away from terroir or to argue that terroir itself is replicable. And unlike in the case of copyright, the bar that GIs erect to rivals seeking to join an established auratic narrative is at least theoretically perpetual.

Are auratic narratives non-rivalrous in consumption? If a consumer reads a Harry Potter book, this does not decrease the book's value to other consumers: the Harry Potter book is non-rival in consumption. Similarly, if a consumer buys a lounge chair surrounded by an authorial narrative centering on the lives and work of Charles and Ray Eames, the consumption of the narrative does not necessarily decrease the narrative's value to other consumers.<sup>332</sup> While the lounge chair itself is a rival resource (if I sit on the chair, you cannot sit on the chair at the same time), the aura surrounding the chair is non-rival: if I consume the auratic narrative, you can consume it at the same time. Similarly, if I consume an imaginary rural America in a distant past by placing a Thomas Kinkade painting in my living room, this does not prevent my neighbor from doing the same. This does not mean that auratic consumption will always stay non-rival. If a car enters a highway, its consumption of the highway is non-rival only up to the point where too many cars cause a traffic jam. Under certain conditions, auratic narratives may become congested as well: consumption of the auratic narrative may become rivalrous if the point of consuming it is to distinguish oneself from other consumers *and* if wide consumption of cheap copies interferes with that. But it is far from obvious that such congestion would often result — before a particular market in auratic narrative approaches congestion, market signals are likely to lead to a fall-off in investment in the creation of additional narratives for that market.

At this point we can say that the production of auratic narrative seems to fit the standard public goods model that justifies IP protections, albeit only up to a certain point, which is often the case with other public goods. We recognize that applying a public goods rationale to auratic narratives may be surprising to some and a stretch to others. But as we try to show in this Section, the public goods framework fits to auratic narratives surprisingly — and perhaps uncomfortably — well. In our view, this is partly a result of the inherently vague definition of what constitutes a public good. Steven Shavell captured this imprecision in the definition well:

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331. See *supra* text accompanying note 190.

332. See, e.g., *Eames Lounge Chair and Ottoman*, HERMANMILLER, <https://www.hermanmiller.com/products/seating/lounge-seating/eames-lounge-chair-and-ottoman/design-story> [<https://perma.cc/B4WT-VMBG>].

[W]hen professional economists talk about “public goods” they do not mean that there is a general category of goods that share the same economic characteristics, manifest the same dysfunctions, and that may thus benefit from pretty similar corrective solutions. Most economists . . . would agree that there is no such thing as “public goods”; there is merely an infinite series of particular problems (some of overproduction, some of underproduction, and so on), each with a particular solution that cannot be deduced from the theory, but that instead would depend on local empirical factors.<sup>333</sup>

The strength of the public good rationale is that it is highly abstract and can thereby be applied to areas as disparate as lighthouses,<sup>334</sup> fire-works, information goods, intellectual property,<sup>335</sup> radio, Wikipedia, air, military defense, and education. This does not mean that a public good rationale is able to capture all the aspects and challenges in all these areas. Rather, by applying public goods analysis to an area, economists hope to uncover dynamics of market competition and market failure. Economists accept the vagueness of the public goods definition as it still can provide a helpful framework to discuss such dynamics.

As the public goods framework is the foundation of a consequentialist justification of intellectual property protection, the analysis can help us understand the manufacture of aura. And while we have argued so far that the production of auratic narrative seems to fit the standard public goods model, that means neither that each investment in auratic narrative should receive protection,<sup>336</sup> nor that such protection would only have positive consequences. But there is at least a tentative case to be made that, in general, the gains on the swings may outweigh the losses on the roundabouts. Investment in auratic narrative is, broadly, investment in the creation of social meaning. A richer, more complex consumption experience is a species of innovation. And the worry that

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333. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 250 (1996) (reporting from a conversation with Steven Shavell).

334. See generally Ronald Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 375 (1974).

335. See generally LANDES & POSNER, *supra* note 16.

336. Take the short brand story printed on the wrapper of an 18 Rabbits granola bar as an example: “Growing up, my mom taught me the importance of eating organic and understanding food labels. She was very sick, and doing both restored her health. To cheer us up, my dad brought home a rabbit. Soon, we had 18 rabbits hopping around. As a mom today, those memories inspire the wholesome recipes I create in my kitchen for you. Alison.” Solja et al., *supra* note 324, at 295. One can certainly question whether the world is better off by infusing granola bars with a narrative about the health and the pets of the parents of the founders of a firm.

IP protection of auratic narratives will suppress competition does not seem especially pressing in general, although we cannot rule out competition concerns in particular cases.

Whether intellectual property law should support the manufacture of aura is therefore an exercise in trading off aspects of potential underproduction, competitive forces, market failures, and other matters the law cares about. In this sense, we argue that the debate on aura production is not different from the long-standing debate around the justification and scope of intellectual property protection as applied to the goods to which various forms of IP right traditionally apply. That said, while we have suggested that there may be cases where the use of intellectual property protection for aura production is justified, we can also point to potential downsides of IP protection.

### *C. Aura and Unintended Consequences*

Let us start with some potential detrimental aspects of IP production for auratic narratives that are familiar from other areas of IP law. First, by protecting auratic narratives through IP, it's possible that we could see over-investment in the creation of auratic narratives. Determining the optimal output of auratic narrative is likely to be even more difficult, both in theory and practice, than in markets where IP traditionally operates. Second, and perhaps more importantly, IP rules are likely to shape the kinds of narratives that are developed and told. As we pointed out earlier,<sup>337</sup> Vitra's auratic narrative could focus on shape rather than authorial pedigree, and the Bordeaux wine producers' auratic narrative could focus on grape recipe or technique and style of winemaking rather than on terroir. IP rules in each case favor the latter focus and not the former.<sup>338</sup> It is difficult, however, to assess which narratives are likely to be the most socially productive, and so it is difficult to choose among them. Similarly, IP rules seem to favor single-owned authorial narratives, but not community-owned place-narratives. If in the future the intellectual property system would provide a community ownership regime to Eames' furniture designs, based perhaps not in geography but on a distributor's adherence to the shape and construction standards set down by the original designer and manufacturers, both Vitra and other furniture distributors could nurture the Eames authorial narrative.

Can the narrative function serve as a source of aura if it is used as a pool resource? As just mentioned, geographical indications enable pool ownership of a place-narrative. We see no reason why an authorial narrative must necessarily be different. An IP rule could treat the Eames

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337. See *supra* Section II.C.

338. On a related note of how copyright and social norms on copying shape the output that stand-up comics produce, see Oliar & Sprigman, *supra* note 287, at 1791.

chair as a pool resource if, for example, it were to restrict the use of the “Eames” identifier to chairs whose shape and construction were faithful to a particular standard deemed authentic. Similarly, the aura of artisan cheese can be manufactured through place-narratives or through authorial narratives. That the European IP system has decided to provide pool ownership to the narrative on Bergamo salami, but exclusive ownership on the Eames chair, are choices that have a direct impact on the incentive structure to create such narratives. The demand for GI protection may be higher among European than American cheese manufacturers, due to their varying preference for place versus authorial narratives. And the fact that protection through copyright, trademark, and geographical indications provides longer terms of protection than, for example, design or utility patents has had a direct impact on the incentives to construct such narratives with the help of the former rather than the latter forms of intellectual property law.

Linking auratic narratives to intellectual property protection can also have distributional consequences. As mentioned before, Vitra’s IP rights give it the power to restrict access to Eames designs.<sup>339</sup> But the more subtle distributional consequences of manufactured aura extend to the relationship between producers and intermediaries. When Vitra instills its product with narrative aura, the consumer cares less about the furniture store where she buys the product and more about the “author.” And when an Italian farmer infuses his salami with aura, the consumer cares less about the supermarket where he buys the salami and more about the Italian salami and the place-narrative to which it is linked. In other words, by creating an aura through narratives backed by IP protections, Vitra devalues IKEA, and the Bergamo farmers devalue Whole Foods. Manufacturing aura thereby not only creates authenticity vis-à-vis consumers; it also tends to increase the power of the producer relative to intermediaries in the distribution chain.<sup>340</sup>

Whether such downsides of protecting auratic narratives through intellectual property ultimately materialize will depend on many factors, as experience from other areas of intellectual property law tells us. It is important to keep in mind that appropriation through intellectual property, whether for products or for auratic narratives, will always have its limits. As the boundaries of auratic narratives are blurry, complete privatization of narratives will almost always be difficult, and spillovers between auratic narratives may enable a discourse on the

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339. Doing so may seem at odds with what Charles and Ray Eames publicly professed as their professional goal: “to make the best for the most for the least.” See Sarah Cowan, *The Best for the Most for the Least*, PARIS REV. (June 14, 2017), <https://www.theparisreview.org/blog/2017/06/14/the-best-for-the-most-for-the-least> [<https://perma.cc/4XLV-NKG8>].

340. Jillian Ivar Björkman, *Aura: Aesthetic Business Creativity*, 5 CONSUMPTION, MKTS. & CULTURE 69, 69 (2002) (“Aura-production describes the building-process how aura is produced and factors that influence the outcome of the aura.”); see also Cavanaugh & Shankar, *supra* note 180, at 53.



social meaning of products as well as the creation of new, but related, narratives. “Surryano” ham, for example, is named after Surry, VA, the hometown of Edwards Virginia Smokehouse, and marketed as “the American alternative to premium-priced European Prosciutto and Serrano hams”:<sup>341</sup>

Surryano ham is a European-style cured ham made from Six-Spotted Berkshire hogs who are pasture-raised without antibiotics or hormones. With a nod to Virginia tradition of setting the hogs free to roam the peanut fields after harvest, the Six-Spotted Berkshire hogs’ diets consist of 2lbs of peanuts per day on top of the natural feed and the pasture they nibble during the day. This fatty dessert makes the ham well-marbled and subtly flavored.<sup>342</sup>

The Surry producers are constructing their own place-narrative, with a boost from existing narratives for traditional European cured hams, including Serrano and prosciutto — the Surryano narrative is legible to consumers in large part because the pre-existing narratives for cured hams establish the category and teach consumers to expect a place-narrative to define products within it. For similar reasons, spillovers also limit the excludability of the aura created by Vitra. An Eames chair has always been an article of manufacture, as distinguished from a singular work of art. Vitra produces many copies of the Eames lounge chair. And at least in the United States, other companies produce copies as well. Vitra’s European IP rights mean that it enjoys most of the returns on its investment in the Eames narrative. But not all — some of the benefits of Vitra’s investment in the Eames narrative likely already spill over to American producers. And once the IP rights that restrain European competitors are removed (specifically, copyrights, which expire), Vitra’s investment likely will spill over to European producers as well. It’s impossible to say as a matter of theory whether Vitra’s investment in narrative will be dissipated once the IP rights expire and competitors are free to jump in. But the facts suggest that the aura of the Eames chair is likely to survive copying by competitors, just as it has survived production in many copies by Vitra. In the United States, where competition from replicas is already possible, the original Eames chair design remains popular and, it appears, can be distinctive when offered in a version touted as “authentic.” Herman Miller, the

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341. *Surryano Boneless Ham*, EDWARDS VA. SMOKEHOUSE, <https://www.edwardsvaham.com/product/boneless-surryano-ham/surryano-ham> [<https://perma.cc/EX63-7VJL>].

342. Sara Kate Gillingham, *Kicking the Imported Ham Habit with Virginia’s Surryano Ham*, THE KITCHN (Aug. 18, 2009), <https://www.thekitchn.com/kicking-the-imported-ham-habit-93019> [<https://perma.cc/6FMG-9K2P>].

Michigan-based company for which the Eameses originally designed the chair in 1956, continues today to market, both directly and through distributors like Design Within Reach, an Eames chair that Herman Miller promotes as “genuinely authentic.”<sup>343</sup> As a Herman Miller ad from the 1950s illustrates (see Figure 6), the company has emphasized this narrative for over seven decades now.<sup>344</sup>



Figure 6: 1950s Herman Miller Ad<sup>345</sup>

Finally, the intellectual property system itself provides tools to limit protection for auratic narratives and counteract the potential detrimental effects of overly broad protection. In copyright law, the origi-

343. See *Eames Lounge Chair and Ottoman*, *supra* note 332.

344. *Beware of Imitations – Customizable Print*, EAMES OFF., <https://www.eamesoffice.com/product/beware-of-imitations-customizable-print> [<https://perma.cc/Z4SB-B4X8>].

345. *Id.*

nality standard, the idea/expression dichotomy, the useful articles limitation, as well as doctrines such as fair use, merger, and *scènes à faire*, all create barriers for producers attempting to infuse their products with aura through IP. The ways in which various IP-limiting doctrines might apply to particular auratic narratives will depend heavily on context and a full treatment is not possible here. But as we have seen, Vitra's auratic strategy in the EU, which depends heavily on copyright protections, is unlikely to be transplantable to the United States, where copyright's useful articles doctrine limits protection for articles, like furniture, that mix aesthetic appeal with utility.<sup>346</sup> Similarly, U.S. trademark's functionality bar and indulgence of descriptive use, and U.S. design patent's very demanding infringement standard and its limited term, mean that auratic narratives will receive only partial protection. In each case, the selection of which IP regime to exploit has nothing to do with principle — the selection of an IP regime is wholly opportunistic and determined by the limitations that attend each regime in a particular jurisdiction. These safeguards in the intellectual property system may help limit detrimental effects of auratic IP, as they limit detrimental effects in other areas of intellectual property law.

But for those hostile to the entire enterprise of IP law protecting auratic narratives, the current safeguards on both sides of the Atlantic (and particularly in the EU) are falling short. In the United States, for example, it is the incontestability doctrine that allows producers like Knoll to recruit trademark law to the protection of auratic narrative (though that recruitment provides only limited shelter from competition).<sup>347</sup> In the EU, it is the absence of a useful articles limitation in copyright law.<sup>348</sup> In both cases, those who oppose the auratic use of IP for furniture designs would be wise to focus on changes to those doctrines.

#### IV. CONCLUSION

We started our journey with Walter Benjamin, who predicted that reproduction techniques would dissolve a work's aura and deprive it of much of its aesthetic authority.<sup>349</sup> That prediction, almost a century after it was made, seems increasingly out of step with what we see. Using an eclectic array of examples including mid-twentieth century furniture, Birkenstock sandals, Italian salami, American cheese, North Carolina pork, Thomas Kinkade reproduction paintings, French wine, and nonfungible tokens, we explored tactics to (re)engineer auratic experience for mass-produced products, where copies are indistinguishable,

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346. See *supra* text accompanying notes 79–81.

347. See *supra* text accompanying note 72.

348. See *supra* text accompanying notes 79–81, 93–98.

349. See *supra* Section II.A.

through a combination of reproduction techniques, social norms, community building, and interlocking business and legal strategies. Most importantly for our purposes, these tactics typically leverage IP protections in some way.<sup>350</sup>

We then suggested that our existing theoretical framework for IP law may give us purchase on a justification for IP rules that promote the production of aura.<sup>351</sup> The manufacture of aura is just another market that is shaped by market forces. And whether a case can be made for using IP to protect auratic narratives is a question that can be analyzed through the standard lens IP provides: public goods theory. Whether IP protection for auratic narrative is desirable or whether the negative consequences of such protection are too dire are questions that can be answered only with respect to particular markets. It is also a question that may depend on your point of view about which narratives are culturally valuable. Infusing products with aura can lead to a form of product differentiation, except without innovation in product features per se. We get innovation in stories that shape consumer experience. Some may lament that auratic IP may lead to an increasingly commodified culture, as more of our production of social meaning is tied to the marketing and sale of products. Others may see normal market forces at play.

Our goal is not to resolve such tensions, which are not particular to auratic IP. Our goal is more modest. By providing an analytical framework on how to think about the use of IP protection for aura production, we hope to uncover some of the hidden policy decisions by which the IP system shapes the production and consumption of auratic experience. By excluding works of applied art from copyright protection through the useful articles doctrine, U.S. copyright law has made it challenging for furniture manufacturers, for example, to create authorial narratives around furniture designers.<sup>352</sup> By contrast, European copyright law encouraged such aura production by expanding the reach of copyright protection. Similarly, while geographical indications may be particularly suitable for common-ownership narratives, the individualistic structure of copyright law has made it more difficult to create authorial narratives focusing on collective creativity.<sup>353</sup> Finally, the fact that we have not seen much auratic use of design patents may have more to do with the limited term of protection patent law provides, as compared to copyright law. It is these unconscious design choices that this Article wanted to uncover in order to spark a debate on the optimal design of auratic IP.

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350. *See supra* Sections II.A–.D.

351. *See supra* Part III.

352. *See supra* text accompanying note 346.

353. *See supra* text accompanying notes 337–38.