

WHY WE SHOULD ABOLISH COPYRIGHT PROTECTION FOR VISUAL ART

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Dear readers,

This draft is still a work-in-progress. I have occasionally used brackets to indicate places where I summarize arguments that I plan to make but have not yet written.

A.A.

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INTRODUCTION

To create his “New Portraits” series, unveiled in fall 2014, the renowned artist Richard Prince trolled Instagram searching for other people’s selfies. When he found ones he liked, he added his own online comment to the user’s page, then screen grabbed the image and emailed it to an assistant who had it ink jet-printed and stretched on canvas.¹ The resulting series of six-by-four foot works sold for \$90-100K.² (This is a bargain for Prince, whose work typically costs in the millions.)³ The images were “stolen” directly from the users’ Instagram pages; Prince’s only changes to the images (other than printing them out in large format) were the addition of his own brief online comments, alternately salacious and nonsensical, often appropriated from things he heard on TV as he grabbed

¹ Jerry Saltz, *Richard Prince’s Instagram Paintings Are Genius Trolling*, VULTURE (Sept. 23, 2014, 2:15 PM), <http://www.vulture.com/2014/09/richard-prince-instagram-pervert-troll-genius.html>.

² See, e.g., Rozalia Jovanovic, *Richard Prince Is Selling Conceptual Instagram Art at Gagosian*, ARTNET NEWS (Sept. 18, 2014), <https://news.artnet.com/market/richard-prince-is-selling-conceptual-instagram-art-at-gagosian-106536> (reporting sales at private showings at Gagosian); Lizzie Plaugic, *The Story of Richard Prince and His \$100,000 Instagram Art*, THE VERGE (May 30, 2015, 11:28 AM), <http://www.theverge.com/2015/5/30/8691257/richard-prince-instagram-photos-copyright-law-fair-use> (reporting sales at the 2015 Frieze Art Fair New York). The resale value of the works was higher. One of the *New Portraits* sold for \$150,000 in a 2015 auction. Anny Shaw, *Richard Prince Instagram Portrait Leaps in Value at Phillips*, THE ART NEWSPAPER (Oct. 15, 2015), <http://theartnewspaper.com/market/richard-prince-instagram-portrait-leaps-in-value-at-phillips/>.

³ Prince’s record at auction is \$9.7 million, achieved last spring at Christie’s. Rain Embuscado, *The Top 10 Artists Who Broke Auction Records This Week*, ARTNET NEWS (May 13, 2016), <https://news.artnet.com/market/artists-who-set-auction-records-spring-2016-495011> (describing \$9.7 million recently paid for Prince’s 2007 painting *Runaway Nurse*). Prince is often listed as one of the top 10 most expensive living artists at auction. See, e.g., Anna Schori, *How Did Richard Prince Produce the Most Expensive Photograph Ever*, INDEPENDENT (Jun. 22, 2008), <http://www.independent.co.uk/arts-entertainment/art/features/how-did-richard-prince-produce-the-most-expensive-photograph-ever-850589.html> (describing one of Prince’s *Cowboys* photographs which sold for \$3.4 million). Prince’s record for most expensive photograph at auction was eclipsed in 2011. See Maeve Kennedy, *Andreas Gursky’s Rhine II Photograph Sells for \$4.3m*, GUARDIAN (Nov. 11, 2011), <https://www.theguardian.com/artanddesign/2011/nov/11/andreas-gursky-rhine-ii-photograph>.

the image.⁴ Given that this is Richard Prince, whose art has always probed (or embodied or celebrated, depending on whom you ask) the seamy side of masculinity, the pictures he chose from Instagram tended to be lascivious, even skeezy, photos of young, attractive women; they also included a smattering of artists and celebrities like Taylor Swift and Kate Moss.⁵ Many of the New Portraits were based on pictures posted by the Suicide Girls, young women from the well known alt-porn pin up collective.

Prince's almost total lack of intervention in the work he copied is part of his longstanding tradition of appropriating and re-photographing images.⁶ This technique, which he arguably "invented" but which draws on a long history in 20th century art,⁷ has won him great critical acclaim—and plenty of legal trouble.⁸ Yet critical reaction to Prince's New Portraits was

⁴ In the artist's statement on his gallery's website, Prince wrote: "The language I started using to make 'comments' was based on Birdtalk. Non sequitur. Gobbledygook. Jokes. Oxymorons. 'Psychic Jiu-Jitsu.' Some of the language came directly from TV. If I'm selecting a photo of someone and adding a comment to their gram and an advertisement comes on . . . I use the language that I hear in the ad. Inferior language. It works. It sounds like it means something. What's it mean? I don't know. Does it have to mean anything at all?" Richard Prince, *Artist's Statement*, GAGOSIAN GALLERY (June 9, 2015), http://www.gagosian.com/exhibitions/richard-prince--june-12-2015?__v%3Afile=1f156f321ba609cf4bed67a08aa4e846. As he wrote, "[w]hatever [intervention] I did, I wanted it to happen INSIDE and before the save. I wanted my contribution to be part of the 'gram.' I didn't want to do anything physical to the photograph after it was printed." *Id.*

⁵ For a critique of the exhibition's supposedly pervasive "sexism," see Paddy Johnson, *Richard Prince Sucks*, ARTNET NEWS (Oct. 21, 2014), <https://news.artnet.com/art-world/richard-prince-sucks-136358>.

⁶ See Nancy Spector, *Nowhere Man*, in RICHARD PRINCE 25 (2007) (showing Prince's central place in the generation of artists who "promoted a radical interrogation into the very nature of representation").

⁷ Other artists before Prince, such as Warhol and Rauschenberg to name just two, had relied heavily on copying in a way that makes this claim seem overblown. Nonetheless, Prince was famously called "the 'inventor' of appropriation." DOUGLAS EKLUND, *THE PICTURES GENERATION, 1974–1984*, at 153 (2009).

⁸ *Cariou v. Prince*, 784 F. Supp.2d 337 (S.D.N.Y. 2011), *reversed*, 714 F.3d 694. There are currently four lawsuits pending against Prince based on the Instagram work. Complaint, *Graham v. Prince*, No. 1:15-cv-10160-SAS (S.D.N.Y. Dec. 30, 2015); Julia Halperin, *Instagram Model and Makeup Artist Sues Richard Prince Over Copyright Infringement*, ART NEWSPAPER (Aug. 26, 2016), <http://theartnewspaper.com/news/news/instagram-model-and-makeup-artist-sues-richard-prince-over-copyright-infringement/>. Hrag Vartanian, *Photographer Sends Cease and Desist Letters to Richard Prince and Gagosian*, HYPERALLERGIC (Feb. 15, 2015), <http://hyperallergic.com/183036/photographer-sends-cease-and-desist->

divided. Most prominently, Jerry Saltz praised the works' "momentous genius," identifying them as the next step in Prince's longstanding practice of twisting images "so that they actually seem to undergo some sort of sick psychic-artistic transubstantiation where they no longer belong to the original makers."⁹ Less enthusiastic was Peter Schjeldahl of the *New Yorker*; he said his response to the show was "a wish to be dead."¹⁰

But regardless of art world divisions, the online, public reaction to Prince's work was near unanimous: Outraged citizens of the web called for Richard Prince's death,¹¹ expressed fury on behalf of his "victims"¹² and lamented the sick state of an art market that rewards rapaciousness and laziness.¹³ (Warhol's famous line, "Art is what you can get away with," seemed to find new meaning.)¹⁴ The consensus was clear: the work was outright "theft," not only of the "victims'" images but of their money too.¹⁵

And indeed the stench of money was a near constant topic for

letters-to-richard-prince-and-gagosian/. [update cites].

⁹ Saltz, *supra* note 1. Saltz continued by praising the way that Prince was "stretch[ing] the membrane thinner" between "immaterial digital reality" and "physical space," thereby "exploring the new unreal-real spaces we all live in." *Id.*; see also David Rimanelli, *All 47 Likes Are Mine*, TEXTE ZUR KUNST, Dec. 2014, at 203, 208 (positioning Prince's work within the tradition of the avant-garde and finding that they reflect back to us the current social conditions of consumer capitalism); Kurt Ralske, *Try to Make Yourself a Work of Art: Richard Prince's New Portraits at Gagosian*, ARTCRITICAL (Oct. 8, 2014), <http://www.artcritical.com/2014/10/08/kurt-ralske-on-richard-prince/> (calling Prince's work "important and enduring art" but also "morally untenable").

¹⁰ Peter Schjeldahl, *Richard Prince's Instagrams*, NEW YORKER (Sept. 30, 2014), <http://www.newyorker.com/culture/culture-desk/richard-princes-instagram>. Schjeldahl continued, "[d]eath provides an apt metaphor for the pictures: memento mori of perishing vanity. Another is celestial: a meteor shower of privacies being burnt to cinders in the atmosphere of publicity." *Id.*

¹¹ Noah Dillon, *What's Not the Matter with Richard Prince*, ARTCRITICAL (July 9, 2015), http://www.artcritical.com/2015/07/09/noah-dillon-on-richard-prince/#_ftnref.

¹² For some of the many articles to use this term to describe Prince's subjects, see, for example, Cait Munro, *Richard Prince Instagram Victims Speak out*, ARTNET NEWS (May 29, 2015), <https://news.artnet.com/market/more-richard-prince-instagram-303166>.

¹³ For some of the many commentators who decried Prince's laziness, see, for example, Munro, *supra* note 12.

¹⁴ Appropriately, Warhol's words seem to have been appropriated, without credit, from Marshall McLuhan.

¹⁵ See e.g., Allen Murabayashi, *Richard Prince Is a Jerk*, PETAPIXEL (May 26, 2015), <http://petapixel.com/2015/05/26/richard-prince-is-a-jerk/> (calling Prince a "thief").

enraged commentators:¹⁶ in their view, a rich, famous artist had ripped off mostly unknown young women, profiting from their images and bodies and labor while luxuriating in his own salaciousness and hands-off production values. And incredibly, rather than ostracize the thief, rich art collectors and powerful galleries had showered Prince with money.¹⁷ The perversity of the soaring contemporary art market was on full display.¹⁸ As one gallerist said of the controversy, “The art market is a disgrace to humanity.”¹⁹



One set of “victims” responded to the theft in true Richard Prince spirit. The Suicide Girls, those cultishly famous alternative pin-up girls, decided to retaliate by selling reproductions of Prince’s reproductions of their original images. Like Prince, they made a slight alteration, adding a line of text to the online Instagram page before printing, but other than that they produced works identical to his -- ink-jet printed canvasses of the same Instagram pages in the exact same dimensions. The dramatic difference was price: instead of Prince’s \$90,000 price tag, the Suicide Girls’ identical copy was a bargain at a mere 90 bucks. Below is an image from their website advertising their replica of Prince’s replica, side by side:

¹⁶ On the subject of money, Peter Schjeldahl wrote: “[T]here’s a bonus to viewing the images as material stock in trade, destined for collections in which they will afford chic shocks. . . . They add a layer of commercial potency to the insatiable itch—to know oneself as known—that has made Instagram a stupefying success.” Schjeldahl, *supra* note 10. For my discussion of the economics of the Suicide Girls theft, see Amy Adler and Felix Salmon, *The Art of Porn*, SLATE PODCAST (Jul. 10, 2015), http://www.slate.com/articles/podcasts/gist/2015/07/the_gist_felix_salmon_and_a_my_adler_on_porn_richard_prince_and_suicide_girls.html.

¹⁷ Ryan Steadman, *Suicide Girls Sell Pics of Richard Prince Pics in Appropriation Tit for Tat*, OBSERVER (May 28, 2015), <http://observer.com/2015/05/suicide-girls-sell-pics-of-richard-prince-pics-in-tit-for-tat-appropriation-battle/> (claiming “high-powered collectors can’t seem to get enough” of the new work); Ralske, *supra* note 9 (stating “massive amounts of capital are being created and accumulated here” and noting that Prince is ranked number seven among living artists for sales on the secondary market in recent years).

¹⁸ See *infra* note 35 and accompanying text for an account of the record breaking heights reached by the market in contemporary art over the past few years.

¹⁹ Ben Davis, *Art Flippers Attempt to Unload Suicide Girls’ Version of Richard Prince Work*, ARTNET NEWS (Aug. 13, 2015), <https://news.artnet.com/art-world/art-flippers-suicide-girls-richard-prince-prints-324580>.

<p>\$90,000</p> <p>SOLD BY FAT CAT ARTISTS AND MILLIONAIRE GALLERY OWNERS</p>	<p>\$90</p> <p>SOLD BY SUICIDEGIRLS</p>
<p>suicidegirls 20h</p>  <p>Based on people you follow 24991 likes bigtimo123 I like her tongue kashimmi @kalypsoskitz basically 🤔 she's obviously my purrfect sister from another mister! 🐾 richardprince1234 Private Lives, mind if I sneeze on</p>	<p>suicidegirls 20h</p>  <p>Based on people you follow 24991 likes bigtimo123 I like her tongue kashimmi @kalypsoskitz basically 🤔 she's obviously my purrfect sister from another mister! 🐾 richardprince1234 Private Lives, mind if I sneeze on suicidegirls true art</p>
<p>size: 67x55 materials: ink jet on canvas profits go to rich gallery owner and millionaire "artist"</p>	<p>size: 67x55 materials: ink jet on canvas sold by the actual people who created the image and profits go to charity</p>

What exactly did Richard Prince steal from the Suicide Girls? And what did the Suicide Girls steal back from Prince? How did an essentially valueless Instagram page give birth to a \$90,000 art work that gave birth in turn to a \$90 identical copy? Can these price disparities and the artistic dialogue of replicas upon replicas from which they stem tell us something about the vexed relationship between visual art and copyright law?

It is axiomatic in copyright law that an unauthorized copy is a threat to creativity. If the traditional story that copyright tells us about copying is true, the Suicide Girls' copies of Richard Prince's art works would have been a death knell for Prince's business model.²⁰ In their jiu-jitsu self-help

²⁰ I'm assuming for this question that Richard Prince would have a valid copyright in the stolen images because they were fair use. I understand what a controversial assumption that is, and that it's currently being litigated. Nonetheless, I think it's a correct analysis of the legal question. For my general views on fair use, see Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L.

move, the Suicide Girls did to Prince exactly what he did to them. They (like Prince before them) incarnated the very specter that copyright law is designed to ward off: the dreaded free rider, who produces copies that undercut the “original” in the marketplace, misappropriating its value from the true author and thereby destroying his incentive to innovate.²¹ Copyright law tells us that in a world like this, in which one couldn’t control and profit from one’s copies, creativity would shut down. Undercut by copyists, artists would stop producing art. Critics of Richard Prince and admirers of the Suicide Girls’ payback made the same assumption,²² viewing the Suicide Girls’ theft from the thief as a threat to Prince’s business model.

But all of this misunderstands the market for contemporary art, where this dialogue of copies upon copies has become a model of creativity rather than its undoing. The Suicide Girls \$90 replicas posed no economic threat to Prince. Indeed, instead of seeing the copies as siphoning from his profit, Prince welcomed the Suicide Girls on the gravy train.²³ Even major supporters of Prince, like critic Jerry Saltz, openly planned to make cheap copies before the Suicide Girls did. In his glowing review of Prince’s “genius,” Saltz touted his plan to make unauthorized copies of the work rather than buy the real thing: “I have already made several of my own screen-grabs of his Instagram grid and plan to enlarge and print them on canvas.”²⁴

Conversely, Prince’s theft from the Suicide Girls may have been a moral violation, but in the brute terms of money (the terms that copyright law sounds in, as we will see), Prince’s theft enriched his victims. Can copyright law reckon with the possibility that the \$90,000 Prince charged had nothing at all to do with original authors’ image and everything to do with the fact that Prince stole it? Can it acknowledge that this outright theft

REV. 559 (2016).

²¹ Once again, I’m making the controversial assumption that Prince’s works would be fair use, as discussed *supra* note 20.

²² See, e.g., K.C. Ifeyani, *Whoever Bought This \$90K Richard Prince Instagram Print Is About to Be Pissed*, FAST COMPANY (May 28, 2015), <http://www.fastcompany.com/3046798/the-recommender/whoever-bought-this-90k-richard-prince-instagram-print-is-about-to-be-pissed>.

²³ He tweeted that their idea was “smart,” see Richard Prince (@RichardPrince4), TWITTER (May 29, 2015), <https://twitter.com/RichardPrince4/status/603874714201751552>, and also retweeted their tweet announcing their sales of “copies” of his copies. Richard Needham, *Richard Prince v Suicide Girls in an Instagram Price War*, GUARDIAN (May 27, 2015), <https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram>; @MissySuicide, TWITTER (May 26, 2015, 9:30 PM), <https://twitter.com/MissySuicide/status/603372550131879936>.

²⁴ Saltz, *supra* note 1.

actually conferred money on its victims—unwanted of course—because the famous artist/thief/brand had stolen their image out of the sea of the billions of images in which we are all drowning?

In this Article, I explore these questions and others swirling around the escalating battles between art and copyright law in order to upend the most basic assumptions on which copyright protection for visual art is grounded. It is a foundational premise of intellectual property law that copyright protection is essential for the “progress” of the arts: uncontrolled copying would kill the incentives for artists to create.²⁵ I argue that this premise is wrong. The theft and counter-theft between Prince and the Suicide Girls provides a glimpse into a much larger story about the peculiar workings of the contemporary art world and the complex relationship between copies and originals that characterize that world. Here, by juxtaposing copyright theory with the reality of the contemporary art market, I show the fundamental misfit between the two.

In recent years, visual art has emerged as a central battleground for copyright law, as many of the most revered artists of our day have been caught, sometimes repeatedly, in copyright’s web. Major cases over the past few years have ensnared Jeff Koons, Richard Prince, Shepard Fairey, Banksy, Elizabeth Peyton, and Sarah Morris.²⁶ The disparate results of these

²⁵ U.S. CONST. art. I, § 8, cl. 8. For full discussion of this the utilitarian view of copyright, see *infra* Part II. For a discussion of the vexed problem of conceptualizing art in terms of “progress,” see Barton Beebe, *Bleistein*, Copyright Law, and the Problem of Aesthetic Progress (Oct. 15, 2012) (unpublished manuscript).

²⁶ See Randy Kennedy, *Apropos Appropriation: A Copyright Infringement Lawsuit Raises Questions About How Far Artists Can Go*, N.Y. TIMES, Jan. 1, 2012, at AR1 (discussing the pervasiveness of copying in contemporary art). A photographer who previously sued Elizabeth Peyton for copyright infringement in a case that was settled out of court just announced he is considering bringing a new copyright claim against her for her drawing “John Lydon, Destroyed” (1994). Anny Shaw, *Sex Pistols Photographer Accuses Artist Elizabeth Peyton of Copyright Infringement*, ART NEWSPAPER (Feb. 18, 2016), <http://theartnewspaper.com/market/sex-pistols-photographer-accuses-artist-elizabeth-peyton-of-copyright-infringement/>. For two recent lawsuits against prominent artists in Europe, see Doreen Carvajal, *Belgian Artist’s Painting Infringes upon Photographer’s Work, Court Rules*, N.Y. TIMES (Jan. 21, 2015), <http://artsbeat.blogs.nytimes.com/2015/01/21/belgian-artists-painting-infringes-upon-photographers-work-court-rules/> (describing French lawsuit against artist

cases,²⁷ not to mention the high costs of litigating against a backdrop of uncertainty, help explain why a climate of “self-censorship” has taken hold in the art world.²⁸ In a 2013 case involving Richard Prince, the Second Circuit had the opportunity to clarify the mess; instead, its decision, *Cariou v. Prince*,²⁹ made the law even less predictable for artists.³⁰ In the wake of that case, in the last year alone, four new lawsuits have been filed against Richard Prince³¹ and one against Jeff Koons.³² This marks the fifth time both Prince and Koons have each been sued. As artists have come to rely increasingly on copying as a basic building block of creativity, the world of the visual arts has become a “boxing ring” for endless copyright disputes.³³

Luc Tuymans’s painting based on a photograph); Coline Milliard, *Swiss Artist Valentin Carron Accused of Plagiarism*, ARTNET (Nov. 8, 2014), <http://news.artnet.com/art-world/swiss-artist-valentin-carron-accused-of-plagiarism-159859> (describing accusations against Swiss artist Valentin Carron for copying another artist’s work).

²⁷ See *infra* Part I (discussing cases). As I will discuss below, the cases present no coherent pattern and yield no predictable standard by which courts evaluate transformativeness, the key to the fair use defense under copyright law. As a result, artists who wish to copy but also to avoid liability for copyright infringement have insufficient guidance.

²⁸ See PATRICIA AUFDERHEIDE ET AL., COPYRIGHT, PERMISSIONS AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 8 (2014) (describing self-censorship by artists based on apprehension about fair use law); see also James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (explaining how uncertainty of doctrine creates risk aversion among creators).

For an example of the chilling effect on museums, note that the 2011 Whitney exhibition of Sherrie Levine’s work did not include some of her major works, reportedly because of fear that she or the museum would be sued for copyright violation. See Laura Gilbert, *No Longer Appropriate?*, ART NEWSPAPER (May 9, 2012), <http://old.theartnewspaper.com/articles/No-longer-appropriate/26378> (describing how Levine “changed her practice to avoid ‘copyright snags’”). But see William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 17 (2000) (arguing that the artistic community’s concern that copyright threatens appropriation art is “greatly exaggerated”).

²⁹ 714 F.3d 694 (2d Cir.).

³⁰ Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016).

³¹ See *supra* note 8.

³² Brian Boucher, *Experts Weigh in on Jeff Koons Copyright Infringement Lawsuit*, ARTNET (Dec. 16, 2015), <https://news.artnet.com/people/experts-jeff-koons-copyright-infringement-suit-393690>. [cite complaint]

³³ Patricia Cohen, *Photographers Band Together to Protect Work in ‘Fair Use’ Cases*, N.Y. TIMES, Feb. 22, 2014, at C1.

Copyright law figures as a constant threat to artists; its vast uncertainty has led to an ornate and conflicting body of case law that chills artistic expression.

But what if this entire battle were unnecessary? What if the very idea of granting copyright to visual art were a mistake? This Article argues that copyright law does not incentivize the creation of artistic work and is unnecessary to its “progress.”³⁴ In fact, because of the peculiar relationship of copies to originals that I will describe and because of other surprising characteristics of the art market, copyright law, rather than being essential for art’s flourishing, actually impedes it.

United States copyright law has come to be understood almost universally in utilitarian terms. On this account, the reason we grant copyright to authors is because it gives them economic incentives to create culturally valuable works. While many scholars have persuasively questioned the assumptions of the utilitarian account, for purposes of this Article, I accept the prevalent copyright narrative in which creativity depends on economic incentives. I argue that assuming that this basic premise is correct, copyright law fails on its own terms.

As I will show, to the extent artists create for economic reasons or would cease to create if they were not able to exploit the economic value of their work, copyright is worthless to them. Art is radically different from all other kinds of copyrightable creations; unlike books or music or other core realms of copyright protection, copies play almost no economic role in the art market, and when they do, the role is trivial. As a result, copyright provides no significant monetary incentive for artists to create.

Furthermore, the basic premise of copyright law—that the copy poses a threat to creativity—does not apply to art. This is because the art market already has a powerful mechanism in place that legal scholars have ignored and that obviates the need for copyright. As I will show, the norm of authenticity, which forms the foundation of the art market, makes copyright superfluous. The market’s insistence on authenticity ensures that even if an artist’s content is stolen, the thief cannot misappropriate the economic value of the work; an art work’s price depends on who the authentic author is, not what it looks like. As a result, copying causes no economic harm to artists.

If copyright does not provide an economic incentive to artists, what does it actually do? By exploring how artists actually use copyright, I suggest that copyright is essentially functioning in the art world to protect artist’s reputational interests. As such, artists employ copyright to

³⁴ An important note about definitions: My argument applies only to the market for “visual art” a category that is notoriously hard to circumscribe, not to commercial art. *See infra* Part V.A.

accomplish ends that we have traditionally conceived of as belonging in the non-economic, personality rooted realm of “moral rights.” Does this use of copyright to protect artists’ reputations nonetheless serve to incentivize artistic creativity in a way that can help us resuscitate the economic, utilitarian account of copyright law? Ultimately I conclude that it cannot. While using copyright in this fashion sometimes provides an economic incentive to create and is thus compatible with the utilitarian vision of copyright, this is by no means assured. As I show, an artist’s use of copyright to protect his reputation may sometimes be directly contrary to his economic interests, or directly contrary to the public -- and free speech -- interests that copyright seeks to promote.

Ultimately, this Article shows that art is radically different from other kinds of copyrightable creations and that this difference suggests a radical conclusion: Stop treating art as copyrightable intellectual property altogether. The current framework provides no benefits to art under conventional copyright theory; the “protection” we grant art actually imposes costs on artists and the public. Copyright therefore impedes rather than promotes the constitutionally mandated “progress” of the visual arts.

I. ART AND THE COPYRIGHT WARS: THE COSTS IMPOSED BY COPYRIGHT ON ART

Even if you don’t follow art, there have been two developments in the art world over the last decade that you still probably know about. First, the art market is soaring, breaking just about every record in its history.³⁵

³⁵For some recent takes on the record breaking heights reached by the market for contemporary art, see Nick Paumgarten, *Dealer’s Hand*, NEW YORKER, (Dec. 2, 2013), <http://www.newyorker.com/magazine/2013/12/02/dealers-hand>, (describing a market that “regularly furnishes new symbols of extravagance, with record-breaking auction prices”); Scott Reyburn, *International Record Setting Auctions Cap Turbulent Year*, N.Y. TIMES (Jan. 5, 2015), <http://www.nytimes.com/2015/01/05/arts/international/record-setting-auctions-cap-a-turbulent-year.html>; Dan Duray, *Christie’s Contemporary Art Sale Nets \$852.9 M., All-Time Auction Record*, ARTNEWS (Nov. 12, 2014), <http://www.artnews.com/2014/11/12/christies-contemporary-art-sale-nets-853-9-m-all-time-auction-record/>; Neil Irwin, *The \$179 Million Picasso That Explains Global Inequality*, N.Y. TIMES (May 13, 2015), <http://www.nytimes.com/2015/05/14/upshot/the-179-million-picasso-that-explains-global-inequality.html>; Alanna Martinez, *World Art Market Booms to Record \$54 Billion as US Uber-Wealthy Fuel Growth*, OBSERVER (Mar. 11, 2015), <http://observer.com/2015/03/annual-tefaf-report-shows-art-market-shattering->

Last year, after another market spurt in which more than a billion dollars of art sold in a week, critic Adam Gopnik commented on the current mania for buying art: “The record for the price of a single work sold at auction has once again been broken,” Gopnik wrote, “this time, with a hundred and seventy-nine million dollars spent on a so-so Picasso, from his just-O.K. later period.”³⁶ With the market ascent, art has become firmly entrenched as an “asset class,” an essential investment for newly minted billionaires.³⁷ And as an investment, it’s got great appeal: prices for contemporary art skyrocketed by over 600% from 2004-2014.³⁸

In addition to the record breaking prices being paid, the other thing you might already know about art, even if you don’t follow it closely, is that the art world has been flooded by a barrage of copyright lawsuits.³⁹ Numerous recent cases have preoccupied the art and business worlds. Two of the top ten bestselling artists of our day have become frequent defendants in court.⁴⁰ The *New York Times* recently reported what has been obvious for

record-sales-hitting-all-time-highs/; and Geoffrey Smith, *The Fine Art Market Just Turned over \$1 Billion in 48 Hours*, FORTUNE (May 13, 2015), <http://fortune.com/2015/05/13/the-fine-art-market-just-turned-over-1-billion-in-48-hours/>. Cf. Scott Reyburn & Doreen Carvajal, *Gauguin Painting Is Said to Fetch \$300 Million*, N.Y. TIMES (Feb. 6, 2015), <http://www.nytimes.com/2015/02/06/arts/design/gauguin-painting-is-said-to-fetch-nearly-300-million.html> (“[O]ne of the highest prices believed to have been paid for an artwork . . .”).

For an analysis of the economics of the contemporary art market, see CLARE MCANDREW, TEFAF, TEFAF MARKET REPORT 2015 (2015). Since the ’90s and certainly over the past ten years, prices for the post-war and contemporary sector have skyrocketed. Last year this category accounted for close to half of all sales in the overall auction market for fine art (which is the primary public feature of the secondary market). Within the market for post war and contemporary, big money sales dominate. Half of the value of the transactions in that market was for works priced at over one million Euros. *Id.* at 70.

³⁶ Adam Gopnik, *Art and Money*, THE NEW YORKER (June 1, 2015), <http://www.newyorker.com/magazine/2015/06/01/art-and-money-gopnik>.

³⁷ Felix Salmon, *Panama Papers Show How The Very Rich Use Art To Get Richer*, FUSION, (Apr. 7, 2016) <http://fusion.net/story/288515/panama-papers-leak-art-market/>

³⁸ CLARE MCANDREW, TEFAF, TEFAF MARKET REPORT 2015 AT 70 (2015).

³⁹ Daniel Grant, *In 2012’s Art World, More Lawsuits Than Art*, HUFFINGTON POST (DEC. 21, 2012), http://www.huffingtonpost.com/daniel-grant/in-2012s-art-world-more-l_b_2338534.html. Authenticity, which I discuss *infra* Part III.B, has been the other hot legal topic.

⁴⁰ Jeff Koons and Richard Prince, the first and ninth most expensive living American artists of the last decade, respectively, have each been sued five times for copyright infringement. <https://news.artnet.com/market/most-expensive-living->

some time: “Technological advances, shifting artistic values and dizzying spikes in art prices have turned the world of visual arts into a boxing ring for intellectual-property rights disputes.”⁴¹ At the same time that art depends on copying, copyright law has evolved in a way that has made the legality of copying in art more uncertain, leaving artists vulnerable to lawsuits under a doctrine that is incoherent and that misunderstands the very creative work it governs.

[This Part, not yet finished, will explain two developments that have contributed to this state of affairs: first, an evolution in art over the last forty years toward copying as an essential building block of creativity, and second, a shift in fair use law.]

Thus, there are plenty of reasons *not* to grant artists copyright: It presents roadblocks to creativity, evidenced by the fair use battles that have plagued the art world. But normally the costs associated with copyright come with a concomitant gain. Copyright is presumably necessary for creative works to be produced in the first place. In the following parts, I present that theory of copyright and then show its failure to work in the realm of art. In my view, copyright imposes costs on art--the fair use battles and self-censorship that we have seen--without offering any benefit.

II. A BRIEF SKETCH OF THE UTILITARIAN VIEW OF COPYRIGHT AND ITS DISCONTENTS

A. *Why We Grant Copyright*

United States copyright law has come to be understood almost universally in utilitarian terms.⁴² On this account, adhered to by courts,

[american-artists-2016-543305](http://www.newyorker.com/business/currency/who-owns-this-image).

⁴¹ Cohen, *supra* note 33; Ben Mauk, *Who Owns This Image?*, NEW YORKER (Feb. 12, 2014), <http://www.newyorker.com/business/currency/who-owns-this-image>.

⁴² See, e.g., Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576-77 (2009) (stating that “copyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms”); Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 524 (1999) (“The fundamental premise of our copyright law is that the best way to encourage the creation of valuable works is to let authors capture the market value of those works.”); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and*

Congress and many legal scholars, the reason we grant copyright to authors is because it gives them economic incentives to create culturally valuable works. As the Supreme Court explained, “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”⁴³ Copyright gives authors a limited monopoly over their works,⁴⁴ and by doing so, the law overcomes the threat that cheap copies presumably pose to innovation. The theory is that absent their exclusive right to create copies of their works, authors would not invest in creating new works. Copyright prevents free riders from making cheap copies that would deprive the original author of the ability to profit from her work and would ultimately leave her no economic incentive to create.⁴⁵

Economics of Intellectual Property, 5 J. ECON. PERSP. 3, 5 (1991) (arguing that creators need an appropriate return to innovate). For a rich account of the major theories that inform copyright law in addition to the utilitarian one, see William W. Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168 (Steven R. Munzer, ed. 2001). For an account of the labor justification for copyright, see Sean Valentine Shiffrin, *Lockean Arguments for Private Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 138 (Steven R. Munzer, ed. 2001).

The utilitarian model of copyright has sometimes led scholars to call for extending the reach of copyright protection on the theory that doing so will maximize creativity. For critical accounts of this view, see, for example, Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 344 (2002); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007) (criticizing position advocating for extreme control of copyright by showing that spillovers can be a beneficial and necessary part of markets in intellectual property); see also Raymond Shih Ray Ku, Jiayang Sun, & Yiying Fan, *Does Copyright Law Promote Creativity? An Empirical Analysis of Copyright’s Bounty*, 62 VAND. L. REV. 1669, 1673–74 (finding that increasing copyright rewards “does little to change [authors’] incentives overall”).

⁴³ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

⁴⁴ Copyright law protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 101 (2012). A copyright holder has the exclusive right to reproduce the work, distribute copies of it, prepare derivative works based on it, and other rights. 17 U.S.C. § 106 (2012). Generally speaking, the current copyright term extends from creation until seventy years after the author’s death. 17 U.S.C. § 302(a) (2012). The Copyright Term Extension Act passed by Congress in 1998 and upheld by the Supreme Court in *Eldred v. Ashcroft*, 537 U. S. 186 (2003), increased the usual term from fifty to seventy years. *Compare* 17 U.S.C. § 302(a) (1994), *with* Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b)(4)(C), 112 Stat. 2827, 2827 (1998).

⁴⁵ *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11 (2003); William M. Landes &

This utilitarian vision stems from the language of the Constitution itself; the Copyright Clause gives Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors . . . the exclusive right to their respective Writings.”⁴⁶ Note the distinctly public purpose behind this grant of private rights.⁴⁷ As the Supreme Court explained the constitutional provision, “The economic philosophy behind the clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.”⁴⁸ Thus “[t]he monopoly created by copyright . . . rewards the individual author in order to benefit the public.”⁴⁹

Precisely because copyright is designed to benefit the public, and the benefit to individual creators is in some ways incidental to this goal,⁵⁰ the

Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, (1989) (“[A]nyone can buy a copy of the book when it first appears and make and sell copies of it. The market price of the book will eventually be bid down to the marginal cost of copying, with the unfortunate result that the book probably will not be produced in the first place, because the author and publisher will not be able to recover their costs of creating the work.”); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262 (11th Cir. 2001) (“Without the limited monopoly, authors would have little economic incentive to create and publish their work.”).

⁴⁶ U.S. CONST. art. I, § 8, cl. 8.

⁴⁷ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (Copyrights “are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward[.]”); 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.2.1, at 63 (1989) (“[t]he aim of copyright law is to direct investment toward the production of abundant information.”).

⁴⁸ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁴⁹ *Sony*, 464 U.S. at 477 (Blackmun, J., dissenting); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[T]he ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (“copyright law serves public ends by providing individuals with an incentive to pursue private ones”).

⁵⁰ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the

law has built in mechanisms that presumably reduce the public costs associated with the grant of private limited monopoly rights.⁵¹ The costs imposed by copyright include most prominently its limits on public access to copyrighted works and the concomitant limit on using those works to build new ones. Yet the assumption is that these public costs are offset by the public benefit of having works produced in the first place, a benefit that copyright enables. Furthermore, copyright doctrine aims to mitigate these costs through certain public protections, such as limitations on the duration of copyright and exceptions for certain uses, such as “fair use” of works to create new ones that further copyright’s goals.⁵² As Terry Fisher explains, this doctrinal design reflects the overall goal of striking an optimal balance between “the power of exclusive rights to stimulate the creation of inventions and works of art and . . . the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.”⁵³

labors of authors.”).

⁵¹ See Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. ON TELECOMM. & HIGH TECH. L. 317, 320 (2009).

⁵² See Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997); Neil Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 283 (“If copyright is cast too narrowly, authors may have inadequate incentives to produce and disseminate creative works. . . . If copyright extends too broadly, copyright owners will be able to exert censorial control over critical uses of existing works or may extract monopoly rents for access, thereby chilling discourse and cultural development.”). For one recitation of the link between copyright and free speech, see *Sun Trust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1261 (2001), which concluded that “[i]n the United States, copyright has always been used to promote learning by guarding against censorship.”

For more on the relationship between copyright and free speech, see *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003), which discussed fair use and the idea/expression dichotomy as the two realms where First Amendment values exert themselves in copyright law; *Golan v. Holder*, 132 S.Ct. 873, 890 (2012), which described the “speech-protective purposes and safeguards” embraced by copyright law; and *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985), which stated that First Amendment protections are “embodied in” in the “latitude for scholarship and comment” safeguarded by the fair use defense.

⁵³ Fisher, *supra* note 41 at 169–70; see also Jeanne C. Fromer, *Expressive Incentives in Intellectual Property Law*, 98 VA. L. REV. 1745, 1752 (attributing to Professor Fisher the view “that intellectual property protection ought to help foster the achievement of a just and attractive culture”).

B. Attacks on the Utilitarian Model

Several scholars, while acknowledging the overwhelming dominance of the incentives driven utilitarian account of copyright, have nonetheless sharply questioned its assumptions. These scholars attack copyright's utilitarian account from a number of angles. Some argue that copyright law underestimates the non-economic reasons that drive people to create.⁵⁴ Rebecca Tushnet, for example, has shown that copyright's incentive model overlooks a persuasive account of creativity grounded in artist's own experiences that are often unrelated to economic incentives.⁵⁵ Other scholars have argued that the economically driven model of U.S. copyright law is insufficient because it fails to account adequately for the ways in which creators' concern for their "moral rights," their personal

⁵⁴Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

⁵⁵ *Id.* at 513. Several other significant works explore the incentives to creativity that do not involve economic rewards. See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS AND EVERYDAY INTELLECTUAL PROPERTY* (2014) (offering a thick account of creativity in which creators indicate the many non-economic reasons they engage in innovation); Diane Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 30 (2011) (offering extensive critique of assumptions underlying economic incentives theory of copyright and exploring powerful role of non-economic incentives and intrinsic motivations in creativity); see also TERESA AMABILE, *CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY* 153 (1996) (presenting an empirical study of creativity); Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 THEORETICAL INQUIRIES L. 309 (2011) (emphasizing role of social, non-economic factors in incentivizing creativity); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1183, 1190 (2007) (discussing factors other than monetary incentives that affect creativity); cf. Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590 (1987) (arguing that "the public interest in creative enterprises depends upon the quality of the works themselves" and "that this interest is not adequately served by exclusive focus on the pecuniary benefits that copyright analysis traditionally affords[]").

Still other scholars criticize the economic incentives account by showing how copyright law fails to actually implement this goal and is overprotective in a way that makes it unmoored from its utilitarian purpose. See, e.g., Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996). And as Mark Lemley has recently argued, intellectual property's incentive to create is diminishing in light of the lowered costs of creation and distribution enabled by the internet: Mark Lemley, *IP in a World Without Scarcity*, 90 NYU L. REV. 460, 507 (2015) (arguing that "once creation is cheap enough, people may do it without the need for any IP incentive").

relationship with their works, spurs creativity⁵⁶ or deserves protection in its own right.⁵⁷ Still other scholars powerfully criticize copyright's assumptions by exploring creative industries, such as fashion or food, which thrive in the absence of copyright protection.⁵⁸ In their view, these stories of successful innovation show the limits of copyright's necessity.

My argument differs from these critiques of copyright law, many of which I find compelling, in two key respects. First, in contrast to those scholars who draw lessons by looking at successful innovation in areas that flourish without any copyright protection, such as food or fashion or comedy, areas which have always been excluded from copyright's purview, here I look at a bedrock, core realm of copyright protection—visual art—to argue that copyright is unnecessary for innovation in one of its central domains.⁵⁹

Second, I do not join the chorus of scholars who argue that creators create for non-economic reasons that copyright systematically fails to credit. Instead, (and even though I am quite persuaded by many of these accounts), for purposes of this paper I accept the prevalent copyright narrative in which creativity depends on economic incentives. I argue that even assuming that this basic premise is correct, copyright law fails on its own terms. My account of certain features of the fine art market -- its conception of authorship, and the relationship in that market between copies and originals -- shows that to the extent artists create for economic reasons,

⁵⁶ Fromer, *supra* note 52, at 747, shows the ways in which non-pecuniary “expressive incentives” often captured in moral rights literature “can bolster the utilitarian inducement to create valuable intellectual property.”

⁵⁷ See, e.g., Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006). For criticism of moral rights as impeding creativity, see Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263 (2009).

⁵⁸ CHRIS SPRIGMAN & KAL RAUSTIALA, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012); see also Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1695-717 (2006) (describing innovation in fashion); Dotan Oliar & Christopher 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, 1787-88 (2008) (discussing innovation without IP in stand up comedy); see also Yochai Benkler, *Coase's Penguin, or, Linus and the Nature of the Firm*, 112 YALE L.J. 369 (2002) (account of collaborative creativity in the production of open source software).

⁵⁹ It is interesting to consider the copyright clause's wording which appears not to have contemplated protection for the fine arts. See Barton Beebe, Bleistein, Copyright Law, and the Problem of Aesthetic Progress (Oct. 15, 2012) (unpublished manuscript) (on file with the author).

copyright law is worthless to them as an incentive. Assuming, as the utilitarian theory of copyright law does, that artists create for pecuniary reasons and would cease to create if they were unable to exploit the economic value of their works, copyright is not an incentive to creativity.

III. WHY ART DOESN'T FIT THIS MODEL

In this Part, I show why copyright does not incentivize the production of visual art. My argument proceeds in two Sections.

The first Section argues that copyright is unnecessary because visual artists, unlike other authors, do not make money from copies of their work; 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. Thus, even assuming that artists create for economic reasons, as the utilitarian vision of copyright posits, copyright does not provide an economic incentive to visual artists. This Section draws on the debate about resale royalties for artists to further establish the limits of copyright law by showing that copyright is virtually worthless in pecuniary terms to fine artists.

The next Section explores a second step of the argument. I argue that not only does copyright fail to provide an incentive for artists to create, but also, that lack of copyright would not disincentivize visual artists. This is because free riders do not pose a threat to producers of “original” content in the art market as they do in some other creative markets. Here I introduce the norm of authenticity in art. I argue that this norm, which forms the foundation of the art market, already functions to police copying in art, rendering copyright law superfluous. The art market’s insistence on authenticity ensures that even if an artist’s content is stolen, the thief cannot misappropriate the economic value of the work. A work’s price depends on who the authentic author is, not what it looks like. As a result, copying causes no economic harm to artists.

A. Why Copyright Does Not Incentivize the Production of Visual Art.

1. Prizing Unique Originals, Not Copies

Copyright law is about—well—*copies*. But visual art, for the most part does not exist in copies; unlike all other kinds of intellectual property, visual art works are almost always produced as unique works or as limited

editions.⁶⁰ Compare visual art to music or books or movies, other core realms of copyright protection. Because musicians, writers, and filmmakers earn money from selling copies of their work,⁶¹ and they depend on (or hope for) high volume sales of these copies to generate income, they require intellectual property protection to reap value from their creations. But in contrast, the art market prizes scarcity rather than volume and authentic originals rather than copies.⁶² While individual songs or books or movies are perfect substitutes for one another,⁶³ the distinction between originals

⁶⁰ William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 6 (2000). *see also* Hearing on H.R. 2690, *Visual Artists Rights Act of 1990 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the H. Comm. on the Judiciary*, 101st Cong. 27 (1989) (statement of Hon. Ralph Oman, Register of Copyrights) (“Works of visual art present special challenges in copyright law because of the nature of their creation and dissemination. They are neither mass produced nor mass distributed. They often exist only in a single copy.”).

Obviously there are some artworks, such as digital, conceptual, or performance works, that don’t fit this model. Furthermore, there are ways in which some creators, such as musicians, for example, find alternate methods to make money from their creations outside of copyright, such as through live performance.

⁶¹ *But see* increasing value in music market of live performance, etc.

⁶² On the relationship between art’s uniqueness and its value, *see* VAGA, Written Comments on Notice of Inquiry Concerning the Resale Royalty Right, at 1 (Dec. 1, 2012) (“[F]ine art’s value is derived from its singularity[] [and] its scarcity”); Sotheby’s, Inc. & Christie’s, Inc., Comments on Notice of Inquiry Concerning the Resale Royalty Right, at 6 (Dec. 5, 2012) (explaining that an original work of art is “valuable precisely because so few of its kind exist”); Joshua Rogers, *How to Outsmart the Billionaires Who’ll Bid \$80 Million for “The Scream”*, FORBES (Apr. 4, 2012, 11:59 AM), <http://www.forbes.com/sites/joshuarogers/2012/04/04/how-to-outsmart-the-billionaires-wholl-bid-80-million-for-the-scream/> (contending that some surges in the value of art are caused by “massive demand for a nearly nonexistent supply”). *But see* Felix Salmon, *The Not So Special Hundred-Million-Dollar Giacometti*, NEW YORKER (Nov. 5, 2014), <http://www.newyorker.com/business/currency/the-hundred-million-dollar-giacometti> (suggesting that in the current art market, scarcity may have an inverse relationship to price, at least in the context of limited editions). The recent record breaking Giacometti existed in an edition of six. *Id.* Salmon contends that it sold for more than it would have had it been a unique work because other pieces in the edition, owned by major museums, burnished the value of the piece. *Id.* Increasingly the best-selling artists of our time, such as Jeff Koons, are working in limited editions. *Id.*

⁶³ The exception is rare books where we put a great value on a first edition. The rare book market is remarkably similar to the market in vintage photographs, another realm where the market shows we value a copy because it was made closer

and copies forms the very foundation of the art market (as I have argued previously).⁶⁴

As we evaluate the case for copyright protection for art, what are the implications of the art market's single copy business model and the sharp distinction it draws between original and copy?⁶⁵ Fundamentally, these aspects of the market mean that copies almost never provide a source of income for visual artists. Instead, the economic value of their art is realized (or not) in the sale of the original unique or limited edition artworks they create.⁶⁶ As we will see, the vast majority of artists have no market whatsoever for copies of their works.⁶⁷ And, surprisingly, even for the tiny fraction of artists who do manage to have some market for copies of their work, the value of that market is at best a trivial source of their income.⁶⁸

to the time of its origin—even if the creator had no physical connection to the production of the work. ROSALIND KRAUSS, *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS* 5 (1986) (discussing the desire for vintage prints of photographs).

⁶⁴ Amy Adler, *The Artifice of Authenticity* (June 22, 2014) (unpublished manuscript) (on file with author) (exploring the centrality of authenticity to the art market).

⁶⁵ I return to the distinction between original and copy in Section B, where I consider the role of authenticity in policing copying.

⁶⁶ Landes, *supra* note 60, at 5. [Include here issue of non-edited art as well as dematerialized art.]

⁶⁷ See, e.g., Sotheby's, Inc. & Christie's, Inc., *supra* note 61, at 4 ("The primary market is the main or exclusive source of income for almost all American artists . . ."); see *infra* notes xx-xx and accompanying text.

⁶⁸ VAGA, *Written Comments on Notice of Inquiry Concerning the Resale Royalty Right*, at 5 (Dec. 1, 2012) ("[C]opyright licensing is usually an insignificant source of income for most fine artists.").

I should note that architectural works, which were not protected by copyright until 1990, 13 Architectural Works Copyright Protection Act, Pub. L. No 101-650, 104 Stat. 5089, 5133 (1990), present some similar problems to visual arts. Although I don't delve here into the scope of the similarities and differences between the market for visual art works and the market for architectural works, others have documented the misfit between copyright theory and architecture. As Professor Sterk has written, "The notion that according copyright protection to architectural works will generate more creative architecture, for instance, is manifestly ridiculous." Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996); see also Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1606 (1992) (contrasting price of architectural plans "with books and musical recordings, for which the sale of only one copy usually would not cover the cost of production."); Landes & Posner, *supra* note 45, at 101 (describing the Architecture Works Protection Act of 1990 as a "dubious extension

As a result, the economic incentives theory of copyright—the primary justification for granting copyright to creators—simply doesn’t apply to visual art.

a. The Artist’s Income Depends on First Sales

How can it be that artists have no market for copies? What about posters or postcards or other reproductions as an income stream? It turns out that almost no artists have any market whatsoever for reproductions of their work in any form.⁶⁹ In fact, most artists don’t even have a resale market for their actual artworks, let alone for copies of them.⁷⁰ As John Merryman has explained, for most art, there is no market to “resell [the work] *at any price*.”⁷¹ Indeed, most art depreciates in value⁷²—a surprising fact given the endless discussions in today’s current market boom (or bubble) about art as a soaring investment.⁷³ Only a tiny fraction of art works has any resale

of copyright protection”).

⁶⁹ Simon Frankel, Sotheby’s Inc., Remarks at Resale Royalty Public Roundtable at 111:6–8 (Apr. 23, 2013) (transcript available at <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>) (“[F]or most artists . . . [the primary market] is the *only* market they have, [in] the original sale of their works.” (emphasis added)); Telephone Conversation with Kerry Gaertner Gerbracht, director of Contemporary Art at Artory, New York, N.Y. (Aug. 30., 2016) (describing the extremely limited set of artists who have market for reproductions).

⁷⁰ NYU School of Law Art Law Society, Comments on Notice of Inquiry Concerning the Resale Royalty Right, at 7–8 (undated) (noting that most art depreciates in value).

⁷¹ John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 106 (1993) (emphasis added).

⁷² REGISTER OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST’S REALE ROYALTY 137 (1992) 1992 (“It is an economic reality that most art depreciates in value.”).

⁷³ Scott Reyburn, *Ultrarich Keep Contemporary Art Market Bustling*, N.Y. TIMES (July 17, 2015), <http://www.nytimes.com/2015/07/20/arts/international/ultrarich-keep-contemporary-art-market-bustling.html>. A significant contraction in the art market took place in 2016, so it is possible that the bubble may have burst. Scott Reyburn, *Contemporary Art Sales: What a Difference a Year Makes*, N.Y. TIMES (May 18, 2016), <http://www.nytimes.com/2016/05/19/arts/design/contemporary-art-sales-what-a-difference-a-year-makes.html>; see also Scott Reyburn, *Art Market Forecast: A Hazy Summer*, N.Y. TIMES (June 13, 2016), <http://www.nytimes.com/2016/06/14/arts/international/art-market-forecast-a-hazy-summer.html>.

value;⁷⁴ one study posited that over 99.8 percent of artists lack a resale market.⁷⁵ And even within the tiny percentage of artists who create works with resale value, just a few elite artists account for the vast majority of the money generated in this sector of the market. An recent analysis of the art market found that within the rarified global resale market in 2014, a handful of art stars accounted for most of the value; less than 1% of all artists in the resale market accounted for half the value in that market.⁷⁶ This lack of a resale market *at any price* for most artists' original works means that these same artists of course have no market for reproductions of their work. Thus, as Professor Merryman has concluded, "the only realistic source of income from their art is, for most working artists, first sales" of that art.⁷⁷

b. The Limited Market for Derivative Works

Visual artists, unlike other producers of intellectual property, almost never have a market for derivative uses of their works.⁷⁸ Recently, in a different context, the Register of Copyrights highlighted this distinction, contrasting the "ability of visual artists, relative to other authors, to exploit

⁷⁴ Sotheby's, Inc. & Christie's, Inc., *supra* note 61, at 2 ("[O]nly a tiny percentage of artworks are ever resold . . ."). A study in 1999 showed that only 0.15% of artist had a work that resold at a price of \$1,000 or more. Jeffrey C. Wu, *Art Resale Rights and the Art Resale Market: A Follow-Up Study*, 46 J. COPYRIGHT SOC'Y U.S.A. 531, 543 (1999). Almost all of those artists were huge successes in the primary market. *Id.* at 543–44.

⁷⁵ Sotheby's, Inc. & Christie's, Inc., *supra* note 61, at 4.

⁷⁶ Clare McAndrew, TEFAF Art Market Report 2015, *supra* note 35, at 36. Note that this figure only applies to the auction market and does not include other kinds of resales through private sales. There is no reliable data outside of the auction market, however, since figures on private sales are not generally available.

⁷⁷ Merryman, *supra* note 71, at 107; *see also* Société des auteurs dans les arts graphiques et plastiques (ADAGP), Comments Submitted in Response to the Notice of Inquiry on Resale Royalty Right, at 2 (Nov. 29, 2012) ("[F]or most visual artists, unlike writers or composers, the amounts involved in reproduction or representation are generally insignificant: income derives mostly from the sale . . . of the works.").

⁷⁸ 17 U.S.C. § 101 (2012) (defining a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted"). Note that the statute gives examples of derivative works in a list that includes "art reproductions." The list gives examples such as a "translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation." *Id.*

the right to create derivative works.”⁷⁹ The Register wrote: “[A] literary author may sell rights in his or her novel to a publisher, sell the right to create a screenplay to a writer, or sell the right to create a motion picture from that screenplay. . . . By contrast, . . . [a] sculptor or painter may spend months or years creating a unique and singular work of art, the value of which is likely to be based on its originality and scarcity, rather than on its potential for use in derivative works.”⁸⁰

Furthermore, for those few, lucky artists who do have a market for copies or derivative uses of their work, the value of that market is almost always trivial compared to the value of even one unique work. This is because the only artists who have such markets at all have attained a level of recognition that correspondingly makes their original works more valuable.⁸¹

Consider one of the few artists who commands a significant reproduction market: Andy Warhol, who has the most active market for copies of any contemporary artist.⁸² It is no that surprise that Warhol, who is art market royalty, has a market for reproductions and licensed images whereas most artists do not; in 2014 and 2015, sales of his original art works made Warhol the highest selling artist in the world.⁸³ Warhol’s

⁷⁹ OFFICE OF THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, *RESALE ROYALTIES: AN UPDATED ANALYSIS* 12 (2013).

⁸⁰ *Id.* at 11. The Report concluded that “most artists earn little or no income from derivative uses” such as licensing or other “third party uses” of their work. *Id.* at 12.

⁸¹ For discussion of this aspect of the art market and the artist as brand, see DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* (2010); MICHAEL FINDLAY, *THE VALUE OF ART: MONEY, POWER, BEAUTY* 47 (2012); Xiyin Tang, Note, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 *YALE L.J.* 218, 233 (2012). See generally DAVID W. GALENSON, *ARTISTIC CAPITAL* (2006) (offering an economic analysis of art’s value). I return to this in Section B, *infra*, where I discuss the relevance of the artist’s brand to authenticity.

Note that my assertion is limited to artists who occupy the “art world” as it has been understood and does not extend to commercial artists who are not part of this world. See *infra* note 185 and accompanying text (delimiting art world and discussing difficulty of marking this boundary).

⁸² THOMPSON, *supra* note 81, at 79 (noting the success of the Warhol brand); Eileen Kinsella, *Warhol Inc.*, *ART NEWS* (Nov. 1, 2009, 12:00 AM), <http://www.artnews.com/2009/11/01/warhol-inc/> (describing the success of the Warhol brand).

⁸³ TEFAF, *supra* note 35, at 75 (describing Warhol as “the highest selling artist across all sectors [of the art market] worldwide in 2014”); see also CLARE MCANDREW, TEFAF, *TEFAF MARKET REPORT 2016* AT 96 (2016) (describing

images are frequently licensed not only for art posters, but for a dizzying range of products such as sneakers, snowboards, high fashion, and even condoms.⁸⁴ Yet even for Warhol, the most reproduced, most iconic, contemporary artist, the value of this market for derivative works is trivial compared to the value of the unique art objects. The Warhol Foundation, which licenses Warhol's works, made approximately four million dollars last year from all of its many licensing activities combined.⁸⁵ Contrast that figure with the value of one Warhol canvas: a Warhol painting sold for \$105 million in 2013; another old for \$81.9 million last year.⁸⁶

The copyright market for Robert Rauschenberg, another market star, tells a similar story. Indeed, it helps explain the decision announced this year by the Rauschenberg Foundation to make its copyrighted images

Warhol as the highest selling artist in the post war and contemporary market for 2014 and 2015). Note the very small group of artists who even come close to Warhol in terms of their market power. In 2014, there "were just 28 artists whose work sold for over €10 million." TEFAF 2015, *supra* note 35, at xx. Warhol alone accounted for "over 8% of the [postwar and contemporary art] sector's value, including the most expensive work sold in Euro terms, Triple Elvis, at Christie's New York." *Id.*

⁸⁴ See Kinsella, *supra* note 82; Cait Munro, *Converse X Andy Warhol Coming in February*, ARTNET NEWS (Jan. 21, 2015), <http://news.artnet.com/in-brief/converse-x-andy-warhol-coming-in-february-227472>.

⁸⁵ Mike Boehm, *Andy Warhol Foundation Finishes Spree of Art Giveaways*, L.A. TIMES (Jan. 5, 2015, 6:10 PM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-andy-warhol-foundation-art-donations-exhibitions-museums-universities-grants-20150105-story.html>.

The Warhol Foundation income points to a cost of eliminating copyright protection for art: the money the Foundation makes goes overwhelmingly to fund art. In this way, the Foundation provides a pecuniary incentive to create for its grant recipients. (Even aside from incentives, it pains me that my proposal would eliminate the good the Foundation does with this income.) But we must recognize that this benefit comes, as all copyright for art does, at a significant cost: the cost to the public from lack of access and the cost to other artists from lack of use. The latter cost is particularly high, as I have argued, given the importance of copying to art, an importance that Warhol's work attests to.

⁸⁶ Lynn Douglass, *Warhol Painting Sells for \$105 Million at Auction*, FORBES (Nov. 14, 2013, 8:48 AM), <http://www.forbes.com/sites/lynndouglass/2013/11/14/warhol-painting-sells-for-105-million-at-auction/#7adf21272617>; Marion Maneker, *Making Sense of NYC's \$1.5 Billion Art Auction Week*, HYPERALLERGIC (Nov. 14, 2014), <http://hyperallergic.com/162812/making-sense-of-nycs-1-5-billion-art-auction-week/>.

available for free for most uses.⁸⁷ (The Foundation, in announcing its decision, cited the high costs imposed by copyright on public uses that ought to be encouraged, such as scholarship and work created by new artists.⁸⁸) The Foundation reported annual income from copyright of about \$100,000 for all of Rauschenberg's extensive oeuvre.⁸⁹ A lot of money--until one considers that a single Rauschenberg canvas sold for \$18,645,000 last year.⁹⁰ And remember, Rauschenberg and Warhol are unicorns in this story: Only a small fraction of artists have a market for reproductions or other derivative works.

2. Resale Royalties and Copyright

Surprisingly, in a different context, the United States Copyright Office itself has acknowledged these basic features of the art market that I describe—the reliance on first sales and the lack of income from derivative works. In 2013 the Register of Copyrights and Director of the U.S. Copyright Office took up the hotly debated issue of whether Congress should grant artists a resale royalty right as so many civil law countries do.⁹¹ Based on the Report, Congress introduced a bill proposing a resale royalty right in 2014; it marked Congress's fifth attempt to enact such a provision.⁹² The point of a resale royalty right is to grant artists a percentage

⁸⁷ Randy Kennedy, *Rauschenberg Foundation Eases Copyright Restrictions on Art*, N.Y. TIMES (Feb. 26, 2016), <http://www.nytimes.com/2016/02/27/arts/design/rauschenberg-foundation-eases-copyright-restrictions-on-art.html>.

⁸⁸ *Id.* (describing artists Rachel Harrison's recent work using Rauschenberg images); see Amy Adler & Rachel Harrison, *Conversation*, in RACHEL HARRISON: G-L-O-R-I-A 116, 118 (2015) (addressing Harrison's work building on Rauschenberg in catalogue for Harrison exhibition at Cleveland Museum of Art).

⁸⁹ Kennedy, *supra* note 87.

⁹⁰ *Post-Sale Release*, CHRISTIE'S (May 13, 2015), <http://www.christies.com/about/press-center/releases/pressrelease.aspx?pressreleaseid=7907> (describing 2015 Christie's sale of Robert Rauschenberg's *Overdrive* from 1963).

⁹¹ See OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 79.

⁹² Congress introduced a bill which if passed would grant visual artists such a right in 2014. The American Royalties Too Act of 2014 (the ART Act), S. 2045, 113th Cong. (2014); H.R. 4103, 113th Cong. (2014). This was Congress' fifth attempt to introduce such a right. Previous bills were Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011); Visual Artists Rights Act of 1987, S. 1619, 100th Cong. (1987); Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists' Residual Rights Act of 1978, H.R. 11403, 95th Cong. (1978). In 1975, California passed its own resale royalty law that imposes a

of the proceeds from certain resales of their work.⁹³ It is premised on the worry that artists profit only from the first sale of their work, not from the resale, or “secondary,” market. As we saw, the vast majority of artists have no resale market and most art depreciates in value. But for those few artists at the top of the market who do have a resale market, collectors who resell the work reap the profits from the increase in value and those profits can be enormous, particularly in light of the record breaking gains the market has shown in the last decade. Advocates of a resale royalty right insist that as a matter of fairness or incentives, artists whose work increases in value over time should share in collectors’ profits. They further argue that artists, who rely on first sales for their income, are at a “material disadvantage” compared to other authors.⁹⁴ Both of these arguments have been hotly disputed (and, in my view, persuasively so).⁹⁵

There was one point of agreement in the otherwise highly polarized most recent debate over resale royalties: the utter inconsequentiality of copyright revenue to artists. Does copyright ever serve to supplement visual artists’ reliance on first sale proceeds? Again and again, from advocates on both sides of the resale royalty issue, the Register of Copyrights heard testimony that copies provide at best an “*insignificant*” source of income to artists. For example, consider the statement of Robert Panzer, the director of the Visual Arts and Galleries Association (“VAGA”) (one of the two primary organizations in the U.S. that deals in artist intellectual property rights). Panzer explained: “When we’re talking about fine art in particular,

5% resale royalty on works of fine art resold for \$1,000 or more. Cal. Civ. Code § 986 (West 2012). See Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. FORUM 1, 1 (2014), http://www.yalelawjournal.org/pdf/Rub_Final_4.27.14_4rcwvqzv.pdf; see also Anna J. Mitran, *Royalties Too?: Exploring Resale Royalties for New Media Art*, 101 CORNELL L. REV. 1349, 1363 (2016) (discussing international approach to resale royalties).

⁹³ John L. Solow, *An Economic Analysis of the Droit de Suite*, 22 J. CULTURAL ECON. 209, 209 (1998); Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 65-66 (2013).

⁹⁴ OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 79, at 2.

⁹⁵ For criticism, see, e.g., Kal Raustiala & Chris Sprigman, *Artist Resale Royalties: Do They Help or Hurt?*, FREAKONOMICS BLOG (Dec. 22, 2011), <http://freakonomics.com/2011/12/22/artist-resale-royalties-do-they-help-or-hurt/>; Kal Raustiala & Chris Sprigman, *Artist Profit-Sharing: Another Example of How California Is Like Europe*, FREAKONOMICS BLOG (Nov. 3, 2011), <http://freakonomics.com/2011/11/03/artist-profit-sharing-another-example-of-how-california-is-like-europe/>; for further criticism of the premises of the argument in favor of resale royalties, see Merryman, *supra* note 71.

it's about the unique work. And so even though there's a little market for reproduction rights, it's a very small market. I can't think of any artists who said, I want to be an artist because I'm going to sell posters, or I'm going to put my art on book covers"⁹⁶ Even a copyright advocate acknowledges that copyright is not an economic incentive for artists to create.

The Director of VAGA's British counterpart (The Design and Artists Copyright Society or DACS) emphasized the way this economic reality distinguished visual artists from other copyright authors. As she bluntly explained: "Let's be honest, the reproduction rights [a fine artist] enjoys generates a tiny portion of their income. Compare that to the careers of musicians where a majority of their income is generated from the reproduction of their music and the sale of those reproductions."⁹⁷ The Copyright Office's Report credited this testimony, finding that "for most visual artists, unlike writers or composers, the amounts involved in reproduction or representation are generally insignificant";⁹⁸ at best, "reproduction rights represent a 'very minor aspect of [most artists'] careers."⁹⁹

Yet even though the Copyright Office's Report acknowledged this feature of the art market, the conclusion it drew was that artists needed "extra protection"¹⁰⁰ because of the "inequity"¹⁰¹ they suffered under the current copyright system when compared to other kinds of authors. The worry was that the "disadvantage"¹⁰² artists faced because of their lack of

⁹⁶ Robert Panzer, VAGA, Remarks at Resale Royalty Public Roundtable at 93:20–94:1, 94:21–95:2 (Apr. 23, 2013) (transcript available at <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>).

⁹⁷ Tania Spriggens, Design and Artists Copyright Soc'y (DACS), Remarks at Resale Royalty Public Roundtable at 100:8–14 (Apr. 23, 2013) (transcript available at <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>).

⁹⁸ OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 79, at 2 (citations omitted).

⁹⁹ *Id.* (quoting Robert Panzer, VAGA, Remarks at Resale Royalty Public Roundtable at 107:12–13 (Apr. 23, 2013) (transcript available at <http://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf>)).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 3.[this is to the report at note 65].

¹⁰² *Id.* at 2 ("[M]any visual artists [are placed] at a material disadvantage vis-à-vis other authors, and therefore the Office supports congressional consideration of a resale royalty right."); *id.* at 31 ("[C]opyright law has effectively discriminated against [visual artists] in many respects for centuries." (quoting Shira Perlmutter, Resale Royalties for Artists: An Analysis of the Register of Copyrights' Report, 16 Colum.-VLA J.L. & Arts 395, 403 (1992))).

reliance on copyright ultimately posed a threat to the fundamental reason we grant copyright itself: “to incentivize the creation and dissemination of artistic works.”¹⁰³ Because copies do not provide significant incentives for visual artists to create, the Register reasoned, we must give them extra rights, such as a resale royalty right, to encourage them to do so.

In my view the Register had it backwards. Rather than seeing this as a failure of copyright law to assist artists, it shows instead copyright law’s *irrelevance* to this realm of creativity. The real story is that visual art does not depend on copyright at all.

I leave aside the question of whether creating resale royalties would further optimize the creation of art, or whether the current system, in which artists rely on income from first sales, is sufficient.¹⁰⁴ But it is clear that copyright in its conventional form does not affect an artist’s financial prospects, nor can it. Even if tweaked, copyright governs a realm of copies, a realm that is almost entirely irrelevant to an artist’s income.

3. Previous Accounts of the Art Market in Copyright Scholarship

¹⁰³ The Report concluded that “[t]here are sound policy reasons to address this inequity [between art and other forms of intellectual property] including the constitutionally rooted objective to incentivize the creation and dissemination of artistic works.” *Id.* at 3.

¹⁰⁴ Although it’s beyond the scope of this Article, I have strong suspicions that resale royalties are not necessary for most artists for the reasons ably stated by, among others, John Merryman, Chris Sprigman, and Guy Rub. *See* Merryman, *supra* note 71, at 107–08; Rub, *supra* note 81, at 1–2 (disputing the assumption that the copyright act discriminates against visual artists by distinguishing art sales based on single copies from the multi copy business model that animates other kinds of markets for copyrighted works); Sprigman, *supra* notes 51; *see also* Henry Hansmann & Marina Santilli, *Royalties for Artists versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259 (2001).

One can look at the booming, record-breaking art market, to suggest that in the absence of copyright incentives, art is still a thriving industry. Art school has become a savvy choice for someone who wants to make a lot of money right out of school; the refrain circulates that “The MFA is the new MBA.” That said, the market may still be far from optimal for creativity. (For example, the extreme market dominance of high-end artists and the lack of a vibrant market for mid-range artists may be one of many realms that could stand to be corrected.) But my analysis shows that even if changes were needed, copyright law, because it governs a realm that is irrelevant to this market, could not be tweaked to provide significant financial incentives to artists.

Two scholars have previously touched on the potential misfit of visual art within copyright. Both Richard Posner and William Landes have acknowledged that visual art involves primarily unique works, the production of which would *not* seem to require copyright's benefits.¹⁰⁵ Yet both scholars nonetheless go on to assume that even if the case for copyright is weak, copyright still provides some limited incentive to create art.

Posner, for example, notes that copyright incentives might not appear necessary to incentivize the production of unique works of art, such as paintings; yet he nevertheless assumes that copyright still drives the production of art because of the income stream it enables for derivative works. Thus he writes: "Copyright does, however, enable the artist to obtain additional income from derivative works. Hence allowing paintings to be copyrighted increases artists' incomes and presumably therefore the supply of art."¹⁰⁶ Landes makes the same assumption. In his article on the law and economics of appropriation art, Landes acknowledges that art's uniqueness weakens the case for copyright, but he still concludes that copyright serves an incentivizing role. He writes:

With art, the unauthorized copying or free riding on unique art works will reduce the income an artist receives from posters, note cards, puzzles, coffee mugs, mouse pads, t-shirts, and other derivative works that incorporate images from the original work. And without this source of the income there will be less incentive *ex ante* to create unique works.¹⁰⁷

The problem is that both Landes and Posner seem to overestimate the value of copies in the fine art market. They assume a market exists for reproductions and derivative works. Landes further suggests that even if this market is not available to all, it can still be significant source of income for some artists. Thus Landes writes, "Even if the number of artists who receive substantial income from ancillary products is small, the *ex ante* return, which depends on both the small probability and the potentially large income from ancillary products, could be large relative to the artist's other expected earnings."¹⁰⁸ The problem with this analysis, as my discussion of the Warhol and Rauschenberg markets above suggests, is that the only artists who are able to exploit a market for copies are ones for whom the

¹⁰⁵ Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON PERSP. 57, 66 (2005).

¹⁰⁶ *Id.* at 71.

¹⁰⁷ Landes, *supra* note 60, at 5.

¹⁰⁸ *Id.* at 9.

market for originals is so robust that any ancillary income from copies would be insignificant rather than “large relative to the artist’s other expected earnings” as Landes envisions. Landes concludes that this possibility of a high income from ancillary products proportional to an artist’s other earnings therefore incentivizes the creation of art. He writes, “In short, given the speed and low cost of copying as well as the difficulty of employing private measures to prevent copying, we would expect a decrease in the number of new works created in the absence of copyright protection.”¹⁰⁹

I do not dispute that there is a small minority of artists— although fewer than Posner and Landes seem to envision—who have a market for copies or derivative works. But my point is that any artist lucky enough to have such a market will be one for whom the price of her original, unique works is so substantial that the value of her income from copyright will be trivial in comparison. To the extent such an artist is motivated by money, as the utilitarian vision of copyright assumes, she would reasonably produce new works not for the unlikely and at best slight relative value of any potential copyright income, but instead for the value of earning a huge sum for the sale of the work itself.¹¹⁰ Similarly, artists who have not yet attained success would be irrational to assume *ex ante* that copyright would ever provide a significant income stream for their careers. Even to the extent such an artist might irrationally overestimate *ex ante* her future chances of success and the value of her work by assuming she will become not only an art star, but one of the few art stars who somehow has a market for

¹⁰⁹ *Id.* at 6.

¹¹⁰ It is possible that on the margin some artists who were flash in the pans or had a successful early period that was never rivaled *and* sold all of those works may have some interest in copyright revenue. (They would certainly have an interest in resale royalties.) Still, flash in the pan artists follow the general rule outlined above: there was never demand for copies of their work. Demand dies for their actual works let alone for copies of those works. *See* THOMPSON, *supra* note 81, at 115–24 (discussing rise and fall of prices for artist Jacob Kassay). But the question for copyright law is whether a rational artist who knows anything about the art market would be motivated *ex ante* by such atypical possible scenarios. My guess is that an artist *ex ante* will not estimate: a. that he will have one period of success followed by a decline; and b. irrationally estimate that that successful period will be one in which he has somehow managed to develop a market for copies. Mark Lemley has suggested that we should be wary of incentives based on “systemic cognitive mistakes.” Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 490 n. 152 (2015) (citations omitted). He writes “It is possible that creators create in hopes of being one of the few superstars whose work is actually rewarded by copyright law . . . In effect, we are coaxing works out of these creators by lying to them about their chances of getting paid.” *Id.*

derivative works,¹¹¹ she would still have at best a market in which the price of her unique works of art would dwarf any income she might make from that market in copies.

In the next Section, I turn to an important facet of the relationship between copies and originals that other scholars have not considered. There I show that the art market already has a powerful mechanism in place that polices copying. The art market's foundational norm of authenticity renders copyright law superfluous.

B. Authenticity: How the Art Market Already Polices Copying

*"The single most important thing you can say about a work of art is that it is real."*¹¹²

The previous Part argued that granting a visual artist the exclusive right to exploit copies of her work provides no incentive to create because copies have no significant economic value for visual artists. This section focuses on a related corollary. Here I show that in a world without copyright, there would be no *disincentive* for an artist to create art, at least in terms of the standard utilitarian account of copyright.¹¹³ Because of certain features of the art market that legal scholars have not considered, free copying by others cannot cause economic harm to a visual artist. Thus, not only does copyright provide no significant monetary incentive to artists; lack of copyright would not disincentivize them. The basic premise of copyright law—that the copy poses a threat to creativity—does not apply to art.

Although, as described above, artists depend on first sales to recover the fixed costs of producing their work, not on sales of copies, here I

¹¹¹ See Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011) (showing circumstances under which creators tend to overestimate the expected return from their creative efforts).

Shyam Balganeshe's work on foreseeability and copyright incentives could prove valuable here by suggesting that the question is whether a creator could have reasonably foreseen a market for the work at the time that the work was created. See Shyamkrishna Balganeshe, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1575 (2009); see also Balganeshe's discussion of *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 930 (2d Cir. 1995) (limiting fourth factor analysis under fair use to "traditional, reasonable, or likely to be developed" markets for the work).

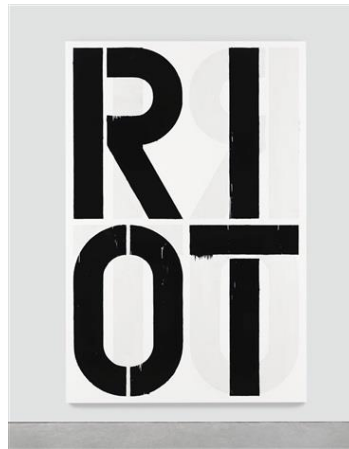
¹¹² Richard Dormant, *What Is An Andy Warhol?*, THE NEW YORK REVIEW OF BOOKS, Oct. 22, 2009.

¹¹³ In Part IV, I address whether free copying might cause other kinds of harms, primarily sounding in moral rights and reputational harms.

consider another threat copies might still pose to artists: A copy might substitute in the market for the original work, depriving the artist of his first sale of that work. Since, as established, artists depend on first sales, surely this would be a disincentive to create.

As I show in this Section, however, the art market already has a mechanism in place that polices this kind of copying. The norm of authenticity operates to ensure that an artist who steals another artist's visual material—all or in part—cannot usurp that artist's market. (The exception would be an undetected forgery, which I consider below.) Ultimately, the norm of authenticity eliminates the threat of copying to artist's first sales, rendering copyright law superfluous.

As a hypothetical, consider the highly acclaimed market darling, Christopher Wool, whose painting "Riot," pictured below, recently sold for \$29.9 million¹¹⁴:



Wool's work (like many contemporary works) would be fairly easy to copy; he paints with stenciled letters. If I were to make a perfect, visually indistinguishable copy of one of Wool's new paintings, and sell it for \$300 instead of the millions Wool would charge for an original, then Wool will presumably suffer market harm; a consumer could choose my cheap, perfect copy over Wool's original. Note that despite his critical and market success, Wool does not have a significant market for copies; he is not Andy Warhol. I am purporting with my copy to interfere with his market for first sales, where (as I have established) all the money is for artists. Surely this would diminish Wool's economic incentive to create. Thus my hypothetical

¹¹⁴ Lauren Palmer, *Artnet News's Top 10 Most Expensive Living American Artists 2015*, ARTNET NEWS (Aug. 13, 2015), <https://news.artnet.com/market/artnet-newss-top-10-expensive-living-american-artists-2015-323871>.

suggests that even without a market for copies, unauthorized copying still provides a disincentive for an artist to create because he will be deprived of his value of his creation on first sale.

The absurdity of this hypothetical, however, should reveal to us a few things about the art market and why copying does not pose a threat to visual art. My copy of Wool's painting, no matter how convincing, would never be a market substitute for it. (The exception is if I forged his name, a problem I will explore below.) This is because a powerful device already operates in the art market to police copying: the norm of authenticity.¹¹⁵ Authenticity is the bedrock of the art market. The supreme value placed on authenticity, and the utter distinction it draws between original and copy and between one artist's authorship and another's, makes copyright law superfluous.

To understand how authenticity operates to police copying, let's take a detour into the world of forgery. Although I begin with forgery, as I will demonstrate, the principles of authenticity revealed here extend well beyond the context of forgery alone, governing all kinds of artistic copying.

In 2004 the seasoned art collector Domenico De Sole bought an \$8 million Rothko (pictured below) from the Knoedler Gallery, New York's oldest art gallery.¹¹⁶ Rothko experts admired it; a noted connoisseur declared it "sublime."¹¹⁷ Then in 2011 a scandal broke that rocked the art world. The "Rothko," and thirty other modern masters sold by Knoedler, were fakes, painted by a Chinese immigrant in a basement in Queens. The \$8 million painting was now rubbish, an unmarketable embarrassment.

¹¹⁵ Adler, *The Artifice of Authenticity*, *supra* note 63.

¹¹⁶ *See* De Sole v. Knoedler Gallery, LLC, 2015 WL 5918458, (S.D.N.Y. Oct. 9, 2015) (denying defendants' motions for summary judgment in case involving forged Rothko painting); *see generally* Patricia Cohen, *Selling a Fake Painting Takes More Than a Good Artist*, N.Y. TIMES (May 2, 2014), <http://www.nytimes.com/2014/05/03/arts/design/selling-a-fake-painting-takes-more-than-a-good-artist.html> (describing the extent of the forgery scandal).

¹¹⁷ Blake Gopnik, *How the Knoedler Lawsuit Transformed a 'Sublime' Rothko Painting Into Junk*, ARTNET NEWS (Jan. 29, 2016), <https://news.artnet.com/art-world/knoedler-lawsuit-sublime-rothko-becomes-junk-without-changing-416162>.



The Knoedler “Rothko”

What does this story of a “sublime,” \$8 million painting, reduced to worthlessness, have to do with copyright? First, it shows that the value we place on art can be completely divorced from its visual appearance. After the Knoedler “Rothko’s” true author was revealed, the painting was the same--physically unchanged, still beautiful, even sublime—but it had lost all market value. And this shift in value is consistent with how inauthentic works, forgeries or otherwise, are treated.¹¹⁸ Numerous recent authenticity

¹¹⁸ The category of “inauthentic” art includes far more than forgeries. It also includes misattributions, works that were created with no intent to deceive but are now mistakenly (or deceitfully) attributed to an artist. Since copying and emulation

cases and controversies reveal the same pattern as the Knoedler Rothko: even works that experts have called “fabulous” and “beautiful,” or “a perfect copy of the original,” became worthless once declared inauthentic.¹¹⁹ Indeed, an art world declaration that a work is inauthentic is the equivalent of an economic death sentence, rendering a work unsaleable—even if a court disagrees,¹²⁰ and even if everyone knows the work is actually “real.”¹²¹

The story of the Knoedler Rothko reveals a dramatic rupture between the visual appearance of a work and its price. And this rupture has become more pronounced in light of a shift in art in the contemporary era: Quite simply, contemporary art is no longer visual. This may sound implausible given that for centuries, the word “art” used to invoke beauty or, at the very least, visuality. But contemporary art has migrated from the realm of the beautiful, physical, or even visual to the realm of the conceptual. Renowned critic and art philosopher Arthur Danto wrote that in our era, “[w]hatever art is, it is no longer something primarily to be looked at.”¹²² Instead, in the contemporary moment, “visuality drops away, as little relevant to the essence of art as beauty proved to have been.”¹²³

Compare the experience of viewing Duchamp’s urinal with the experience of viewing, say, a Rembrandt painting. I am not claiming that viewing the former is devoid of value (although Duchamp himself was dismayed when people evaluated *Fountain* aesthetically).¹²³ But, in contrast to the Rembrandt, it is clear that a great deal of the value of the Duchamp is conveyed simply by describing it and how it was made (or not) by the artist: Duchamp took a manufactured urinal and put it in a

have been such an important tradition in the history of art, this is a significant problem. “Fakes” can also arise through unauthorized reproductions rather than forgeries; such inauthentic copies give rise to legal issues on two fronts—authenticity disputes as well as copyright. For all of these reasons, connoisseurs prefer to avoid the words “fake” or “forgery” and instead refer to inauthentic works as “wrong” or “not right.” Michael Findlay, *Authenticity, Connoisseurship and the Art Market*, <http://www.artdealers.org/findlayessay/>, Art Dealers Association of America (2011).

¹¹⁹ *Greenberg Gallery v. Bauman*, 817 F. Supp. 167 (D.D.C. 1993) (adjudicating authenticity of work that dealers called “fabulous” and “beautiful” but became unsaleable even though visually it was “an exact copy of the original”).

¹²⁰ *Cite Greenberg, Thome, Doig*

¹²¹ *Balthus, Cady Noland, andre Emmerich. Susman v. Flavin.*

¹²² ARTHUR C. DANTO, *AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY* 16 (1996).

¹²³ Duchamp complained that critics “admire [my readymades] for their aesthetic beauty.” *Id.* at 84.

gallery space. Indeed, much visual art represents a loss of interest not only in visuality but also in the art object itself. The much-touted “dematerialization of the art object” that emerged in the ’60s has taken hold; in our present era, the physical object has famously become “contingent” to contemporary art.¹²⁴

As art’s essence has become unmoored from the visual, so has its market price, not only for contemporary art, but for all sectors of the art market. Economist David Galenson has succinctly explained the art market: “Aesthetics have nothing to do with it.”¹²⁵ Thus the cliché in today’s market is that collectors of contemporary art now “buy with their ears,” not their eyes, choosing art based on factors other than its visual qualities.¹²⁶

If art’s market value doesn’t inhere in aesthetics of a work, what does it depend on? Here is the second key lesson from the Knoedler forgery story for copyright and art. Art’s market value, divorced from aesthetics, resides almost completely in the identity and reputation of the artist it is attributed to. 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.¹²⁷ The Knoedler

¹²⁴ See MARTHA BUSKIRK, *THE CONTINGENT OBJECT OF CONTEMPORARY ART* 16 (2003) (asserting that in the last 40 years, “[a]lmost anything can be and has been called art”); see also LUCY R. LIPPARD, *SIX YEARS: THE DEMATERIALIZATION OF THE ART OBJECT FROM 1966 TO 1972* (1973) (documenting the emergence of conceptual art); cf. Yves Klein, *Speech: The Evolution of Art Towards the Immaterial* (June 3, 1959), in *VERS L’IMMATÉRIEL* (Editions Dilecta, 2006) (calling for dematerialization of art).

¹²⁵ James B. Stewart, *With Art, Investing in Genius*, N.Y. TIMES, Nov. 28, 2014, at B1 (quoting Galenson, Professor of Economics at University of Chicago); DAVID W. GALENSON, *ARTISTIC CAPITAL* (2006) (offering economic analysis of art’s value as tied to significance of artist’s innovation).

The mysterious quality of authenticity and its divorce from aesthetics is captured by Winnie Wong who writes about Chinese copies of famous paintings: the copyists can never “‘reproduce’ an original van Gogh painting, no matter what quantity of labor is put to such a task.... The van Gogh trade painter cannot, by his work alone, ‘diminish’ the scarcity of the original van Gogh painting, no matter how perfect the copy nor how many were produced.” WINNIE WON YIN WONG, *VAN GOGH ON DEMAND: CHINA AND THE READYMADE* 162 (2013).

¹²⁶ DON THOMPSON, *THE \$12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART* 92 (2010)

¹²⁷ See Adler, *supra* note 64 (analyzing the central role of authenticity in the art market). I note here that Nelson Goodman’s classical distinction in art between allographic and autographic works maps onto the distinction between visual arts and other kinds of copyrightable material that I drew in Section A. And

painting was beautiful before and after its true author was revealed; only the shift in attribution, from Rothko to Pei Shen Qian (the name of the immigrant forger), accounts for its changed market value.¹²⁸

This explains the absurdity of the Christopher Wool “Riot” hypothetical that I began with. If I made a copy of a Christopher Wool stenciled painting (probably easy enough to do) and sold it under my own name, it would do nothing to supplant Wool’s market for his original. A perfect copy, no matter how visually remarkable, beautiful, or identical, sold under another artist’s name, is not a market substitute in art. Instead, its value depends on the market for the artist who appropriated it. Thus my identical copy of the Wool would be worth the price one would pay for my work, not his. (And given my complete lack of a reputation as an artist, my copy would be essentially worthless.) Yet the same copy by an “artist” would have market value. If it did, however, the value would depend on that artist’s reputation, not Wool’s. Thus if Jeff Koons copied Wool’s work, the price of the work would reflect the market for Koons. This dynamic, in which the price of a work is tied to authorship, has always been foundational in art, but it has become more pronounced in recent years in contemporary art as the soaring art market increasingly treats artists not as authors but as “brands,” sorting value based entirely on the artist/brand’s power.¹²⁹

What is the significance for copyright law of these lessons from the world of forgery about authenticity and art’s market value? The main implication is this: stealing visual content from an artist does not harm her market. If visual art’s market value depends on the identity of the artist, not on the aesthetics of the work, then stealing another artist’s visual content

importantly for our purposes, Goodman places authenticity, or the possibility of forgery, as the pivotal distinction between visual arts and other art forms. NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* 113 (1968).

¹²⁸ Note that some works fluctuate in value based on changes in attribution but do not entirely lose their value; this usually occurs if the attribution is downgraded from a renowned artist to a lesser known one. See METROPOLITAN MUSEUM OF ART, *REMBRANDT/NOT REMBRANDT* (catalogue). We still value School of Rembrandt artworks. But we don’t value copies made by nobodies or amateurs. (Cite recent Pollock controversy). Hence my copy of a Wool would be valueless, but the same copy by an “artist” may have value.

¹²⁹ See generally THOMPSON, *supra* note (arguing that an artist’s brand is a central feature of the art market and also specifying the relevance of the gallery’s brand); DON THOMPSON, *THE SUPERMODEL AND THE BRILLO BOX: BACK STORIES AND PECULIAR ECONOMICS FROM THE WORLD OF CONTEMPORARY ART* (2014); Xiyin Tang, Note, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L.J. 218, 233 (2012).

alone can never usurp her market power. An artist who copies another's work takes the original artist's visual material but does not take her brand (which would be forgery); she took something that is unrelated to the market value of the original work. All the copyright disputes that have rocked the art world in recent years, unlike forgeries, involve copied visual material without attempts to steal the "original" artist's name. In contrast, an artist who copies both the visual material and the artist's brand has created a forgery and a fake. It's as valuable as the original artist's work—unless and until it's discovered as a copy, in which case it becomes unmarketable. In sum, given current market preferences, because the identity of the artist defines the range of the relevant market, outside of forgeries, a copy by another artist cannot usurp the market for the original artist.

As an example, consider the two highly acclaimed photographs below. They are visually identical. The first, by Walker Evans, is called *Alabama Tenant Farmer Wife* (1936). Taken as part of the WPA during the Depression, depicting a woman ravaged by poverty, the photograph has become a celebrated symbol of art's power to reveal and document human suffering.¹³⁰ The second photograph, taken by Sherrie Levine in 1981, is formally indistinguishable from the Walker Evans. Indeed, the photo, called *After Walker Evans: 4*, is a photograph of a photograph, an exact replica. (Note that the title clearly signals that Levine, while copying visual content, has not attempted to create a forgery.)

¹³⁰ See JAMES AGEE & WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN* (1960); LINCOLN KIRSTEIN WITH WALKER EVANS: *AMERICAN PHOTOGRAPHS* 14 (Fiftieth Anniversary ed., 1988).



In another Article, I have discussed the radically different meanings that these pictures bear: one is an icon of the Depression, the other a foundational image of postmodernism and its assault on the notion of authorship and originality.¹³¹ But for our purposes, I want to consider the way in which these identical images by different authors do not function as market substitutes for each other. Data for the valuation of art is hard to come by because the art market deals in unique or limited edition goods that rarely change hands and often do so privately.¹³² Nonetheless, Levine's and Evans's two identical images were recently auctioned within a year of each other at the same auction house. While Levine's version sold for approximately \$30,000, the same exact image by Walker Evans sold for approximately \$142,000.¹³³

¹³¹ Adler, *supra* note 20, at 606-07.

¹³² See William J. Baumol, *Unnatural Value: Or Art Investment as Floating Crap Game*, 76 AM. ECON. REV. 10, 11 (1986) (explaining that data on past activity is not a good portent for the future when the resale of a given art object may not even occur once in a century).

¹³³ Compare Lot 448, Sale 1180, CHRISTIE'S, <http://www.christies.com/lotfinder/lot/sherrie-levine-untitled-4004386-details.aspx> (last visited Nov. 20, 2015) (listing information concerning sale of Sherrie Levine), with Lot 139, Sale 1287, CHRISTIE'S, <http://www.christies.com/lotfinder/lot/walker-evans-alabama-tenant-farmer-wife-4165505-details.aspx> (last visited Feb. 21, 2016) (listing information concerning sale of Walker Evans's ALABAMA TENANT FARMER WIFE (ALLIE MAE BURROUGHS)). Obviously this is not a perfect comparison since prices at auction can be affected by issues such as provenance,

With this in mind, let us return to Richard Prince's Instagram portraits that I began with, and the attempt by one set of his "victims," the Suicide Girls, to retaliate. (Remember, Prince's copies of the Suicide Girls's Instagram page sold for \$90,000, while the Suicide Girls's identical copies of Prince's work sold for \$90.) Once we realize that the value of Prince's work resides wholly in the brand of the artist rather than the visual appearance of the image, we see that the popular conception that Prince "stole" something of economic value from the Suicide Girls is mistaken. He stole visual content, but it was only through his act of stealing—by slapping the authentic Richard Prince brand on it—that he created \$90,000 of value. Prince functions like King Midas; it is his touch (or his assistant's) that turns worthless material into art.¹³⁴ And thus the Suicide Girls couldn't exploit their own work for the \$90,000 Prince could; their identical copy could only sell for what their brand was worth. Indeed, the \$90 they charged was no doubt attributable to Prince; the scandal produced the value. In short, in the art market, copying doesn't harm the market for the original. If fact, as this story suggests, copying in art often seems to help the market for the original, or even create it.¹³⁵

IV. REPUTATIONAL INTERESTS: COPYRIGHT CLAIMS AS DISGUISED MORAL RIGHTS CLAIMS

In this Part, I consider whether we can resuscitate the economic argument for copyright by looking at other ways it might be said to incentivize artistic creativity.¹³⁶ Here I suggest that copyright is primarily functioning in art is to protect an artist's reputational interests,¹³⁷ as such,

condition, edition size, etc.

¹³⁴ I have previously described Prince as evidencing the new locus of creativity in curating contemporary imagery rather than creating it. Prince's New Portraits curates Instagram from his point of view and in that curation creates a new work of art. For my discussions of the curator as artist, see ...

¹³⁵ [wade guyton; eggleston; shepard fairey] Cf. WINNIE WON YIN WONG, VAN GOGH ON DEMAND: CHINA AND THE READYMADE 160-62 (2013) (exploring the relationship between art masterpieces and Chinese copies, finding that the widely publicized auction prices for famous works increased the market demand for copies of those works, but the copies did not diminish the market value of the originals).

¹³⁶ Note that most artists choose in their contract negotiations to retain copyright, suggesting they place a value on it.

¹³⁷ See Jeanne Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?* 53 HOUSTON L. REV. 549, 558-564 (2016) (exploring ways in which

artists are actually using copyright to accomplish goals that are more traditionally associated with non-economic, personality based moral rights claims. Ultimately this use of copyright shows the complexity of the relationship between moral rights and copyright, the ways in which these radically different realms have surprising points of convergence as well as deep incompatibilities.

As we will see, the use of copyright law to protect reputational interests may or may not be aligned with an artist's economic interests. In some cases, an artist may use copyright to protect his reputational interests in a way that furthers his pecuniary interests in his work; such uses would fulfill the utilitarian goals of copyright. But this is by no means assured. Protection of an artist's reputation through copyright can often have no legitimate goal in terms of copyright's utilitarian justification and instead serve goals that undermine it. As I illustrate below, an artist's use of copyright to protect his reputation may sometimes be directly contrary to his pecuniary interests, or directly contrary to the public -- and free speech -- interests that copyright seeks to promote.

One primary way copyright could protect an artist's reputation is by allowing her to prevent the appearance of copies of her work in settings that would, in her view, harm the perception of that work, or, to borrow the parlance of trademark, dilute her brand.¹³⁸ While this kind of concern is particularly important given the brand-driven nature of the art market that I have previously addressed,¹³⁹ these kinds of uses may also be extremely unlikely, given the very small market for reproductions of art images.¹⁴⁰ I

copyright holders sometimes assert their rights not because they care about market substitution but to protect their privacy or reputation).

¹³⁸ For discussion of the difficulty of applying trademark law to visual art, see Breanna Hinricks, *Protecting an Artist's Brand* (2014) (unpublished paper) (on file with author). See also *Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1290 (S.D.N.Y. 1988) (holding that Salvador Dali's style was not protectable under trademark law, and that the claim belonged in the realm of copyright). Michelle Brownlee, Note, *Safeguarding Style: What Protection is Afforded to Visual Artists by the Copyright and Trademark Laws?*, 93 COLUM. L. REV. 1157 (1993) ("Fine art is rarely bought and sold under circumstances in which consumer confusion is likely to play a role, since buyers are generally aware of what they are buying and any deception as to the origin of a work of fine art would constitute more than simple copyright or trademark infringement—it would be forgery or fraud."). For discussion of how moral rights functions like trademark for artists, see

¹³⁹ See *supra* note 81 and accompanying text.

¹⁴⁰ In addition to the fundamental lack of demand for copies of art works it's worth noting that we live in a world with such a glut of images that the ones produced by artists would hold no special appeal. Each day, users post 1.8 billion images online, only a fraction of which could be categorized as belong to the art

nonetheless consider here the ways in which these uses might affect an artist's incentives to create.

Below I consider three different ways artists invoke copyright law to protect their reputational interests. First, an artist might use copyright to prevent her work from being used in commercial settings that in her view would damage her brand or otherwise conflict with her artistic vision. Second, she may object to reproductions that misrepresent her work, for example failing to capture the quality of her brushstrokes, in a way that may harm her reputation. Third, she may object to reproductions being used in non-commercial contexts she finds offensive or disapproves of, such as a negative review. As I will show, these uses of copyright often mimic moral rights concerns.¹⁴¹ And while they sometimes coincide with copyright's utilitarian, market based justification, they also sometimes undermine it.

To illustrate the first scenario, consider an artist who objects to copies of her work being used to sell products – raising concerns that resemble right of publicity claims—or used in commercial contexts she might view as demeaning, such as on mass-market T shirts.¹⁴² Whether these kinds of uses would indeed harm the reputation of the artist depends to a large extent on the artist's existing “brand.” For an artist like Warhol, whose work consistently attacked the boundary between “high” art and “low” popular culture, and who talked about his work as “business” art,¹⁴³ the use of his images, even unauthorized, to sell products or to adorn mass market T shirts might seem to fulfill rather than defeat his artistic vision. (Warhol himself appeared in advertisements; he began his career as a commercial artist and even returned to make art for advertising, such as his

world. Jim Edwards, *Planet Selfie: We're now posting a Staggering 1.8 Billion Photos Every Day*, BUS. INSIDER (May 28, 2014), <http://www.businessinsider.com/were-now-posting-a-staggering-18-billion-photos-to-social-media-every-day-2014-5>. And for commercial firms looking for attractive or appealing images, images from the fine arts seem a particularly bad bet, given that visual art is no longer characterized by visual or aesthetic qualities, let alone by beauty (as it once was).

¹⁴¹ All three of these types of concerns approximate the moral right of integrity. I have not considered here the extent to which artists use copyright to approximate the moral right of paternity or attribution. I think this is a far less common use of the copyright law in art.

¹⁴² For an example of artists work being licensed for T shirt use, see Sarah Cascone, *MoMA Licenses Warhol, Pollock, and Basquiat for Uniqlo's Newest Fashion Line*, ARTNET NEWS (Mar. 28, 2014), <https://news.artnet.com/market/moma-licenses-warhol-pollock-and-basquiat-for-uniqlos-newest-fashion-line-7859>. Once again, this kind of derivative use involves extremely famous artists, Warhol, Pollock and Basquiat, whose work dominates the art market. [aa add Ryan McGinley].

Absolut vodka image, long after he had crossed over into the realm of serious art.)

Nonetheless it is easy to imagine another artist for whom such unauthorized reproductions of his work in commercial or mass market settings would be harmful to his reputation or at least dampen his spirit. (Once again this raises the question of the relationship between copies and originals. It may be that unauthorized copies would draw positive attention to the originals, acting as advertisements in effect. But the opposite may also be true.¹⁴⁴) Suppose for example that the great sculptor Richard Serra--known for his forbidding minimal works, so majestic that they conjure the sublime¹⁴⁵-- suddenly saw images of his sculptures sold on coffee mugs or used to advertise a liquor brand. I can imagine the artist would be horrified, even anguished. Should the harm he would presumably suffer in such a scenario be cognizable under copyright law?

The kind of anguish I am envisioning in this hypothetical sounds in the language traditionally reserved for "moral rights."¹⁴⁶ Moral rights are thought to protect an artist's personality interests, his dignity and personal

¹⁴⁴ Landes, *supra* note 60, at 6. Landes notes these two possibilities but concludes "[b]ecause one cannot say a priori which effect will dominate, vesting adaption or derivative work rights in the artist will create an incentive for him to license his work only in those instances where he expects the overall effect to be positive." *Id.* This raises a deeper question that I have addressed in my work on authenticity: Is the relationship between the copy and the original parasitic or synergistic? Does the proliferation of copies undercut our demand for the original (a concern that copyright law addresses)? Does it destroy the "aura," as Walter Benjamin predicted? Or do copies reinforce our desire for the real, just as the existence of a uniquely prized original drives us to yearn for the copy as a token? As my discussion in Part xx indicates, I think that in the art market, copies are reinforcing our desire for the real, contra Benjamin.

¹⁴⁵ Robert Hughes, *Man of Steel*, GUARDIAN (June 22, 2005, 6:23 AM), <https://www.theguardian.com/artanddesign/2005/jun/22/art>.

¹⁴⁶ Moral rights are enshrined U.S. law through the Visual Artists Rights Act of 1990 ("VARA"), passed as an amendment to the Copyright Act. Visual Rights Act of 1990, 17 U.S.C. § 106A (2000). Moral rights are a centerpiece of the international Berne Convention for the Protection of Literary and Artistic Works, Paris Act of the Berne Convention, Article 6bis. S. Treaty Doc. No. 27, 99th Cong., 2d Sess. 37 (1986). Article 6bis became part of the Convention in 1928. The U.S. ratified the Berne Convention in 1988. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified as amended in scattered sections of 17 U.S.C.). Prior to VARA, eleven states had enacted various forms of moral rights protections for artists. For a discussion of the state statutes, the extent to which VARA preempts them, and of cases litigating the issue, see 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:44 (2013).

connection to his artwork, as opposed to his pecuniary interests.¹⁴⁷ Traditionally understood as being independent of “the author’s economic rights,” moral rights are premised on the idea that an art work is in some ways like an artist’s “child,” and that mistreatment of that child personally wounds the parent/artist.¹⁴⁸ But moral rights in the United States do not extend to reproductions of art works.¹⁴⁹ Because they protect only unique or limited edition works of art, not copies, moral rights offer no protection to an artist who is personally offended by the unauthorized *copying* of his work in settings he disapproves of. Such an artist must resort to copyright law for any possible remedy.

In my view, because of this limitation of moral rights law—its application only to changes to the artwork itself, not copies—copyright lawsuits sometimes function as disguised moral rights claims. Yet this “off-label” use of copyright to accomplish goals more commonly associated with moral rights may strike us as surprising. Commentators frequently describe moral rights as the “anti-copyright,” acting as a “bulwark against the market” that copyright stimulates.¹⁵⁰ As historian Peter Baldwin explains it, “copyright sees culture as a commodity,” whereas the moral rights tradition “runs counter to the market.”¹⁵¹ Built to enshrine the almost sacred and deeply personal relationship between an author and his work, the moral

¹⁴⁷ JOHN H. MERRYMAN & ALBERT ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 423 (5th ed. 2007) (describing an artist’s art work as an “expression of his innermost being”). As the Second Circuit observed, moral rights “spring from a belief that an artist in the process of creation injects his spirit into the work.” *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 81 (2d Cir. 1995). Moral rights are said to have a “spiritual, non-economic and personal nature.” *Id.* at 81. See generally Adler, *supra* note 57. For some of the foundational scholarship on U.S. moral rights, see, for example, Roberta Rosenthal Kwall, “*Author-Stories*”: *Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1 (2001); Susan P. Liemer, *Understanding Artists’ Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 41-42, 44 (1998); John H. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976) (urging American adoption of moral rights before the passage of VARA). See generally JOSEPH SAX, *PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES* (1999) (explaining the urgent public interest in preserving important cultural objects).

¹⁴⁸ Henry Hansmann & Marina Santilli, *Authors’ and Artist’s Moral Rights: A Comparative Legal and Economic Analysis*, 6 J. LEGAL STUD. 95, 102 (1997); Adler, *supra* note 57, at 269 (discussing right of “paternity”).

¹⁴⁹ The exception is New York’s moral rights law, the AARA.

¹⁵⁰ PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 29 (2014).

¹⁵¹ *Id.* at 15-16.

rights tradition thus “protects the creator’s vision from commercialization.”¹⁵² Indeed, the French tradition from which moral rights law stems specifically repudiates the “mercantile” U.S. tradition of copyright and the idea that protecting intellectual property stimulates creativity.¹⁵³

And yet, although copyright is designed to protect an artist’s economic interests, I suggest that an artist may sometimes invoke copyright not because he suffers the kind of market harm that copyright protects against, but instead because he disapproves of or is personally anguished by the new use being made of the work, regardless of whether such use harms him economically. For example, Patrick Cariou, in his landmark copyright lawsuit against Richard Prince,¹⁵⁴ was offended by Prince’s use of his imagery. Cariou said he found Prince’s treatment of his work “racist.”¹⁵⁵ Certainly it violated his artistic vision. Whereas Cariou’s photographs of Rastafarians were solemn and respectful, Prince might be said to have desecrated these images, taking Cariou’s reverential portraits of religious figures and defacing them, cutting them up and splicing them together with pornography, electric guitars and other detritus of our tawdry pop culture, precisely the culture that Rastafarians have rejected. Although Cariou suffered no pecuniary harm in the sense that copyright is meant to remedy¹⁵⁶—indeed the value of his work probably increased from the notoriety of the lawsuit and the prominent circulation of his work that surrounded it¹⁵⁷—he no doubt suffered personal harm in the sense that moral rights law traditionally addresses. Yet moral rights law does not extend to copies; his only potential legal remedy was in copyright.¹⁵⁸ As a result, we could say that Cariou’s copyright claim functioned as an “off label” use of copyright--a disguised moral rights lawsuit.

What, if anything, is the significance of this kind of disguised moral

¹⁵² *Id.* at 15.

¹⁵³ *Id.* at 17.

¹⁵⁴ *Cariou v. Prince*, 714 F.3d 694 (2d Cir.).

¹⁵⁵ Patrick Cariou, Quoted in Adam Lindemann, *My Artwork Formerly Known as Prince*, OBSERVER (Mar. 29, 2011, 11:49 PM), <http://observer.com/2011/03/my-artwork-formerly-known-as-prince/>.

¹⁵⁶ *Cariou*, 714 F. 3d at xx (specifically finding no harm under the fourth factor market test).

¹⁵⁷ *Cf.* Jeanne Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615 (2015).

¹⁵⁸ Note that Prince sometimes used Cariou’s actual book to create works. If Prince had used Cariou’s limited edition photographs rather than the images from the book, Cariou might have had a moral rights claim against him.

rights claim for copyright law?¹⁵⁹ Is it merely a misuse of the law, to the extent that copyright is premised on a market based, utilitarian vision? In my view the answer is sometimes yes and sometimes no.

Sometimes the artist's personal anguish will be aligned with a market interest. As Henry Hansmann and Marina Santilli have shown, moral rights may sometimes protect an artist's commercial or pecuniary interests even though they are traditionally understood as being independent of "the author's economic rights."¹⁶⁰ To the extent that moral rights can ward off damage to an artist's reputation, they can protect against uses that "could potentially lower the price he can charge" for work he has yet to produce.¹⁶¹ Peter Baldwin also observes the many instances when "the moral and the mercenary blur," in spite of their supposed opposition.¹⁶² To return to the example of Serra, it may be hard to conceive that Serra would suffer economic as well as psychic harm from the unauthorized reproductions scenario I suggested above; his market power and reputation are transcendent. Nonetheless, it is conceivable that a less established artist could be damaged not just psychically but also economically by this kind of unauthorized use.

Another example of this kind of use that seems to harmonize moral rights and copyright concerns occurs when an artist objects to a reproduction because he believes it misrepresents his work in terms of overall feel or quality. A well-known painter told me (off the record) that he polices some inferior copies of his work online because he finds the copies to have poor brushwork and worries that online viewers will attribute the lesser quality to him.¹⁶³ This use of copyright approximates the moral right

¹⁵⁹ For a deep look at the historical and philosophical roots of copyright and its tension with moral rights, see PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANSATLANTIC BATTLE* (2014).

¹⁶⁰ Hansmann & Santilli, *supra* note 103, at 102.

¹⁶¹ *Id.* at 104.

¹⁶² PETER BALDWIN, *THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE* 33 (2014).

¹⁶³ For example, the acclaimed painter John Currin told me (off the record) that he polices bad copies of his work because it misrepresents his paint style and may affect his reputation. *See also* Hinricks, *supra* note 138 (discussing David Smith lawsuit in terms of reputational interests); Rozalia Jovanovic, *David Smith's Estate Demands "House Arrest" for a Young Artist's Works*, BOULIN ARTINFO (Oct. 3, 2013), <http://www.blouinartinfo.com/news/story/966834/david-smiths-estate-demands-house-arrest-for-a-young-artists#> (interviewing Robert Panzer, of VAGA, on the subject of a cease and desist letter sent on behalf of the Smith estate to Lauren Clay, which Panzer justified because the "importance of a work of art can lose its value when people reproduce it without permission"). The estate said its copyright claim furthered its mission "to preserve the integrity of David

of integrity, which allows an artist to prevent “distortion, mutilation, or other modification of [his original] work” when it “would be prejudicial to his or her honor or reputation.”¹⁶⁴ (Once again, moral rights offer no remedy here since they protect against modifications of actual artworks but not reproductions.) This kind of claim also seems harmonious with copyright’s utilitarian goals; although the painter is not using copyright in the classic sense of preventing a copyist from usurping his market, he does invoke it to protect against a use that may diminish the value of his brand.

But sometimes an artist may wish to protect his reputation in a way that makes his work *less* rather than more valuable; such a use seems contrary to the utilitarian, market protecting goals of copyright.¹⁶⁵ Indeed as Hansmann and Santilli have shown, some artists may exercise rights in a way that “*reduces* the value of the works” because they “wish to have a personal reputation as the kind of person who creates certain types of works, even if those works are not the most marketable.”¹⁶⁶ As I suggested above, it’s probable that Patrick Cariou was benefited in an economic sense by Prince’s appropriation, even though the appropriation offended him and perhaps harmed him in a personal sense. The same is true for the Suicide Girls.

Thus we see that artists may wish to prevent uses of their work that would be economically beneficial to them but that harm them in non-economic ways. In such instances, violating an artist’s vision can make his work more, not less, valuable.¹⁶⁷ For example, the great Modernist critic Clement Greenberg, acting as executor of the estate of sculptor David Smith, essentially vandalized several of Smith’s sculptures in direct violation of the artist’s wishes.¹⁶⁸ Smith’s most famous sculptures are in unpainted steel, but he sometimes executed painted steel forms as well. Greenberg found the unpainted work artistically superior. After Smith died, as executor of his estate, Greenberg stripped several of the painted

Smith’s work.” Brian Boucher, *David Smith Copyright Dispute Delays Brooklyn Artist’s Show*, ART AM. (Oct. 9, 2013), <http://www.artinamericamagazine.com/news-features/news/david-smith-copyright-dispute-delays-brooklyn-artists-show/>. Note that it is unclear these uses affect value or price of Smith. *Id.*

¹⁶⁴ Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (a)(3)(A) (2000).

¹⁶⁵ Hansmann & Santilli, *supra* note 103, at 102–03.

¹⁶⁶ *Id.* (emphasis supplied). This example is consistent with Peter Baldwin’s observation that “impairing a work’s integrity does not invariably damage the authors’ reputation. Indeed it may improve it.” BALDWIN, *supra* note 159.

¹⁶⁷ Adler, *supra* note 57, at 275.

¹⁶⁸ Rosalind Krauss, *Changing the Work of David Smith*, ART IN AMERICA, Sept.-Oct. 1974, at 30, 31.

sculptures and exposed others to the elements, destroying their painted surfaces in direct violation of Smith's artistic vision. The art world was horrified, labeling Greenberg's act vandalism. Yet putting aside the morals of this episode, we might say that Greenberg's violation of the artist's wishes made the sculptures "better" and more valuable. The art market agreed with Greenberg: unpainted Smiths are more valuable than painted ones.¹⁶⁹ The story of Greenberg and Smith shows that an artist may attempt to realize a vision that diminishes the market value of his work.

To the extent that an artist uses copyright to protect his artistic vision, then in some instances, that use will be directly contrary to the artist's pecuniary interests. Yet might we still say that these uses of copyright serve to incentivize artistic production? Might an artist be more willing to produce work under such a regime, not because he believes his economic interests will be protected, but because he knows that he can prevent his work from being used in a way that undermines his vision, hurts his feelings, or damages his reputation? To the extent this ability to prevent uses of his work that he disapproves of functions to incentivize production of his work, we can see that non-economic interests may motivate an artist to create.

This insight gives support to the many critics of copyright's utilitarian vision, who have argued that it overlooks the non-economic reasons that motivate creators.¹⁷⁰ It also shows the way in which non-pecuniary moral rights types of concerns, traditionally thought to be completely separate from the utilitarian goals of copyright, might in some instances actually serve to further utilitarian goals by incentivizing the production of art. Jeanne Fromer has persuasively shown in her work that there are "expressive incentives" that moral rights serve that are in harmony with copyright's utilitarian goals.¹⁷¹ Similarly, Henry Hansmann and Marina Santilli have explored the pecuniary as well as non-pecuniary interests that can be served by moral rights, even though traditionally moral rights have been understood in contradistinction to economic rights.¹⁷²

Yet the problem with these types of uses of copyright law is that they might be invoked in ways that promote the public interest by ensuring the production of more art, but also in ways that are contrary to the public interest that copyright is meant to serve. This happens when an artist uses

¹⁶⁹Richard Serra, *Art and Censorship*, 17 *CRITICAL INQUIRY* 574, 576 (1991). Even critic Rosalind Krauss, arguing for the importance of the painted work in Smith's oeuvre, still recognized the stripped work's appeal. Krauss, *supra* note 168, at 30.

¹⁷⁰ See *supra* note 54-55 and accompanying text.

¹⁷¹ Fromer, *supra* note 53.

¹⁷² Hansmann & Santilli, *supra* note 103.

copyright to prevent uses that may harm his vision or reputation but at the same time would lead to the production of art by others or serve to enrich the public discourse around art. Ideally fair use would protect these uses from the artist's reach, but it does not always do so, as I suggest below.

For example, the Picasso Foundation denied permission to use any of Picasso's images in the 1996 Merchant and Ivory film, "Surviving Picasso."¹⁷³ The family refused to license the work because they were reportedly offended by the script's representation of Picasso as a careless womanizer.¹⁷⁴ In an attempt to "recreate the atmosphere" of the time, the filmmakers substituted the works of the artist's contemporaries, such as Braque and Matisse, for Picasso's works.¹⁷⁵ This is a use of copyright to prevent the creation of a new work and to censor discourse about an artist; as such, it seems to violate the public purpose of copyright and the first amendment values that copyright is thought to enable.

In a similar example, an artist told me (again off the record) that he used copyright law to prevent a magazine from running images of his work to accompany a scathing review of his major museum retrospective.¹⁷⁶ Even Richard Prince himself has invoked copyright law to police his reputation in a way that has dubious benefit to his market while imposing a clear cost on public discourse.¹⁷⁷ Prince hates the work he made early in his career in the 1970s and omits all references to it. Indeed, he destroyed a great deal from this period, although some of it is owned by institutions and museums. As the legal copyright holder for these works, Prince refuses to allow any images of them to be reproduced in books or catalogues. Such a use of copyright law loosely approximates a moral right of withdrawal or (a variation) on the negative right of attribution.¹⁷⁸

Some cases suggest that redressing reputational harm in the absence of traditional market harm should not be cognizable in copyright.¹⁷⁹ For example, in *Garcia v. Google*, an actress brought a copyright claim to redress what was in essence harm to her reputation and emotional

¹⁷³ Patricia Cohen, *Art Is Long; Copyrights Can Even Be Longer*, N.Y. TIMES (Apr. 24, 2012), <http://www.nytimes.com/2012/04/25/arts/design/artists-rights-society-vaga-and-intellectual-property.html>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ [I am awaiting permission to use the details.]

¹⁷⁷ Daniel Grant, *Artistic Paternity: When and How Artists Can Disavow Their Work*, OBSERVER (Jul. 7, 2016), <http://observer.com/2016/07/artistic-paternity-when-and-how-artists-can-disavow-their-work/>.

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¹⁷⁹ See Fromer, *supra* note 137.

distress.¹⁸⁰ Garcia was duped into acting in the notorious anti-Islamic film titled *Innocence of Muslims*; a voice saying inflammatory lines about Islam was dubbed over hers in the final cut. Citing reputational harms, emotional distress, and security concerns (a cleric had issued a fatwa against anyone involved in the film) Garcia invoked copyright to try to force Google and YouTube to remove the film from its sites. In rejecting Garcia's claim in part because it was too attenuated from the purpose of copyright law, the court specifically remarked on its resemblance to a moral rights claim. Garcia was invoking copyright in an attempt to approximate the moral right of integrity, seeking to protect her performance "against distortion, manipulation, or misappropriation."¹⁸¹ But the court emphasized the irrelevance of the harms Garcia experienced to the market interests protected by copyright law.¹⁸²

Indeed, in the fair use context, the Supreme Court has highlighted the distinction between the economic harm caused by damage to reputation and the economic harm of market substitution. In *Campbell v. Acuff-Rose*, the Court emphasized that only the latter harm is cognizable in copyright. As the Court explained:

"We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,' the role of the courts is to

¹⁸⁰ *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015).

¹⁸¹ *Id.* at 746. As the court observed, moral rights were unavailable in that case since they do not apply to motion pictures.

¹⁸² *Id.* at 745. For example, the court noted that damages for emotional distress are "unrelated to the value and marketability" of the work." Similarly, a court rejected a copyright claim brought by an artist when he experienced personal affront at the manipulation of his artwork (resembling a claim for a violation of his moral right of integrity) but could not demonstrate market harm from the use. As the court wrote, "Mackie sought to introduce evidence of his personal objections to the manipulation of his artwork. Although it is not hard to be sympathetic to his concerns, the market value approach is an objective, not a subjective, analysis. Consequently, Mackie's subjective view, which really boils down to 'hurt feelings' over the nature of the infringement, has no place in this calculus." *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir.2002).

distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’”¹⁸³

Extrapolating from Campbell, we can see that using copyright to protect an artist’s reputation or general artistic vision, even if it averts market harm, may still have no legitimate basis in copyright’s market based, utilitarian justification. Furthermore, such uses may serve a goal that undermines the public interest rationale at the core of a utilitarian view of copyright. These uses of copyright cast further doubt on the case for copyright protection for visual art.

[More to come here.]

V. CAVEATS AND OBJECTIONS

In this Part, I consider two significant objections to my argument. The first, very serious, objection is to the limited scope of my theory: My argument applies only to “visual art,” a category that is notoriously hard to circumscribe. I then briefly consider a second objection to my argument: Might the obstacles copyright poses to creativity actually function as a perverse incentive to create?

C. *What is “Art”?*

A major objection—maybe a deal-breaker—to my approach is that it applies only to visual “artists” and not to other kinds of visual creators, such as illustrators, graphic designers or “commercial” artists whose markets may depend on multiple copies rather than sales of authentic originals, or whose markets lack the protection the art market provides by valuing authenticity.¹⁸⁴ Drawing such a distinction would require us to delineate

¹⁸³ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591–92 (1994) (internal citation omitted).

¹⁸⁴ As a result of their reliance on revenue from licensing or sales of copies, these kinds of visual authors would presumably suffer pecuniary harm from copyright infringement in a way that artists in the fine art market do not. See, e.g., Brian Boucher, *Angry Artists Accuse Zara of Stealing Their Designs*, ARTNET (Aug. 1, 2016), <https://news.artnet.com/art-world/artists-accuse-zara-stealing-designs-584951> (describing legal action contemplated by “designers” and “illustrators” who claim their work was ripped off by Zara). While commercial

“visual art” from commercial art and other forms of visual expression. To do this would be no small feat. Indeed, the difficulty of defining “art” has vexed philosophers for centuries and has been a central theme of my scholarship.¹⁸⁵

I note, however, that Congress has already drawn this line (for better or worse) in the copyright context, where for purposes of “moral rights” it has defined works of “visual art” and distinguished them from commercial art and other kinds of visual expression.¹⁸⁶ Moral rights are enshrined U.S. law through the Visual Artists Rights Act of 1990 (“VARA”), passed as an amendment to the Copyright Act.¹⁸⁷ VARA defines visual art as “a painting, drawing, print, or sculpture, existing in a single copy, or in a limited edition

artists have been ripped off with some frequency by fashion companies and other large brands, there are almost no examples of this kind of theft from artists. Telephone Conversation with Kerry Gaertner Gerbracht, director of Contemporary Art at Artory, New York, N.Y. (Aug. 30., 2016). Although my proposal wouldn’t affect commercial artists’s claims, since it only applies to fine arts not commercial arts, the difficulty of drawing the distinction between art and commercial art has a potential to harm them. [exceptions: Turrell, car ad—DZ]

¹⁸⁵ Amy Adler, *The Folly of Defining Art*, in *THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS* (Donald Hawthorne, et. al. eds., 2004) (arguing that while the definition has always been fraught, it has become more so in the last 100 years or so, since attacks on the category of art have in some ways come to constitute and perhaps destroy the category); see Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 580–81 (1964) (presenting his well-known theory defining art in its relationship to “an atmosphere of artistic theory”).

Aesthetic philosopher Nelson Goodman’s foundational division of works into two categories, autographic and allographic, corresponds closely to the division between “visual arts” and other forms of expression that I have drawn. Interestingly for our purposes, Goodman shows that the concept of authenticity is central to this distinction.

In *Languages of Art*, Nelson Goodman confronted the question of why only some categories of artwork are capable of being forged. Introducing the now classical distinction between “autographic” works—defined as those for which “the distinction between original and forgery of it is significant” and “allographic” works (those for which the history of production is irrelevant to whether something counts as a genuine instance of a work), This is refined by the statement that a work is autographic “if and only if even the most exact duplication of it does not thereby count as genuine.” NELSON GOODMAN, *LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS* (1968) 113. Goodman placed painting, sculpture, and prints into the former category, and gave music and poetry as examples of the latter. **The pivotal distinction between these two categories relies on the possibility of forgery and issue surrounding authenticity. *Id.* at 211-218.**

¹⁸⁶ 17 U.S.C. § 101 (2012).

¹⁸⁷ Visual Rights Act of 1990, 17 U.S.C. § 106A.

of 200 copies or fewer that are signed and consecutively numbered by the author.”¹⁸⁸ Photography is included if it has been “produced for exhibition purposes only” and exists “in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.”¹⁸⁹ VARA explicitly excludes from its definition of “visual art” a number of materials such as motion pictures, audiovisual works, books, magazines, electronic publications, advertising or promotional materials.¹⁹⁰

I have previously questioned the approach VARA takes to defining visual art, primarily because its high formalism seems ill-suited to the conceptual, dematerialized era of contemporary art.¹⁹¹ Indeed VARA seems to resemble a vision of art that the Supreme Court first introduced in the customs context over a century ago, when “art” as a category was quite circumscribed.¹⁹² The definition is underinclusive, failing to account for many forms of artistic expression that do not exist in traditional media such as painting or sculpture.

Yet for all its failings, the VARA definition may prove a pragmatic starting point for further legal line drawing. It would allow us to build on a definition already included in to the existing copyright statute. And for my purposes, the definition’s underinclusiveness may be a virtue: The primary

¹⁸⁸ The statute protects “multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author.” *Id.* VARA’s legislative history directs courts to “use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition.” H.R. REP. 101-514 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6915, 6921.

¹⁸⁹ 17 U.S.C. § 101.

¹⁹⁰ *Id.* For some cases finding material did not meet the definition of “visual art” under VARA, see *National Association for Stock Car Auto Racing, Inc. v. Scharle*, 56 F. Supp. 2d 515 (E.D. Pa. 2005); *Lilley v. Stout*, 384 F. Supp. 2d 83 (D.D.C. 2005); *Pollara v. Seymour*, 344 F.3d 265 (2nd Cir. 2003). *Cf.* *Kelley v. Chi. Park Dist.*, 635 F.3d 290, 302 (7th Cir. 2011) (noting the case raised “serious questions” about the VARA definition of art, but deciding the case on other grounds). 17 U.S.C. § 113(d) makes special provisions for works attached to buildings.

¹⁹¹ *Supra* note 123-124 and accompanying text.

¹⁹² *United States v. Perry*, 146 U.S. 71 (1892). For cases showing the previously formalistic view of defining art, see, for example, *United States v. Olivotti & Co.*, 7 Ct. Cust. 46 (Ct. Cust. App. 1916) (defining art for customs purposes according to strict formal criteria). *Cf.* *Brancusi v. United States*, T.D. 43063, 54 Treas. Dec. 428 (Cust. Ct. 1928) (dispensing with requirement of mimesis in defining “art” for customs purposes).

risk of my proposal to abolish copyright protection for art would be the harm of misapplying it to creators of visual content who are not fine artists and whose income depends on copies. The very limited VARA definition dramatically reduces that threat.

D. Perverse Incentives: Transgression and Creativity

[This Section, still in progress, will draw on my previous work exploring how censorship and other obstacles to expression not only silence speech but also produce it, serving as perverse incentives to create.]¹⁹³

CONCLUSION

[This Part, not yet written, will evaluate the overall case for and against abolishing copyright. I will also consider whether we should revise fair use law rather than abolishing copyright altogether.]

¹⁹³ Amy Adler and Jonathan Adler, *Creativity and Constraint*, (Oct. 3, 2013) <https://www.dwell.com/article/creativity-and-constraint-a-city-modern-preview-880fdd74>; (cite Perverse Law; Postmodernism) .