Why Art Does Not Need Copyright

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Abstract

This Article explores the escalating battles between visual 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 is necessary for the "progress" of the arts. This Article demonstrates that this premise is flatly wrong when it comes to visual art. United States courts and scholars have come to understand copyright law almost universally in utilitarian terms; by this account, the reason we grant copyright to authors is to give them economic incentives to create culturally valuable works. But legal scholars have failed to recognize that their paradigm makes no sense when applied to visual art, one of the highest profile and most hotly contested fields in intellectual property law. This is because scholars have failed to take into account the single most important value for participants in the art market: the norm of authenticity, which renders copyright law superfluous. The fundamental assumption of copyright law—that the copy poses a threat to creativity—is simply not true for visual art. By juxtaposing copyright theory with the reality of the art market, this Article shows why copyright law does not—and cannot—incentivize the creation of visual art. In fact, copyright law, rather than being necessary for art's flourishing, actually impedes it.

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INTRODUCTION

FIGURE 1. RICHARD PRINCE, *NEW PORTRAITS* (2014) (INSTALLATION VIEW)[1]

[1] Jess Howard, *Social Media, Appropriation, and the Art World*, NORWICH RADICAL (June 30, 2015), https://thenorwichradical.com/2015/06/30/social-media-appropriation-and-the-art-world/ [https://perma.cc/FA8N-CLLR]. This image can be viewed in color at https://gwlr.org/adler-prince-new-portraits/.

To create his *New Portraits* series, unveiled in fall 2014, the renowned artist Richard Prince searched Instagram for other people's selfies.[2] When he found a photo he liked, he added his own online comment to the user's post, then took a screenshot of the page and emailed it to an assistant, who had it inkjet-printed and stretched on canvas.[3] The resulting series of six-by-four-foot works sold for $90,000–$100,000 each.[4] This is a bargain for a Prince piece; his work typically costs in the millions.[5] Other than printing them out in large format, Prince's only additions to the Instagram posts he captured were his own brief online comments, alternately salacious and nonsensical, often appropriated from things he heard on television as he grabbed the image.[6] 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 tended to be lascivious, even skeevy, photos of young, attractive women; they also

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2 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 [https://perma.cc/H93X-FD9R].

3 *Id.*

4 *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 [https://perma.cc/JMR6-Z355] (reporting sales at private showings at Gagosian); Lizzie Plaugic, *The Story of Richard Prince and His $100,000 Instagram Art*, VERGE (May 30, 2015, 11:28 AM), http://www.theverge.com/2015/5/30/8691257/richard-prince-instagram-photos-copyright-law-fair-use [https://perma.cc/M2CF-XX96] (reporting sales of Prince's work at the 2015 Frieze Art Fair New York). The resale value of the works was higher; one sold for nearly $150,000 in a 2015 auction. *See* Anny Shaw, *Richard Prince Instagram Portrait Leaps in Value at Phillips*, ART NEWSPAPER (Oct. 15, 2015), http://theartnewspaper.com/market/richard-prince-instagram-portrait-leaps-in-value-at-phillips/ [https://web.archive.org/web/20170325021253/http://theartnewspaper.com/market/richard-prince-instagram-portrait-leaps-in-value-at-phillips/].

5 Prince's record at auction is $9.7 million, achieved in 2016 at Christie's. *See* 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 [https://perma.cc/69YQ-7GLM] (documenting $9.7 million paid for Prince's 2005–2006 painting, *Runaway Nurse*). Prince is often listed as one of the top ten most expensive living artists at auction. *See, e.g.*, Rain Embuscado, *The Top 10 Most Expensive Living American Artists of 2016*, ARTNET NEWS (July 25, 2016), https://news.artnet.com/market/most-expensive-living-american-artists-2016-543305 [https://perma.cc/XX27-FMAT] [hereinafter Embuscado, *Expensive Artists 2016*].

6 In the artist's statement on the Gagosian 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.'" *Richard Prince: New Portraits: June 12–August 1, 2015*, GAGOSIAN, http://www.gagosian.com/exhibitions/richard-prince--june-12-2015 [https://perma.cc/6GMZ-EWAZ]. As Prince wrote, "Whatever [intervention] I did, I wanted it to happen INSIDE and before the save. . . . I didn't want to do anything physical to the photograph after it was printed." *Id.*

included a smattering of artists and celebrities like Taylor Swift and Kate Moss.[7] Many of his *New Portraits* were based on pictures posted by the Suicide Girls, young women from the well-known alt-porn pinup collective.[8]

Prince's almost total lack of intervention in the work he copied is part of his longstanding tradition of appropriating and rephotographing images.[9] This technique, which he arguably "invented" but which draws on a long history in twentieth-century art,[10] has won him great critical acclaim—and plenty of legal trouble.[11] Yet critical reaction to Prince's *New Portraits* was divided. Most prominently, Jerry Saltz praised the momentous "genius" of the series, identifying it 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."[12] Less enthusiastic was Peter Schjeldahl of the *New Yorker*, who said his response to the show was "a wish to be dead."[13]

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7 For a critique of Prince's 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 [https://perma.cc/439E-XMKU].

8 Ben Davis, *Art Flippers Attempt to Unload Suicide Girls' Version of Richard Prince Work*, ARTNET NEWS (Aug. 13, 2015), https://news.artnet.com/market/art-flippers-suicide-girls-richard-prince-prints-324580 [https://perma.cc/A4XL-CJSW].

9 *See* Nancy Spector, *Nowhere Man*, *in* RICHARD PRINCE 20, 24 (David Grosz et al. eds., 2007) (describing Prince's central place in the generation of artists who "promoted a radical interrogation into the very nature of representation").

10 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).

11 *See, e.g.*, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013). Four lawsuits have been filed against Prince based on the series. Complaint, McNatt v. Prince, No. 1:16-cv-08896-PGG (S.D.N.Y. Nov. 16, 2016); Complaint for Copyright Infringement, Salazar v. Prince, No. 2:16-cv-04282 (C.D. Cal. June 15, 2016); Complaint for Copyright Infringement, Dennis Morris, LLC v. Prince, No. 2:16-cv-03924 (C.D. Cal. June 3, 2016); Complaint, Graham v. Prince, 265 F. Supp. 3d 366 (S.D.N.Y. 2017) (No. 1:15-cv-10160). The latter case recently survived Prince's motion to dismiss. *Graham*, 265 F. Supp. 3d at 371. The two cases filed in California were dismissed, but are expected to be refiled in New York. *See* Stipulation of Voluntary Dismissal of Entire Action Without Prejudice, Dennis Morris, LLC v. Prince, No. 2:16-cv-03924-RGK-PJW (C.D. Cal. Aug. 12, 2016); Stipulation of Voluntary Dismissal of Entire Action Without Prejudice, Salazar v. Prince, No. 2:16-cv-04282-MWF-FFM (C.D. Cal. Aug. 12, 2016).

12 Saltz, *supra* note 3; *see also* David Rimanelli, *All 47 Likes Are Mine*, TEXTE ZUR KUNST, Dec. 2014, at 208, 210–11 (positioning Prince's works within the tradition of the avant-garde); 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/ [https://perma.cc/XRP3-P84Q] (calling Prince's work "important and enduring art" but also "morally untenable").

13 Peter Schjeldahl, *Richard Prince's Instagrams*, NEW YORKER (Sept. 30, 2014), http://

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 suicide,[14] expressed fury on behalf of his "victims,"[15] and lamented the sick state of an art market that rewards what they saw as rapaciousness and laziness.[16] Warhol's famous words—"art is what you can get away with"—seemed to find new meaning.[17] Online critics saw the work as outright "theft," not only of the "victims'" images but of their money too.[18]

Indeed, the stench of money was a near-constant topic for enraged commentators.[19] In their view, a rich, famous artist had ripped off mostly unknown young women, profiting from their images and bodies while luxuriating in his own salaciousness and hands-off production values. And incredibly, rather than ostracize the thief, rich art collectors and powerful galleries showered Prince with money.[20] The perversity of the soaring contemporary art market seemed to be on

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www.newyorker.com/culture/culture-desk/richard-princes-instagrams [https://perma.cc/ZL9A-QPQM].

14 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/ [https://perma.cc/YKD7-K6UJ].

15 For one 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 [https://perma.cc/3XNL-KKNP].

16 *See id.*

17 BARRY SANDYWELL, DICTIONARY OF VISUAL DISCOURSE: A DIALECTICAL LEXICON OF TERMS 129 (2011) (attributing quote to Warhol); SARAH THORNTON, 33 ARTISTS IN 3 ACTS 235 (2015) (same). Warhol was apparently paraphrasing Marshall McLuhan. *Id.*

18 *See, e.g.*, Allen Murabayashi, *Opinion: Richard Prince Is a Jerk*, PETAPIXEL (May 26, 2015), http://petapixel.com/2015/05/26/richard-prince-is-a-jerk/ [https://perma.cc/5GEC-8T8D] (calling Prince "a thief").

19 *See, e.g.*, Schjeldahl, *supra* note 13 (writing that "there's a bonus to viewing the images as material stock in trade, destined for collections in which they will afford chic shocks"). For my discussion of the economics of the Suicide Girls' theft, see Amy Adler & Felix Salmon, *The Gist: The Art of Porn*, SLATE (July 10, 2015, 7:36 PM), http://www.slate.com/articles/podcasts/gist/2015/07/the_gist_felix_salmon_and_amy_adler_on_porn_richard_prince_and_suicide_girls.html [https://perma.cc/X3S8-PSM8].

20 Ralske, *supra* note 12 (stating that "massive amounts of capital are being created and accumulated here" and noting that Prince is ranked seventh among living artists for sales on the secondary market); Ryan Steadman, *Suicide Girls Sell Pics of Richard Prince Pics in Appropriation Tit for Tat*, OBSERVER (May 28, 2015, 8:00 AM), http://observer.com/2015/05/suicide-girls-sell-pics-of-richard-prince-pics-in-tit-for-tat-appropriation-battle/ [https://perma.cc/L3J9-VF44] (claiming "high-powered collectors can't seem to get enough" of the new work).

full display.[21] As one gallerist said of the controversy, "The art market is a disgrace to humanity."[22]

One set of victims responded to the theft in true Richard Prince spirit. The Suicide Girls decided to retaliate by selling reproductions of Prince's reproductions of their own original images.[23] Like Prince, they made a slight alteration, adding a line of text to the Instagram post before printing, but other than that they produced works identical to his—inkjet-printed, on canvas, and 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. Below is an image from their website advertising their replica (right) of Prince's replica (left).

FIGURE 2. SUICIDE GIRLS COPY[24]

21 See *infra* notes 87–91 and accompanying text for an account of the recent record-breaking heights reached by the market.

22 Davis, *supra* note 8 (quoting dealer Magda Sawon).

23 *Id.*

24 *Id.* This image can be viewed in color at https://gwlr.org/adler-suicide-girls/.

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 post give birth to a $90,000 artwork that in turn gave birth 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?[25]

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 artworks would have been a death knell for Prince's business model.[26] In their jiu-jitsu, self-help 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. Copyright law tells us that in a world like this, in which one could not 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, viewing the Suicide Girls' theft from the thief as a threat to Prince's business model.[27]

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. Instead of seeing the copies as siphon-

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25 *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 754–55 (2012) (discussing the problem posed by the fair use treatment of visual images in copyright law).

26 I am assuming here that Richard Prince would have a valid copyright in the stolen images because they were fair use. *See* Keeling v. Hars, 809 F.3d 43, 50 (2d Cir. 2015) (finding that "when a derivative work's unauthorized use of preexisting material is fair use and the work contains sufficient originality, its author may claim copyright protection . . . for her original creative contributions"). I understand my assumption that this is fair use is controversial, and that the issue is currently being litigated in the context of another work from the same series. *See* Graham v. Prince, 265 F. Supp. 3d 366, 386 (S.D.N.Y. 2017) (denying Prince's motion to dismiss and finding that discovery would be necessary because Prince is asserting a fair use defense, which is a fact-sensitive inquiry). For my general views on fair use, see Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559 (2016).

27 *See, e.g.*, KC Ifeanyi, *Whoever Bought This $90K Richard Prince Instagram Print Is About to Be Pissed*, FAST COMPANY (May 28, 2015), https://www.fastcompany.com/3046798/whoever-bought-this-90k-richard-prince-instagram-print-is-about-to-be-pissed [https://perma.cc/BQ8C-KSJR].

ing from his profit, Prince welcomed the Suicide Girls on the gravy train.[28] Even major supporters of Prince, like critic Jerry Saltz, openly planned to make cheap copies before the Suicide Girls did.[29] 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."[30]

Conversely, Prince's original theft from the Suicide Girls may have been a moral violation, but in the crude terms of money (the terms in which copyright law trades, as we will see), Prince's theft enriched his victims.[31] Can copyright law reckon with the possibility that the $90,000 Prince charged had nothing at all to do with the original authors' image and everything to do with the fact that Prince appropriated it? Can it acknowledge that this theft 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[32] 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.[33] I demonstrate that this premise is wrong. The theft and countertheft between Richard Prince and the Suicide Girls provides a

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28 He tweeted that their idea was "smart" and also retweeted their tweet announcing their sales of copies of his copies. Richard Prince (@RichardPrince4), TWITTER (May 28, 2015, 5:45 AM), https://twitter.com/RichardPrince4/status/603874714201751552 [https://perma.cc/MH8S-P6U3]; *see also* Alex Needham, *Richard Prince v Suicide Girls in an Instagram Price War*, GUARDIAN (May 27, 2015, 12:44 PM), https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram [https://perma.cc/Z7YJ-XAM3]; MissySuicide (@MissySuicide), TWITTER (May 26, 2015, 8:30 PM), https://twitter.com/MissySuicide/status/603372550131879936 [https://perma.cc/JV4Z-MFBB].

29 Saltz, *supra* note 3.

30 *Id.*

31 *See infra* notes 161–62 and accompanying text.

32 See *infra* Part II for a definition of "visual art" and for discussion of the difficulties surrounding that definition.

33 *See* U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). For full discussion of the utilitarian view of copyright, see *infra* Part I. For a discussion of the vexed problem of conceptualizing art in terms of "progress," see generally Barton Beebe, Bleistein*, the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319 (2017).

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. By juxtaposing the theory of copyright with the reality of the contemporary art market, I show the fundamental mismatch between the two.

In recent years, visual art has emerged as a central battleground for copyright law, as several 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 a veritable "who's who" of well-known artists such as Jeff Koons, Richard Prince, Shepard Fairey, Elizabeth Peyton, and Sarah Morris.[34] The disparate results of these cases,[35] 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.[36] In a 2013 case involving Richard Prince, *Cariou v. Prince*,[37] the Second Circuit made the law even less predictable for artists.[38] In the wake of that case, since 2015, four new

34 *See, e.g.*, Order, Lang v. Morris, No. 11 Civ. 8821 (KBF) (S.D.N.Y. Feb. 1, 2013) (denying summary judgment to Sarah Morris); Summary Order, Fairey v. The Associated Press, No. 09 Civ. 1123 (AKH) (S.D.N.Y. Mar. 16, 2011) (dismissing case upon settlement); 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 settled announced he is considering bringing a new copyright claim against her for another work. Anny Shaw, *Sex Pistols Photographer Accuses Artist Elizabeth Peyton of Copyright Infringement*, Art Newspaper (Feb. 18, 2016), http://old.theartnewspaper.com/market/art-market-news/sex-pistols-photographer-accuses-artist-elizabeth-peyton-of-copyright-infringement-/ [https://perma.cc/KAD5-WVQ9].

35 *See infra* Section III.B. I argue that the cases 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.

36 *See* Patricia Aufderheide et al., Copyright, Permissions, and Fair Use Among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report 8–9 (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); Laura Gilbert, *No Longer Appropriate?*, Art Newspaper (May 9, 2012), https://web.archive.org/web/20160512192909/http://old.theartnewspaper.com/articles/No-longer-appropriate/26378 (describing how artist Sherrie 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").

37 714 F.3d 694 (2d Cir. 2013).

38 *See id.* at 707 (examining how "artworks may 'reasonably be perceived' in order to assess their transformative nature" and thereby finding twenty-five challenged works by Prince to be "transformative as a matter of law"); *see also* Adler, *supra* note 26, at 563 (noting disparate approaches used by courts to decide fair use cases); Brian Boucher, *Experts Weigh In on Jeff*

lawsuits have been filed against Richard Prince[39] and one against Jeff Koons.[40] This marks the fifth time both Prince and Koons have each been sued.[41] 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.[42] Copyright law figures as a constant threat to artists; its vast uncertainty has led to an ornate and conflicting body of caselaw that chills artistic expression. But what if this battle were (at least partly) 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."[43] In fact, copyright law, rather than being essential for art's flourishing, actually impedes it. To understand why, we need to explore both the foundations of copyright theory and certain characteristics of the art market—particularly the powerful role played by the norm of authenticity in that market.

United States copyright law has come to be understood almost universally in utilitarian terms. By this account, the reason we grant copyright protection to authors is because it gives them economic incentives to create culturally valuable works.[44] Many scholars have persuasively questioned the assumptions of the utilitarian account, but for purposes of this Article, I will accept the prevalent copyright narrative in which creativity depends on economic incentives. I argue that if we assume 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. Visual art is fundamentally different from other kinds of copyrightable creations; unlike books or music or other core realms of copyright pro-

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Koons Copyright Infringement Lawsuit, ARTNET NEWS (Dec. 16, 2015), https://news.artnet.com/people/experts-jeff-koons-copyright-infringement-suit-393690 [https://perma.cc/5QU3-A8N5] (noting trends in fair use litigation since *Cariou v. Prince*).

39 *See supra* note 11 and accompanying text.

40 Complaint, Gray v. Koons, No. 1:15-cv-09727 (S.D.N.Y. Dec. 14, 2015).

41 Boucher, *supra* note 38; *see supra* note 11.

42 Patricia Cohen, *Photographers Band Together to Protect Work in 'Fair Use' Cases*, N.Y. TIMES (Feb. 21, 2014), https://www.nytimes.com/2014/02/22/arts/design/photographers-band-together-to-protect-work-in-fair-use-cases.html?_r=0 [https://perma.cc/9LAY-8VVN].

43 An important note about definitions: my argument applies only to the market for "visual art," but not to commercial art. As I explain below, however, "visual art" as a category is notoriously hard to circumscribe. *See infra* Part V.

44 *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

tection, 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 visual artists to create.

Furthermore, the basic premise of copyright law—that the unauthorized copy poses a threat to creativity—does not apply to visual 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. As a result, copying causes no economic harm to visual artists.[45]

If copyright does not provide an economic incentive to artists, what does it actually do? If we examine the reality of how artists use copyright, we see that they invoke it primarily to police their reputations. Therefore, I argue that copyright in art functions as a stealth system of "moral rights"—noneconomic, personality-rooted rights traditionally disclaimed by utilitarians. Does this use of copyright to police reputation nonetheless incentivize artistic creativity in a way that can help us resuscitate the economic, utilitarian account of copyright law? I conclude that it cannot. Although 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. In fact, 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 fundamentally different from other kinds of copyrightable creations and that this difference suggests a radical conclusion: we should stop treating visual art as copyrightable intellectual property altogether.[46] The current framework provides no benefits to art under conventional copyright theory; the "protection" we grant art actually imposes costs on artists, art historians, curators, and the public. Copyright therefore inhibits rather than promotes the very goal it was created to further: the constitutionally mandated "progress" of the visual arts.

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45 I refer here to the harm of market usurpation. Note that I am excluding the problem of forgery. *See infra* Section II.B. In Part IV, I explore a different kind of harm: being copied has the potential to harm (or to benefit) an artist's reputation, leading to possible market effects.

46 For counterarguments, see *infra* Part V.

Visual arts are at the heart of our culture and at the heart of copyright law.[47] But it turns out that copyright law has no language or theory to capture the mechanisms that animate this realm of creativity. Indeed, copyright's main account of creativity, utilitarianism, fails to describe the art market, and—as I have suggested in other work—deontological accounts also fail.[48] Instead, a different story about creativity emerges here. The creativity we see in the visual arts is best captured by the discourse surrounding the desire for authenticity, a norm about which copyright has virtually nothing to say.

Part I sets out the standard utilitarian account of copyright law which posits that the reason we grant authors copyright protection is to give them economic incentives to create cultural works. Part II demonstrates that this account makes no sense when applied to art: copyright does not and cannot incentivize the creation of visual art. I show that legal scholars have failed to take into account the single most important value for participants in the art market, the norm of authenticity, which renders copyright law superfluous. Part III argues that copyright law not only fails to benefit art but also imposes significant costs on it. Part IV explores why artists continue to invoke copyright given its failure to accomplish what the utilitarian account of copyright posits it should. Part V addresses the difficulty of defining "art" and other limitations of my argument.

I. 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.[49] By this account, adhered to by courts, Congress, and many legal scholars, the reason we grant copyright to

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47 Note that this was not always the case. *See* Beebe, *supra* note 33, at 325; *see also infra* note 66.

48 *E.g.*, Amy M. Adler, *Against Moral Rights*, 97 Calif. L. Rev. 263 (2009).

49 *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"); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, J. Econ. Persp., Winter 1991, at 3, 5 (arguing that creators need an appropriate return to innovate); 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."). For a rich account of the major theories that inform copyright law in addition to the utilitarian theory, see William 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 Seana Valentine Shiffrin, *Lockean Arguments for*

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."[50] Copyright gives authors a limited monopoly over their works,[51] 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.[52]

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."[53]

Private Intellectual Property, *in* NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY, *supra*, at 138.

The utilitarian model of copyright has sometimes led scholars to call for extending copyright protection to maximize creativity. For critical accounts of this view, see, for example, Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 276–84 (2007), advocating against extreme control of copyright by showing that spillovers can be a beneficial and necessary part of markets in intellectual property; 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 (2009), finding that increasing copyright rewards "does little to change [authors'] incentives overall"; and Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 343–45 (2002), discussing incentive and control models of copyright.

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

51 Copyright law protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (2012). A copyright holder has a number of rights, including the exclusive right to reproduce the work, distribute copies of it, and prepare derivative works based on it. *Id.* § 106. Generally speaking, the current copyright term extends from creation until seventy years after the author's death. *Id.* § 302(a). The Copyright Term Extension Act, upheld by the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003), increased the usual term from fifty to seventy years. *Compare* 17 U.S.C. § 302(a) (1994), *with* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b)(4)(C), 112 Stat. 2827, 2827 (1998).

52 *See* 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."); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11 (2003) [hereinafter LANDES & POSNER, INTELLECTUAL PROPERTY LAW]; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 328 (1989) [hereinafter Landes & Posner, *Copyright Law*] ("[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.").

53 U.S. CONST. art. I, § 8, cl. 8.

Note the distinctly public purpose behind this grant of a private right.[54] 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."[55] Thus, "[t]he monopoly created by copyright . . . rewards the individual author in order to benefit the public."[56]

Precisely because copyright is designed to benefit the public, and the benefit to individual creators is in some ways incidental to this goal,[57] the law has built-in mechanisms that presumably reduce the public costs associated with the grant of private limited monopoly rights.[58] 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 works that further copyright's goals.[59] As Terry Fisher explains, this

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54 *See, e.g.*, 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 . . . ."); 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE § 2.2.1, at 64 (1989) ("The aim of copyright law is to direct investment toward the production of abundant information . . . .").

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

56 *Sony Corp.*, 464 U.S. at 477 (Blackmun, J., dissenting) (citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Fox Film Corp. v. Doyal, 286 U.S. 123, 127–28 (1932)); *see also Eldred*, 537 U.S. at 212 n.18 ("[C]opyright law serves public ends by providing individuals with an incentive to pursue private ones.").

57 *Twentieth Century Music Corp.*, 422 U.S. at 156 ("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."); 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."); *Fox Film Corp.*, 286 U.S. at 127 ("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 labors of authors.").

58 *See* Christopher Sprigman, *Copyright and the Rule of Reason*, 7 J. ON TELECOMM. & HIGH TECH. L. 317, 319–20 (2009) (discussing copyright law's rule on derivative works).

59 *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996) ("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 . . . ."). On the relationship between copyright and free speech, a relationship in which fair use figures prominently, see *Golan v.*

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."[60]

B. Attacks on the Utilitarian Model

Several scholars, while acknowledging the overwhelming dominance of the incentive-driven utilitarian account of copyright, have nonetheless sharply questioned its assumptions. Some scholars argue that copyright law underestimates the noneconomic factors that drive people to create.[61] Rebecca Tushnet, for example, has shown that copyright's incentive model overlooks a persuasive account of creativity grounded in an artist's own experiences that are often unrelated to economic incentives.[62] 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' concerns for

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Holder, 565 U.S. 302, 329 (2012), describing the "'speech-protective purposes and safeguards' embraced by copyright law" (quoting *Eldred*, 537 U.S. at 219); *Eldred*, 537 U.S. at 219, discussing fair use and the "idea/expression dichotomy" as the two realms where First Amendment values exert themselves in copyright law (quoting Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 556 (1985)); and *Harper & Row, Publishers, Inc.*, 471 U.S. at 560, stating that First Amendment protections are "embodied in . . . the latitude for scholarship and comment" safeguarded by the fair use defense.

60 Fisher, *supra* note 49, at 169.

61 *See, e.g.*, Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 Wm. & Mary L. Rev. 513, 515 (2009).

62 *See id.* at 517–22. Several other significant works explore incentives to creativity that do not involve economic rewards. *See generally* Jessica Silbey, The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property (2015) (offering a thick account of creativity in which creators indicate the many noneconomic reasons they engage in innovation); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 Theoretical Inquiries L. 29 (2011) (offering an extensive critique of assumptions underlying economic incentives theory of copyright and exploring the powerful role of noneconomic incentives and intrinsic motivations in creativity); *see also generally* Teresa M. Amabile, Creativity in Context 153–78 (1996) (presenting an empirical study of 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); Niva Elkin-Koren, *Tailoring Copyright to Social Production*, 12 Theoretical Inquiries L. 309, 313–32 (2011) (emphasizing role of social, noneconomic factors in incentivizing creativity).

Still other scholars criticize the economic incentives account by showing how copyright law fails to implement this goal and overprotects in a way that undermines 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 argued, intellectual property's incentive to create is diminishing in light of the lowered costs of creation and distribution enabled by the internet. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 460, 507 (2015) (arguing that "[o]nce creation is cheap enough, people may do it without the need for any IP incentive").

their "moral rights"—their personal relationships with their works—spur creativity[63] or deserve protection on their own.[64] Still other scholars powerfully criticize copyright's assumptions by exploring creative industries, such as fashion or food, that thrived for many years in the absence of copyright protection.[65] 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 copyright protection, such as food or comedy, here I look at a bedrock, core realm of copyright protection—visual art—to argue that copyright is unnecessary for creativity in one of its central domains.[66] Second, I do not join the chorus of scholars who argue that creators create for noneconomic reasons that copyright systematically fails to credit. Instead, even though I am quite persuaded by many of these accounts, for purposes of this Article I accept the prevalent copyright narrative in which creativity depends on economic incentives. I argue that if we assume this basic premise is correct, copyright law fails on its own terms. My account of certain features of the fine art market—its conceptions of authorship and authenticity, the relationship in that market between copies and originals—shows that to the extent artists *do* create for economic reasons, copyright law is worthless to them as an incentive.

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63 *See, e.g.*, Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1747 (2012) (arguing that moral rights offer nonpecuniary "expressive incentives" that "can bolster the utilitarian inducement to create" works).

64 *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 Adler, *supra* note 48.

65 *See, e.g.*, KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 19–96 (2012); *see also* Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369 (2002) (account of collaborative creativity in the production of open-source software); 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, 1789–90 (2008) (discussing innovation without IP in stand-up comedy); 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).

66 It is interesting to consider the Copyright Clause's wording, which appears not to have contemplated protection for the fine arts. *See* Beebe, *supra* note 33, at 349, 356–57, 362, 395. Although it is beyond the scope of this Article, this exclusion of fine arts from the Copyright Clause suggests the possibility of a rich, historical analysis of the theory and practice of copyrighting fine art, a subject I hope to return to.

II. WHY ART DOES NOT FIT THE COPYRIGHT MODEL: THE ROLE OF AUTHENTICITY

In this Part, I demonstrate that copyright does not incentivize the production of "visual art." For purposes of my argument, I will adopt the Copyright Act's definition of "visual art." The Visual Artists Rights Act of 1990 ("VARA"),[67] passed as an amendment to the Copyright Act, defines "visual art" as "a painting, drawing, print, or sculpture, existing in a single copy[or] in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."[68] Photography is included in very limited circumstances: 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."[69] The statute distinguishes such work from other forms of visual expression including commercial art.[70] Although I have significant reservations about this definition, to which I return in Part V, for now I find it a useful—albeit flawed—way to capture, at least as a starting point, the category of "visual art" that I address throughout.[71]

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. Here I briefly introduce the norm of authenticity, which forms the foundation of the art market; I show how this norm leads the market to value (in most cases) unique, original works, not copies. Because of this, 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 art-

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67 Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.).

68 17 U.S.C. § 101 (2012) ("work of visual art"). The statute also 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.*

69 *Id.*

70 The statute 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. *Id.*

71 I return to difficulty of defining "art" and the problem it poses for my argument in Part V. For now I use the VARA definition as a placeholder for the category "art," which I consider to be an essentially contested concept. For background on the notion of an essentially contested concept, see generally W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956).

ists. The next Section explores a second step of the argument. I argue not only that copyright fails 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 return to the norm of authenticity in art. I argue that this foundational art market norm 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 visual content (but not name) is stolen, the thief cannot misappropriate the economic value of the work itself. As a result, copying causes no economic harm to visual artists.

A. Why Copyright Does Not Incentivize the Production of Visual Art[72]

1. Prizing Authentic Originals, Not Copies

Copyright law is about—well—copies. But visual art, for the most part, does not exist in copies. Unlike other kinds of intellectual property, visual artworks are almost always produced as unique works or as limited editions.[73] Indeed, as I indicated above, the Copyright Act defines "visual art" by exactly this criterion—as work that exists "in a single copy [or] in a limited edition."[74] Compare visual art to other core realms of copyright protection, such as music, books, or movies. Because musicians, writers, and filmmakers earn money from selling copies of their work,[75] and they depend on (or hope for) high-volume

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72 I note at the outset that there is little empirical data on the questions I address because the art market is characterized by opacity and secrecy. As the Register of Copyrights explained in a recent analysis of the market, "there is a paucity of independent empirical information about the art market, partly as a result of the secrecy and opacity that tend to characterize the purchase, investment, and sale of artwork." OFFICE OF THE REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, RESALE ROYALTIES: AN UPDATED ANALYSIS 26 (2013).

73 *See* Landes, *supra* note 36, at 5; *see also Visual Artists Rights Act of 1989: Hearing on H.R. 2690 Before the Subcomm. on Courts, Intellectual Prop., & the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 27 (1990) (statement of Ralph Oman, Register of Copyrights, Library of Congress) ("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 do not fit this model. Furthermore, some creators, such as musicians, for example, find alternate methods to profit from their creations outside of copyright, such as through live performance. *See* Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 686 (2009).

74 17 U.S.C. § 101.

75 *But cf.* Schultz, *supra* note 73, at 685–86 (noting increasing value in music market of live performance).

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 originals rather than copies.[76] Although individual songs or books or movies are perfect substitutes for one another,[77] the distinction between originals and copies forms the very foundation of the art market.

The preference for unique, individual works evidences in part the supreme value placed on authenticity in the art market (as well as in art history).[78] Authenticity is the bedrock of the art market. There are two overlapping dimensions of the concept of authenticity, both of which are directly relevant to my argument. First, authenticity signals originality, usually but not exclusively in the sense of uniqueness—an authentic work is not a copy. Second, authenticity signals authorship—an authentic work is "by" an artist and can be attributed to him. Both aspects of authenticity figure into my analysis of copyright. Here I focus on the first concept, involving the distinction between original and copy. I then turn to the implications for the art market of the second aspect of authenticity as it relates to authorship and attribution. The supreme value placed on authenticity—and the utter distinc-

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76 On the relationship between art's uniqueness and its value, see Letter from Simon J. Frankel, Covington & Burling LLP, to Maria Pallante, Register of Copyrights, U.S. Copyright Office 6 (Dec. 5, 2012), https://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/Sothebys_Inc._and_Christies_Inc_Simon_J_Frankel.pdf [https://perma.cc/FNQ8-TMUA], explaining that an original work is "valuable precisely because so few of its kind exist"; VAGA, Written Comments on Notice of Inquiry Concerning the Resale Royalty Right 1 (Dec. 1, 2012), https://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/VAGA.pdf [https://perma.cc/2BAM-WKLF], noting that "fine art's value is derived from its singularity[and] its scarcity"; and 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/ [https://perma.cc/5FTM-R6QQ], contending that some surges in art's value 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 [https://perma.cc/BAT6-DAS5] (suggesting that in the current art market, scarcity may have an inverse relationship to price, at least in the context of limited editions).

77 An exception is rare books, where we put great value on a first edition. Gordon N. Ray, *The Changing World of Rare Books*, 59 Papers Bibliographic Soc'y Am. 103, 129–37 (1965). The market for vintage photographs is similar. Rosalind E. Krauss, The Originality of the Avant-Garde and Other Modernist Myths 156 (1985) (discussing the desire for vintage photographic prints).

78 *See* Thierry Lenain, Art Forgery: The History of a Modern Obsession 13–46 (2011) (documenting "obsession" with authenticity as foundational to the art market); *see also* John Henry Merryman, *The Public Interest in Cultural Property*, 77 Calif. L. Rev. 339, 346 (1989) ("We yearn for the authentic, for the work as it left the hand of the artist or artisan."); Amy Adler, The Artifice of Authenticity (June 22, 2016) (unpublished manuscript) (on file with author) (exploring the centrality of authenticity to the art market).

tion it draws between original and copy, and between one artist's authorship and another's—makes copyright law superfluous.

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 authentic original and copy?[79] Fundamentally, these aspects of the market mean that copies almost never provide a source of income for visual artists. Instead, artists are able to realize the economic value (if any) of their unique or limited-edition artworks only from the first sale of those works.[80] As we will see, the vast majority of artists have no market whatsoever for copies of their works.[81] 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.[82] As a result, the economic-incentives theory of copyright—the primary justification for granting copyright to creators—simply does not 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 very few artists have any market for reproductions of their work in any form.[83] In fact, there is no resale value for most

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

80 *See* Landes, *supra* note 36, at 5.

81 *See, e.g.*, Letter from Simon J. Frankel, Covington & Burling LLP, to Maria Pallante, Register of Copyrights, U.S. Copyright Office, *supra* note 76, at 4 ("The primary market is the main or exclusive source of income for almost all American artists . . . ."); *see infra* Section II.A.2 (discussing phenomenon).

82 *See* VAGA, *supra* note 76, at 5 ("[C]opyright licensing is usually an insignificant source of income for most fine artists."). Architectural works, which were not protected by copyright until 1990, *see* Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701–702, 104 Stat. 5133, 5133 (1990) (codified in scattered sections of 17 U.S.C.), present some similar problems to visual arts (as well as some differences). *See* Landes & Posner, Intellectual Property Law, *supra* note 52, at 101 (describing the Act as "a dubious extension of copyright protection"); Sterk, *supra* note 62, at 1198 ("The notion that according copyright protection to architectural works will generate more creative architecture . . . is manifestly ridiculous."); Raphael Winick, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 Duke L.J. 1598, 1606 (1992) (contrasting architectural plans "with books and musical recordings, for which the sale of only one copy usually would not cover the cost of production").

83 U.S. Copyright Office, Resale Royalty Public Roundtable 111:2–8 (Apr. 23, 2013), https://www.copyright.gov/docs/resaleroyalty/transcripts/0423LOC.pdf [https://perma.cc/3CBZ-ZJZA] (remarks of Simon Frankel, representing Sotheby's, Inc.) ("[F]or most artists, . . . [the primary market] is the *only* market they have, [in] the original sale of their works." (emphasis

works of art, let alone for copies of them.[84] As John Merryman explained, for most art, there is no market to "resell [the work] *at any price*."[85] Indeed, most art depreciates in value,[86] a surprising fact given the endless discussions in today's current market boom (or bubble) about art as a soaring investment.[87]

And indeed, despite a recent contraction, the multibillion-dollar art market has soared in the last decade, breaking just about every record in its history.[88] After another recent market spurt, in which more than a billion dollars of art sold at auction in a week, critic Adam Gopnik commented on the current mania for buying art: "[T]he record for the price of a single work sold at auction ha[s] 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."[89] With the market ascent, art has become firmly entrenched as an "asset class," an essential investment for newly

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added)); Telephone Interview with Kerry Gaertner Gerbracht, Dir. of Contemporary Art, Artory (Aug. 30, 2016) (describing how few artists have market for reproductions).

84 *See* N.Y. Univ. Sch. of Law Art Law Soc'y, Comment in Response to Copyright Office's Request for Comments 7–8, https://www.copyright.gov/docs/resaleroyalty/comments/77fr58175/NYU_School_of_Law_Art_Law_Society.pdf [https://perma.cc/NKS9-GZKM] (noting that most art depreciates in value).

85 John Henry Merryman, *The Wrath of Robert Rauschenberg*, 41 AM. J. COMP. L. 103, 107 (1993) (emphasis added).

86 REGISTER OF COPYRIGHTS, DROIT DE SUITE: THE ARTIST'S RESALE ROYALTY 137 (1992) ("[I]t is an economic reality that most art depreciates in value . . . .").

87 *See, e.g.*, 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 [https://perma.cc/62GT-LQDE]. A significant contraction in the art market took place in 2016. *See* 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 [https://perma.cc/BZE6-GPTQ].

88 For some 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 [https://perma.cc/HX3U-BL5X], describing a market reflecting "record-breaking auction prices"; Scott Reyburn, *Record-Setting Auctions Cap a Turbulent Year*, N.Y. TIMES (Jan. 2, 2015), http://www.nytimes.com/2015/01/05/arts/international/record-setting-auctions-cap-a-turbulent-year.html [https://perma.cc/J3HL-EDX5]; 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/ [https://perma.cc/YEH8-AM7Q]. For an analysis of the economics of the contemporary art market, see CLARE MCANDREW, TEFAF ART MARKET REPORT 2015 (2015). Since the 1990s and certainly over the past ten years, prices for the postwar and contemporary sector have skyrocketed. Half of the value of the transactions in that market was for works priced at over one million euros. *Id.* at 72.

89 Adam Gopnik, *Art and Money*, NEW YORKER (June 1, 2015), http://www.newyorker.com/magazine/2015/06/01/art-and-money-gopnik [https://perma.cc/WCJ5-PD9V].

minted billionaires.[90] And as an investment, it has great appeal: prices for contemporary art skyrocketed by over 600% from 2004 to 2014.[91]

Yet this soaring market has nothing to do with copies. Surprisingly, even for originals, only a tiny fraction of artworks have any resale value;[92] one study posited that over 99.8% of artists lack a significant resale market.[93] 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. A recent analysis of the rarified global resale market in 2014 found that a handful of art stars accounted for most of the value: less than one percent of all artists in the resale market accounted for close to half the value in that market.[94] 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.[95]

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.[96] Recently, in a different context, the Register of Copyrights highlighted this distinction, contrasting the "ability of visual artists, relative to

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90 Felix Salmon, *Panama Papers Show How the Very Rich Use Art to Get Richer*, FUSION (Apr. 7, 2016, 2:49 PM), http://fusion.net/story/288515/panama-papers-leak-art-market/.

91 MCANDREW, *supra* note 88, at 70.

92 *See* Letter from Simon J. Frankel, Covington & Burling LLP, to Maria Pallante, Register of Copyrights, U.S. Copyright Office, *supra* note 76, at 2 ("[O]nly a tiny percentage of artworks are ever resold . . . ."). A study in 1999 showed that only 0.15% of artists had a work that resold at a price of more than $1000. 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. *See id.* at 544.

93 *See* Letter from Simon J. Frankel, Covington & Burling LLP, to Maria Pallante, Register of Copyrights, U.S. Copyright Office, *supra* note 76, at 4.

94 MCANDREW, *supra* note 88, at 36. Note this figure only applies to the auction market and does not include private sales. There are no reliable data outside of the auction market, however; figures on private sales are not generally available.

95 Merryman, *supra* note 85, at 107; *see also* Société des Auteurs Dans les Arts Graphiques et Plastiques, Response to the Notice of Inquiry on Resale Royalty Right 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.").

96 A derivative work is defined 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." 17 U.S.C. § 101 (2012).

other authors, to exploit the right to create derivative works."[97] 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.[98]

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 artists who have such markets at all have attained a level of recognition that correspondingly makes their original works more valuable.[99]

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.[100] It is no 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 artworks made Warhol the highest-selling artist in the world.[101] Warhol's images are frequently licensed not only for art posters but also for a dizzying range of products such as sneakers, snowboards,

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97 OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 72, at 11.

98 *Id.* The report concluded that "[m]ost artists earn little or no income from derivative uses" such as licensing or other "third-party uses" of their work. *Id.* at 12.

99 Telephone Interview with Kerry Gaertner Gerbracht, *supra* note 83. For discussion of this aspect of the art market and the artist as brand, see MICHAEL FINDLAY, THE VALUE OF ART: MONEY, POWER, BEAUTY 43 (2012), stating that authenticity is an important factor in collecting art; DON THOMPSON, THE $12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART (2008); and 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 issue in Section II.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* Part V.

100 *See* THOMPSON, *supra* note 99, at 79 (noting the success of the Warhol brand); Eileen Kinsella, *Warhol Inc.*, ARTNEWS (Nov. 1, 2009, 12:00 AM), http://www.artnews.com/2009/11/01/warhol-inc [https://perma.cc/34FE-6NS2] (describing the success of the Warhol brand).

101 MCANDREW, *supra* note 88, at 75 (describing Warhol as "the highest selling artist across all sectors [of the art market] worldwide in 2014"). Note how few artists even approach Warhol's market power. In 2014, "[t]here were just 28 artists whose work sold for over €10 million." *Id.* "Warhol[] alone account[ed] for over 8% of the [postwar and contemporary art] sector's value, including the most expensive work sold in Euro terms . . . ." *Id.*

and even condoms.[102] 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 $4 million in 2014 from all of its many licensing activities.[103] Contrast that figure with the value of a single Warhol canvas: a Warhol painting sold for $105 million in 2013; another sold for $81.9 million in 2014.[104]

The copyright market for Robert Rauschenberg, another market star, tells a similar story. Indeed, it helps explain the decision announced in 2016 by the Rauschenberg Foundation to make its copyrighted images available for free for most uses.[105] (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; I consider these costs directly in Part III.)[106] The Foundation reported annual income from copyright of about

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102 *See* Kinsella, *supra* note 100 (giving examples of licensing Warhol's art for various products); 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 [https://perma.cc/6AT9-FRXP] (describing Warhol's art being used on Converse sneakers).

103 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 [https://perma.cc/L59W-MMDL]. The Warhol Foundation income points to a cost of eliminating copyright protection for art: the Foundation funds new art, providing an incentive to create for its grant recipients. But this benefit comes, as all copyright for art does, at a significant cost: the cost to the public and other artists from lack of access and lack of use. The cost to artists is particularly high, as I have argued, given the importance of copying to art, an importance that Warhol's work attests to. Aside from incentives, it pains me that my proposal would impede the Foundation's philanthropic mission. Still, the Foundation had a much greater source of income, its collection of Warhol's work itself, left to the Foundation through Warhol's will. The Foundation sold this work in 2012 to expand its philanthropic work. Robin Pogrebin, *Foundation Aims to Sell or Donate All Its Warhols*, N.Y. TIMES, Sept. 6, 2012, at C1.

104 Lynn Douglass, *Warhol Painting Sells for $105 Million at Auction*, FORBES (Nov. 14, 2013, 8:48 AM), https://www.forbes.com/sites/lynndouglass/2013/11/14/warhol-painting-sells-for-105-million-at-auction/#7c381e6c1cfd [https://perma.cc/M8HY-B6JL]; 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/ [https://perma.cc/Y9BS-J8YQ].

105 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 [https://perma.cc/WE2C-FYR6].

106 *Id.* (describing artist Rachel Harrison's recent work using Rauschenberg images as an example of important creative work that depends on using Rauschenberg's copyrighted images); *see* Amy Adler & Rachel Harrison, *Conversation*, *in* G•L•O•R•I•A 116, 117 (Rachel Harrison et al. eds., 2015) (discussing Harrison's re-use of Rauschenberg's work).

$100,000 for all of Rauschenberg's extensive oeuvre[107]—a lot of money, until one considers that a single Rauschenberg canvas recently sold for $18,645,000.[108] And remember, Rauschenberg and Warhol are unicorns in this story; only a small fraction of artists have a market for derivative works.

In sum, the small minority of artists lucky enough to have a market for copies or derivative works are artists for whom the price of their original, unique works is so substantial that the value of their income from copyright will be trivial in comparison. To the extent money motivates such artists, as the utilitarian vision of copyright assumes it does, they would produce new works not for the unlikely and, at best, trivial value of any potential copyright income, but instead for the value of earning a huge sum from the sale of the work itself. 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 her future chances of success and the value of her work by assuming she will become not only an art star, but also one of the few art stars who somehow has a market for derivative works,[109] she would still have a market in which the price of her unique works of art would dwarf any income she might make from that market in copies.[110]

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107 Kennedy, *supra* note 105.

108 *Post-Sale Release: Christie's Post-War and Contemporary Art Evening Sale Achieves $658,532,000 (£419,714,468/€584,662,254)*, CHRISTIE'S (May 13, 2015), http://www.christies.com/about/press-center/releases/pressrelease.aspx?pressreleaseid=7907 [https://perma.cc/2C2J-5DZV] (describing Christie's 2015 sale of Rauschenberg's OVERDRIVE from 1963).

109 *See generally* 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). Professor Balganesh's work on foreseeability and copyright incentives suggests the question is whether a creator could have reasonably foreseen a market for the work at the time the work was created. *See* Balganesh, *supra* note 49, at 1575; Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 929–30 (2d Cir. 1995) (limiting fourth-factor analysis under fair use to "traditional, reasonable, or likely to be developed markets" for the work).

110 Some artists who were flashes in the pan or had a successful early period that was never rivaled *and* sold all of those works may seem at first glance to have a strong interest in copyright revenue. (They would certainly have an interest in resale royalties, discussed *infra* Section II.A.2.) *See, e.g.*, DON THOMPSON, THE SUPERMODEL AND THE BRILLO BOX: BACK STORIES AND PECULIAR ECONOMICS FROM THE WORLD OF CONTEMPORARY ART 115–24 (2014) (discussing rise and fall of prices for artist Jacob Kassay). But such artists still follow the general rule outlined above: there was never demand for copies of their work. The question for copyright law is whether a rational artist would be motivated ex ante by such atypical possible scenarios. My guess is that an artist ex ante will not irrationally estimate (1) that he will have one period of success followed by a decline and (2) that that successful period will be one in which he has

2. *Resale Royalties and Copyright*

Surprisingly, in a different context, the U.S. 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.[111] In response to their findings, Congress introduced a bill proposing a resale royalty right in 2014;[112] it marked Congress's fifth attempt to enact such a provision.[113] The point of a resale royalty right is to grant artists a percentage of the proceeds from certain resales of their work.[114] It is premised on the insight 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.[115] 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 market gains in the last decade. Advocates of a resale royalty right insist that, as a matter of fairness or incentives, artists whose work

somehow managed to develop a market for copies. Mark Lemley has suggested that we should be wary of incentives based on "systematic cognitive mistake[s]." Lemley, *supra* note 62, at 491 n.152. He writes that "[i]t 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 . . . ." *Id.* Similarly, it is possible that a relatively unsuccessful artist could hit the jackpot and get licensed to do a major commercial ad campaign. Once again, copyright's focus on the ex ante perspective makes this extreme outlier scenario, one that a rational artist should not be incentivized by.

111 *See* Letter from Maria A. Pallante, Register of Copyrights & Dir., U.S. Copyright Office, to Representative Jerrold Nadler (Dec. 12, 2013), *reprinted in* OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 72.

112 American Royalties Too (ART) Act of 2014, S. 2045, 113th Cong. (2014); American Royalties Too (ART) Act of 2014, H.R. 4103, 113th Cong. (2014).

113 Previous bills were the Equity for Visual Artists Act of 2011, S. 2000, 112th Cong. (2011); Visual Artists Rights Act of 1988, S. 1619, 100th Cong. (1988); Visual Artists Rights Amendment of 1986, S. 2796, 99th Cong. (1986); Visual Artists' Residual Rights Act of 1978, H.R. 11,403, 95th Cong. (1978). *See* Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. F. 1, 1 (2014), https://www.yalelawjournal.org/pdf/Rub_Final_4.27.14_4rcwvqzv.pdf [https://perma.cc/WD9G-KEYK]; *see also* Anna J. Mitran, Note, *Royalties Too?: Exploring Resale Royalties for New Media Art*, 101 CORNELL L. REV. 1349, 1363–64 (2016) (discussing proposed legislation and comparing with international approach to resale royalties). In 1975, California passed its own resale royalty law. CAL. CIV. CODE § 986 (West 2007).

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

115 *See supra* Section II.A.1.

increases in value over time should share in collectors' profits.[116] They further argue that artists, who rely on first sales for their income, are at a "material disadvantage" compared to other authors.[117] Both of these arguments have been hotly disputed.[118]

There is one point of agreement in the highly polarized 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 United States that deal in artist intellectual property rights). As Panzer explained,

> When we're talking about fine art in particular, it's about the unique work. And so even though there's a little market for reproduction rights, it's a very small market. . . .
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> . . . .
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> . . . I can't think of any artist 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 . . . .[119]

Even a staunch advocate for copyright acknowledges that copyright is not an economic incentive for artists to create.[120]

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116 OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 72, at 1–2.

117 *Id.* at 2.

118 For criticism, see, for example, Merryman, *supra* note 85, at 111–20, examining arguments for and against resale royalty rights; Kal Raustiala & Chris Sprigman, *Artist Profit-Sharing: Another Example of How California Is Like Europe*, FREAKONOMICS BLOG (Nov. 3, 2011, 10:41 AM), http://freakonomics.com/2011/11/03/artist-profit-sharing-another-example-of-how-california-is-like-europe [https://perma.cc/4US6-JW5E]; and Kal Raustiala & Chris Sprigman, *Artist Resale Royalties: Do They Help or Hurt?*, FREAKONOMICS BLOG (Dec. 22, 2011, 12:04 PM), http://freakonomics.com/2011/12/22/artist-resale-royalties-do-they-help-or-hurt/ [https://perma.cc/5GAA-7BJ4].

119 U.S. Copyright Office, *supra* note 83, at 93:20–94:1, 94:21–95:2 (remarks of Robert Panzer, VAGA).

120 Both Richard Posner and William Landes have previously argued that visual art involves primarily unique works, the production of which would *not* seem to require copyright. *See* Landes & Posner, *Copyright Law*, *supra* note 52, at 329; Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, 19 J. ECON. PERSP. 57, 66 (2005). Yet both scholars still conclude that even though the case for copyright is weak, copyright still provides some limited incentive to create art, in part through derivative works. Posner, for example, writes that although copyright is not important for the production of unique works, "[c]opyright does, however, enable the artist to obtain additional income from derivative works. Hence allowing paintings to be copyrighted increases . . . the supply of art." Posner, *supra*, at 71. Similarly, Landes writes:

The Director of VAGA's British counterpart, the Design and Artists Copyright Society ("DACS"), emphasized the way this economic reality distinguishes 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."[121] The Copyright Office's report credited this testimony, finding that "for most visual artists . . . the amounts involved in reproduction or representation are generally insignificant";[122] at best, "reproduction rights represent a 'very minor aspect of [most artists'] careers.'"[123]

Although the Copyright Office's report acknowledged this feature of the art market, the conclusion it ultimately drew was that artists faced an "inequity"[124] under the current copyright system when compared to other kinds of authors. The worry was that the "material

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> [U]nauthorized 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.

Landes, *supra* note 36, at 5.

In my view, Landes and Posner appear to overestimate the importance of copies in the fine art market, first by assuming a market exists for derivative works and second by suggesting that this market can be a significant source of income, at least for some artists. Thus, Landes writes, "[e]ven 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." *Id.* at 9. 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 market for originals is so robust that any ancillary income from copies would be trivial rather than "large relative to the artist's other expected earnings" as Landes envisions. *Id.* Landes concludes that the possibility of a high income from ancillary products proportional to an artist's other earnings incentivizes the creation of art. He writes, "In short, . . . we would expect a decrease in the number of new works created in the absence of copyright protection." *Id.* at 6.

I do not dispute that a small minority of artists—although fewer than Posner and Landes at times appear to envision—has a market for derivative works. But 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 money motivates such an artist, as the utilitarian vision of copyright assumes, she would produce new works not for the unlikely and slight, at best, value of any potential copyright income, but instead for the value of earning a huge sum from the sale of the work itself.

121 U.S. Copyright Office, *supra* note 83, at 100:8–14 (remarks of Tania Spriggens, DACS).

122 OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 72, at 2 (alteration in original).

123 *Id.* (alteration in original) (quoting U.S. Copyright Office, *supra* note 83, at 107:12–13 (remarks of Robert Panzer, VAGA)).

124 *Id.* at 3.

disadvantage"[125] artists faced because of their lack of reliance on copyright ultimately posed a threat to the fundamental reason we grant copyright itself: "to incentivize the creation and dissemination of artistic works."[126] 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.[127]

In my view, this misses the point. 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.[128] But, putting aside the issue of resale royalty rights, it is clear that copyright in its conventional form does not affect an artist's financial prospects, nor can it.[129] Even if tweaked, copyright governs the realm of copies, a realm that is almost entirely irrelevant to an artist's income.[130]

In the next Section, I turn to an important facet of the relationship between copies and originals that other scholars have not explored and that has dramatic implications for copyright law. I argue that the art market already has a unique and powerful mechanism in place that polices copying. Here I return to the art market's founda-

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125 *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 n.215 ("[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))).

126 *Id.* at 3. 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.*

127 *See id.* at 35–36.

128 Several scholars have written against resale royalty rights. *See, e.g.*, Merryman, *supra* note 85, at 107–08; Rub, *supra* note 113, at 1–2 (disputing the assumption that the Copyright Act discriminates against visual artists by distinguishing art from the multicopy business model typical of other copyrighted works); Sprigman, *supra* note 58, at 319–20; *see also* Henry Hansmann & Marina Santilli, *Royalties for Artists Versus Royalties for Authors and Composers*, 25 J. CULTURAL ECON. 259, 262 (2001).

129 One exception would be to change the limitations on display rights. Artists currently have little use for the right of public display granted by copyright because of the provisions of the Copyright Act, which allow that "the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to display that copy publicly . . . to viewers present at the place where the copy is located." 17 U.S.C. § 109(c) (2012).

130 *See* OFFICE OF THE REGISTER OF COPYRIGHTS, *supra* note 72, at 1–2. (Once again, I am putting aside the issue of resale royalty rights as an adjunct to copyright.)

tional norm of authenticity to show how it renders copyright law superfluous.

B. 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 . . . .*
>
> —Richard Dorment[131]

The previous Section 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. 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.[132] 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 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 also consider below.) Ultimately, the norm of authenticity eliminates the threat of copying to an artist's first sales, rendering copyright law superfluous.

As a hypothetical, consider the highly acclaimed market darling Christopher Wool, whose painting *Untitled (RIOT)*, pictured below, recently sold for $29.9 million.[133]

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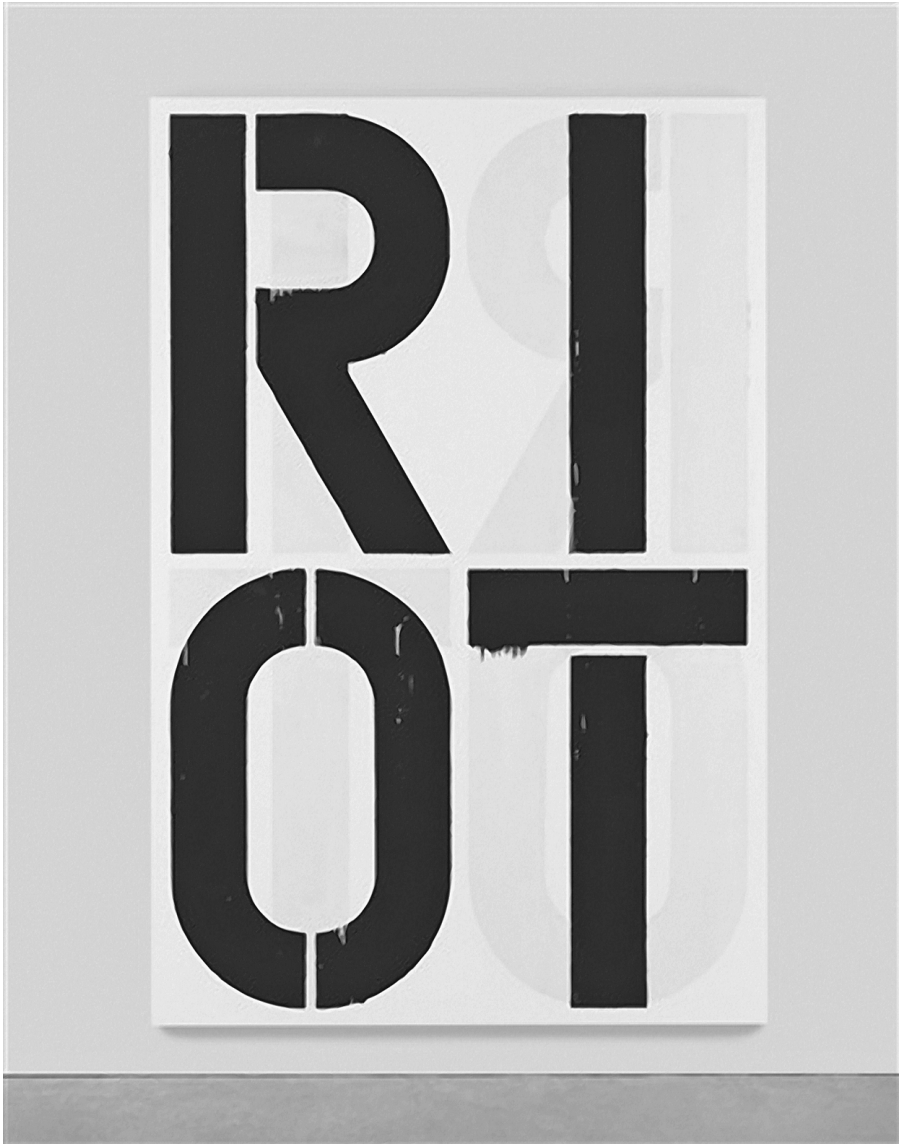
131 Richard Dorment, *What Is an Andy Warhol?*, N.Y. Rev. Books (Oct. 22, 2009), http://www.nybooks.com/articles/2009/10/22/what-is-an-andy-warhol/ [https://perma.cc/U4J6-F6JC].

132 Once again I am considering the harm of market usurpation, which is relevant to the utilitarian theory of copyright. See *infra* Part IV, which asks whether free copying might cause other kinds of harms, primarily sounding in moral rights and reputational harms, which may sometimes but not always cause economic harms (or benefits).

133 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 [https://perma.cc/NFH6-NG3M].

FIGURE 3. CHRISTOPHER WOOL, *UNTITLED (RIOT)*[134]



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 could charge for an original, then Wool would presumably suffer market harm; a con-

134 *Untitled (Riot) by Christopher Wool*, ARTNET, http://www.artnet.com/artists/christopher-wool/untitled-riot-zBYMkMEWA3qJHkRCLQQtcA2 [https://perma.cc/XT2L-ETLQ]. This image can be viewed in color at https://gwlr.org/adler-wool-untitled-riot/.

sumer could choose my cheap, perfect copy over Wool's original. I am purporting, with my hypothetical copy, to interfere with Wool's market for first sales, where (as I have established) all the money is for artists.[135] Surely this would diminish Wool's economic incentive to create. Thus, even without a market for copies, unauthorized copying still provides a disincentive for an artist to create because he will be deprived of the 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 of another aspect of the norm of authenticity as it operates in the art market. Authenticity polices copying in a way that renders copyright law superfluous.

To understand how authenticity operates to police copying, let us 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 painting (pictured below) from the Knoedler Gallery, New York's oldest art gallery.[136] Rothko experts admired it; a noted connoisseur declared it "sublime."[137] Then, in 2011, a scandal broke that rocked the art world. The "Rothko," and thirty-one other paintings sold by Knoedler, were fakes, painted by a Chinese immigrant in a basement in Queens.[138] The $8 million painting was now rubbish, an unmarketable embarrassment.

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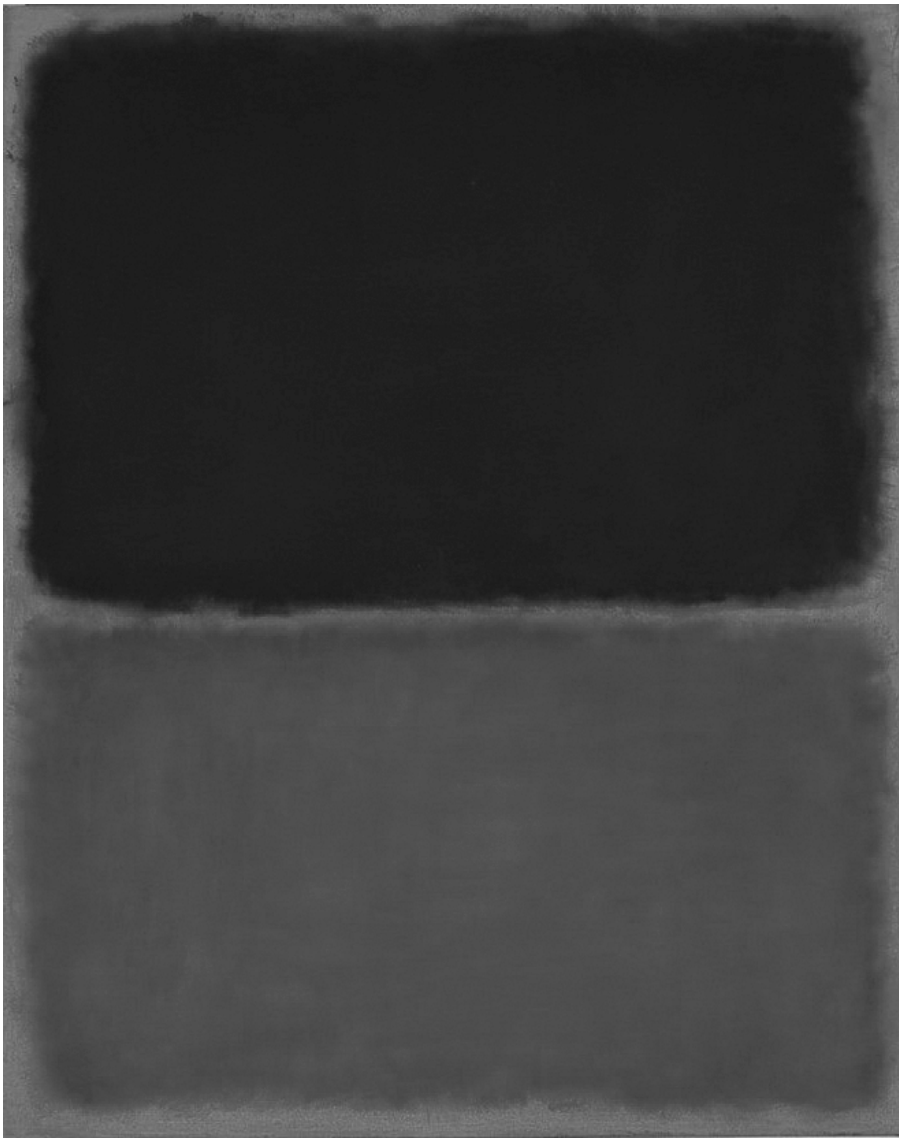
135 *See supra* Section II.A.1.a.

136 *See* De Sole v. Knoedler Gallery, LLC, 139 F. Supp. 3d 618 (S.D.N.Y. 2015) (order 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 [https://perma.cc/JGG6-2SQM] (describing the forgery scandal).

137 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 [https://perma.cc/7BZD-297N].

138 *De Sole*, 139 F. Supp. 3d at 624; Eileen Kinsella, *Potential Witnesses Revealed on First Day of the Knoedler Forgery Trial*, ARTNET NEWS (Jan. 25, 2016), https://news.artnet.com/market/knoedler-forgery-trial-witnesses-413036 [https://perma.cc/9SQ4-7E6X].

FIGURE 4. THE KNOEDLER "ROTHKO"[139]



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 true author of the Knoedler "Rothko" was revealed, the painting was the same—physically unchanged, still

139 David D'Arcy, *What We Learned from the Knoedler Trial and Scandal: A Post-Mortem*, OBSERVER (July 15, 2016, 12:08 PM), http://observer.com/2016/07/what-we-learned-from-the-knoedler-trial-and-scandal-a-post-mortem/ [https://perma.cc/U229-H5RY]. This image can be viewed in color at https://gwlr.org/adler-knoedler-rothko/.

beautiful, even sublime—but it had lost all market value. This shift in value is consistent with how inauthentic works, forgeries or otherwise, are treated.[140] Numerous recent authenticity cases and controversies reveal the same pattern as the Knoedler "Rothko": even works that experts have called "fabulous" and "beautiful," or "an exact copy of the original," became worthless once declared inauthentic.[141] Indeed, an art-world declaration that a work is inauthentic is the equivalent of an economic death sentence, rendering a work unsalable—even if a court disagrees,[142] and even if everyone suspects the work is actually real.[143]

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 necessarily visual. This may sound implausible given that for centuries, the word "art" has been used to invoke beauty or, at the very least, visuality. But contemporary art has migrated increasingly from the realm of the beautiful, physical, or 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."[144] Instead, in the contemporary moment, "visuality drops away, as little relevant to the essence of art as beauty proved to have been."[145]

Compare the experience of viewing Duchamp's *Fountain* (a readymade porcelain 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).[146] But, in contrast to the Rem-

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140 The category of "inauthentic" art includes forgeries, misattributions, and unauthorized reproductions. *See generally* THE EXPERT VERSUS THE OBJECT: JUDGING FAKES AND FALSE ATTRIBUTIONS IN THE VISUAL ARTS (Ronald D. Spencer ed., 2004) (exploring legal treatment of art's authenticity).

141 Greenberg Gallery, Inc. v. Bauman, 817 F. Supp. 167, 171, 175 (D.D.C. 1993) (emphasis omitted).

142 *E.g.*, *id.* at 174–75.

143 *See, e.g.*, Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc., 626 N.Y.S.2d 74, 78 (App. Div. 1995) (finding a triable issue as to the authenticity of an artwork despite several written affidavits from the artist that the work was fake).

144 ARTHUR C. DANTO, AFTER THE END OF ART: CONTEMPORARY ART AND THE PALE OF HISTORY 16 (1997).

145 *Id.*

146 Duchamp complained that critics "admire [my readymades] for their aesthetic beauty." *Id.* at 84.

brandt, it is clear that a great deal of the value of the Duchamp is conveyed simply by describing how it was made (and not made) by the artist: Duchamp took a manufactured urinal and put it in a gallery space. Indeed, a significant swath of contemporary art evidences a loss of interest not only in visuality but also in the traditional art object itself. The much-touted "dematerialization of the art object" that emerged in the 1960s has taken hold; in our present era, the physical object has famously become "contingent" to contemporary art.[147] As art's essence has become unmoored from the visual, so has its market price, not only for contemporary art but for other market sectors as well. Economist David Galenson has bluntly explained the art market: "Aesthetics have nothing to do with it."[148] The cliché (and insult) 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.[149]

If art's market value does not necessarily inhere in the aesthetics of a work, what does it depend on? Here is the second key lesson from the Knoedler forgery story. Art's market value, increasingly divorced from aesthetics, resides to a large extent in the identity and reputation of the artist to whom it is attributed. This emphasis on authorship explains the consummate value placed on authenticity by the art market; an authentic work is one that is properly attributed to its author.[150] The Knoedler painting was beautiful before and after its true author was revealed; only the shift in attribution, from Rothko to Pei Shen

147 *See* MARTHA BUSKIRK, THE CONTINGENT OBJECT OF CONTEMPORARY ART 16 (2003) (asserting that in the last forty years, "[a]lmost anything can be and has been called art"); *see also* SIX YEARS: THE DEMATERIALIZATION OF THE ART OBJECT FROM 1966 TO 1972 (Lucy R. Lippard ed., 1997) (documenting the emergence of conceptual art); *cf.* Yves Klein, The Sorbonne Talk: The Evolution of Art Toward the Immaterial (June 3, 1959), *in* YVES KLEIN, VERS L'IMMATÈRIEL [TOWARD THE IMMATERIAL] 115 (2006) (calling for dematerialization of art).

148 James B. Stewart, *With Art, Investing in Genius*, N.Y. TIMES (Nov. 28, 2014), https://www.nytimes.com/2014/11/29/business/with-art-investing-in-genius.html?_r=0 [https://perma.cc/64KC-8VGJ] (quoting David W. Galenson, Professor of Economics at University of Chicago); *see also* GALENSON, *supra* note 99 (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 . . . . 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 . . . ." WINNIE WON YIN WONG, VAN GOGH ON DEMAND: CHINA AND THE READYMADE 162 (2013).

149 THOMPSON, *supra* note 99, at 92.

150 *See* THE EXPERT VERSUS THE OBJECT, *supra* note 140, at 5; *see also* Denis Dutton, *Authenticity in Art*, *in* THE OXFORD HANDBOOK OF AESTHETICS 258 (Jerrold Levinson ed., 2003).

Qian (the name of the forger), accounts for its changed market value.[151]

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 usurp Wool's market for his original. A perfect copy sold under another artist's name is not a market substitute in art, no matter how visually identical or beautiful. Instead, its value depends on the market for the artist who copied 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 worthless.) Yet the same copy by an established "artist" would have market value, although the value would depend on that artist's reputation, not Wool's. For instance, if Jeff Koons were to copy Wool's work, the price of the work would reflect the market for Koons. An artwork by Martin Kippenberger illustrates this phenomenon. Kippenberger bought a Gerhard Richter painting, then turned it into a coffee table, transforming it from a "Richter" into a "Kippenberger."[152] The value of the Richter (a more high-priced artist) was lost; the piece became valued (lower) as a Kippenberger (which was presumably one point of the work).[153] 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 on the artist's brand power.[154]

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151 Note that some works fluctuate in value based on changes in attribution, but do not entirely lose their value, for example, if the attribution is downgraded from a renowned artist to a lesser known one. *See* 1 HUBERT VON SONNENBURG, REMBRANDT/NOT REMBRANDT IN THE METROPOLITAN MUSEUM OF ART: ASPECTS OF CONNOISSEURSHIP 82–135 (1995). We still value School of Rembrandt artworks. But we do not value copies made by nobodies or amateurs. Hence my copy of a Wool would be valueless, but the same copy by an "artist" may have value.

152 *See* MARTHA BUSKIRK, CREATIVE ENTERPRISE: CONTEMPORARY ART BETWEEN MUSEUM AND MARKETPLACE 248 (2012) (describing Richter's 1987 MODELL INTERCONTI).

153 *See id.*; *see also* Greg Allen, *A Favorite Kippenberger Made from a Favorite Richter*, GREG.ORG (Jan. 7, 2009), http://greg.org/archive/2009/01/07/a_favorite_kippenberger_made_from_a_favorite_richter_.html [https://perma.cc/K3PM-9GS4] (describing the loss in value). Kippenberger once said that the art market was like "screwing your dick to the wall." Jerry Saltz, *The Artist Who Did Everything*, N.Y. MAG. (Feb. 26, 2009), http://nymag.com/arts/art/reviews/54940/ [https://perma.cc/9UV4-YP4V].

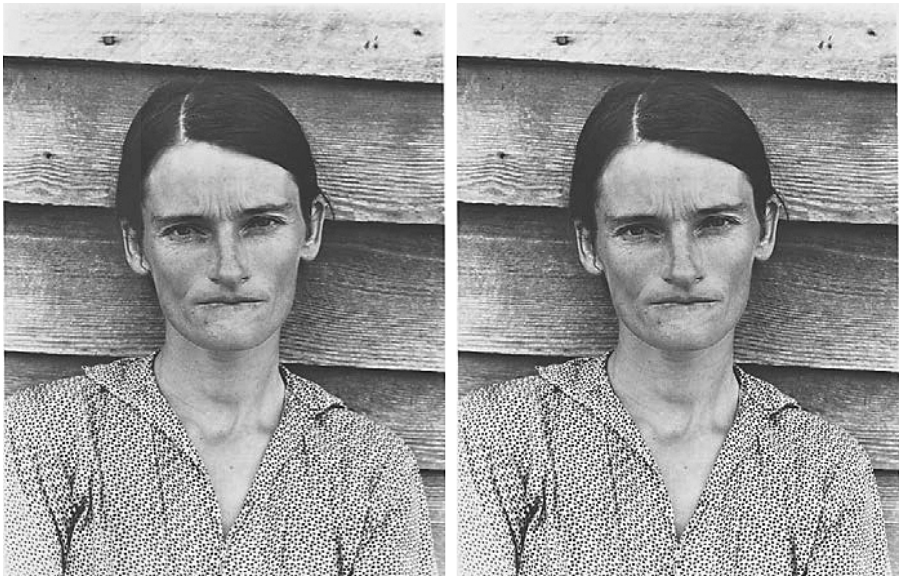
154 *See generally* THOMPSON, *supra* note 99 (arguing that an artist's brand is a central feature of the art market); *see also generally* THOMPSON, *supra* note 110 (focusing on brand-driven nature of contemporary art); Tang, *supra* note 99, at 233.

What is the significance for copyright law of these lessons from the world of forgery? The main takeaway is this: stealing visual content from an artist does not harm her market. If visual art's market value depends primarily on the identity of the artist, rather than the aesthetics of the work, then stealing another artist's visual content 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 takes 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, involved 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 creates a forgery and a fake. It is as valuable to the art market as the original artist's work—until it is discovered as a copy, in which case it becomes instantly worthless and unmarketable. In sum, given current market preferences, because the identity of the artist defines the range of the relevant market, a copy by another artist cannot usurp the market for the original artist unless it is an undiscovered forgery.

As another example, consider the two highly acclaimed photographs at the top of the next page. They are visually identical. The first, by Walker Evans, is called *Alabama Tenant Farmer Wife* (1936). Taken as part of the Works Progress Administration ("WPA") during the Great Depression, the photograph has become a celebrated symbol of art's power to reveal human suffering.[155] The second photograph, taken by Sherrie Levine in 1981, is formally indistinguishable from the Walker Evans. Indeed, the photo, called *After Walker Evans*, 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.)

155 *See* WALKER EVANS, AMERICAN PHOTOGRAPHS 14 (Museum of Modern Art, Fiftieth-Anniversary ed. 1988) (1938).

FIGURE 5. EVANS' (LEFT) AND LEVINE'S (RIGHT) WORKS[156]



In a previous article, I discussed the surprisingly 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.[157] But for our purposes now, I want to consider how these identical images by different authors do not function as market substitutes for each other. Data for the valuation of art are hard to come by because the art market deals in unique or limited edition goods that rarely change hands and often do so privately.[158] Nonetheless, Levine's and Evans's two identical images were recently publicly auctioned within a year of each other at the same auction house. Although Levine's version sold for approximately $30,000, the identical image by Walker Evans sold for approximately $142,000.[159]

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156 Jordana Moore Saggese, *The Pictures Generation*, KHAN ACAD., https://www.khanacademy.org/humanities/global-culture/identity-body/identity-body-united-states/a/the-pictures-generation [https://perma.cc/S8D6-UJYH]. This image can be viewed in color at https://gwlr.org/adler-evans-levine/.

157 *See* Adler, *supra* note 26, at 606–07.

158 *See* William J. Baumol, *Unnatural Value: Or Art Investment as Floating Crap Game*, AM. ECON. REV., May 1986, at 10, 10–11 (explaining that past data are a poor predictor given that resale of an artwork may not even occur once a century).

159 *Compare Sherrie Levine, Untitled (After Walker Evans: Positive) #3*, CHRISTIE'S (Nov. 14, 2002), http://www.christies.com/lotfinder/lot/sherrie-levine-untitled-4004386-details.aspx [https://perma.cc/2EUP-U8FR], *with Walker Evans, Alabama Tenant Farmer Wife (Allie Mae Burroughs)*, CHRISTIE'S (Oct. 20, 2003), http://www.christies.com/lotfinder/lot/walker-evans-alabama-tenant-farmer-wife-4165505-details.aspx [https://perma.cc/L8G9-S36T]. Obviously, this

With this in mind, let us return to Richard Prince's Instagram portraits, with which we began, and the attempt by one set of his "victims," the Suicide Girls, to retaliate. (Remember, Prince's copies of the Suicide Girls' Instagram posts sold for $90,000, and the Suicide Girls' near-identical copies of Prince's work sold for $90.)[160] Once we realize that the value of Prince's work resides more in the fact that he chose the image 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 previously worthless material into art.[161] And thus the Suicide Girls could not exploit their own work for the $90,000 Prince could command; their identical copy could only sell for what their brand is worth. Indeed, the $90 they charged was no doubt attributable to Prince. The theft produced the value. In the art market, copying does not harm the market for the original. In fact, as this story suggests, copying in art often seems to help the market for the original, or even to create a market that did not exist before the copy.[162]

III. The Costs Imposed by Copyright on Art

The previous Part showed that copyright fails to provide a *benefit* to art. Here I argue that copyright imposes a particularly high *cost* on art. The utilitarian theory posits that the costs associated with copyright come with a concomitant gain; copyright is supposedly necessary for creative works to be produced in the first place. But given the failure of that account when it comes to art, we are left only with costs. And as I will show in this Part, these costs are particularly high

is not a perfect comparison because prices at auction can be affected by issues such as provenance, condition, edition size, etc.

160 *See supra* notes 22–24 and accompanying text and images.

161 I have previously described Prince as part of a larger shift in creativity toward curating rather than creating images. In my view, in his *New Portraits*, Prince becomes a curator of Instagram, showing us his unique perspective, and in that curation, he creates a new artwork. For my previous scholarship explaining why curators could be considered artists in the contemporary environment, see Adler, *supra* note 48, at 277–79. I should note that the visual content of the work Prince appropriates *is* relevant, but relevant precisely because it caught the eye of the appropriator, in the same way that it was relevant that Duchamp chose certain objects (such as a urinal or a bottle rack) and not others to become his readymades.

162 *See* Wong, *supra* note 148, at 160–62 (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).

for art because it is a realm of expression that depends on copying. Below, I trace twin developments in art and law that explain why copyright law imposes a significant cost on art, impeding artistic creativity. First, art has changed over the last forty years in a way that has made copying more significant to creativity. Second, at the same time 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 misunderstands the very creative work it governs. Finally, I turn to the widespread and underappreciated costs that copyrighting art imposes on art historians, curators, publishers, and scholars.

A. Contemporary Art and Copying as Creativity[163]

> *Neither . . . is it possible to imagine the making of art without copying, referentiality, or influence in some degree.*
>
> —Winnie Won Yin Wong[164]

Copying has become a central building block of art for two reasons, one age-old and one new. First, there is the longstanding tradition of artists looking at and borrowing from one another's works. This tradition is the history of art: a history of innovation built on imitation.[165] Thus, for example, Manet's *Olympia* (bottom right on next page)[166] riffed on Titian's *Venus of Urbino* (bottom left),[167] which itself had riffed on Giorgione's *Sleeping Venus* (top);[168] the allusion to each previous painting enriched its successor, joining them in a play of meaning.

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163 This section is drawn from Adler, *supra* note 26, at 567–73.

164 WONG, *supra* note 148, at 234.

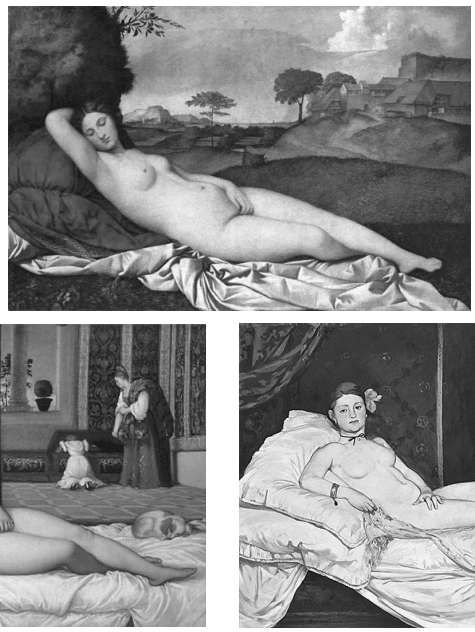
165 As Kathy Halbreich, Associate Director at the Museum of Modern Art ("MoMA"), explained in a fair use case, "virtually every work of art is based upon or inspired by some other work of art." Affidavit of Kathy Halbreich, Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990) (No. 89 Civ. 6707 (CSH)); *see also* HEINRICH WÖLFFLIN, PRINCIPLES OF ART HISTORY: THE PROBLEM OF THE DEVELOPMENT OF STYLE IN LATER ART 230 (M.D. Hottinger trans., Dover Publ'ns 7th ed. 1929) (1915) (writing that "the effect of picture on picture . . . is much more important than what comes directly from the imitation of nature").

166 *Edouard Manet's* Olympia, PBS, https://www.pbs.org/wgbh/cultureshock/flashpoints/visualarts/olympia_a.html [https://perma.cc/S7WQ-4LQR]. This image can be viewed in color at https://gwlr.org/adler-manet-olympia/.

167 Venus of Urbino *by Titian*, UFFIZI.ORG, http://www.uffizi.org/artworks/venus-of-urbino-by-titian/ [https://perma.cc/QXU5-MBZ8]. This image can be viewed in color at https://gwlr.org/adler-titan-venus/.

168 *Giorgione:* Sleeping Venus, WEB GALLERY ART, https://www.wga.hu/frames-e.html?/html/g/giorgion/various/venus.html [https://perma.cc/V9JY-M6YD]. This image can be viewed in color at https://gwlr.org/adler-giorgione-sleeping/.

FIGURE 6. MANET'S *OLYMPIA* (BOTTOM RIGHT), TITIAN'S *VENUS OF URBINO* (BOTTOM LEFT), AND GIORGIONE'S *SLEEPING VENUS* (TOP)[169]



Second, while art has always relied on copying, the technique has become more prevalent in contemporary culture. Because of shifts in both art and technology, copying itself has now become a central subject of art—as well as a basic tool of how people make it.[170] Fittingly, Richard Prince played a role in this shift.[171] His influence has been strong enough that although his work once seemed transgressive, it might now seem quotidian.[172] Of course, Prince drew on (i.e., copied from) others—particularly Pop artists like Warhol, whose work reproduced images and objects from pop culture.[173] Instead of striving to be

169 *See supra* notes 166–168.

170 *See generally* BUSKIRK, *supra* note 147 (exploring dominance and range of copying in contemporary art); Seth Price, *Dispersion*, *in* MASS EFFECT: ART AND THE INTERNET IN THE TWENTY-FIRST CENTURY 51, 54 (Lauren Cornell & Ed Halter eds., 2015) (noting shift in emphasis in art from creating new content to "a system that depends on reproduction and distribution . . . that encourages contamination, borrowing, stealing").

171 *See* MARVIN HEIFERMAN, LISA PHILLIPS & JOHN G. HANHARDT, IMAGE WORLD: ART AND MEDIA CULTURE (1989) (depicting some of Prince's works).

172 *See, e.g.*, Carol Vogel, *Painting, Rebooted*, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/30/arts/design/wade-guytons-computer-made-works-at-the-whitney.html [https://perma.cc/XK8G-R3TZ] (quoting critic Hal Foster on the enormous influence of Prince's generation on younger artists).

173 Pop artists in turn drew on a rich history of copying in collage and cubism, *see* BRANDON TAYLOR, COLLAGE: THE MAKING OF MODERN ART 8 (2004), and also on the history of the

original or new, as artists were expected to do, Warhol celebrated "the second-generation image,"[174] and the promise of endless repetition. "I like things to be exactly the same over and over again," he said.[175]

Prince went further. He made abject copying the subject of his art. In his rephotography work from the early 1980s, such as his famous *Cowboys* pictures, Prince simply rephotographed Marlboro ads.[176] It may be hard for us, from our remix-addled vantage point, to see what made this work so shocking and influential.[177] In my view, these early pieces anticipated the digital culture we live in today. By rephotographing, Prince was downloading before there was an internet.[178] He imagined and exposed the radical possibilities of copying that we now take for granted.

Indeed, artists now do take copying for granted. As technology has unleashed both a torrent of images and the capacity to copy them with a click, copying has become a basic tool for making art, as basic as oil paints once were.[179] If you ask art students about their work, they do not talk about *whether* to copy, but *what* to copy: how to choose the right source.[180] This is not only because technology has produced a new technique for creating work but also because it has changed our landscape. Artists have always tried to depict our world; now our world looks like Google Images.[181] The digital screen and its

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readymade, *see* William A. Camfield, *Marcel Duchamp's* Fountain*: Its History and Aesthetics in the Context of 1917*, *in* MARCEL DUCHAMP: ARTIST OF THE CENTURY 64, 73, 77–78 (Rudolf Kuenzli & Francis M. Naumann eds., MIT Press paperback ed. 1990) (discussing Duchamp's readymade sculptures).

174 TONY SCHERMAN & DAVID DALTON, POP: THE GENIUS OF ANDY WARHOL 17 (2009).

175 HAL FOSTER, THE RETURN OF THE REAL: THE AVANT-GARDE AT THE END OF THE CENTURY 131 (1996).

176 *See* HEIFERMAN, PHILLIPS & HANHARDT, *supra* note 171, at 135 (depicting this photograph).

177 *See generally* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008) (offering classic account of remix culture).

178 *See* Videotaped Deposition of Richard Prince at 50:3–50:8, 62:8–64:20, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (No. 08 CIV 11327 (DAB)), *in* CANAL ZONE RICHARD PRINCE YES RASTA: SELECTED COURT DOCUMENTS FROM *Cariou v. Prince* (Greg Allen ed., 2011) (quoting Richard Prince comparing rephotography to downloading).

179 *Cf.* Arthur Danto, *The Artworld*, 61 J. PHIL. 571, 581 (1964) (calling the readymade "a contribution to artists' materials, as oil paint was" (emphasis omitted)).

180 *See* TEACHING ART IN A POSTMODERN WORLD: THEORIES, TEACHER REFLECTIONS AND INTERPRETIVE FRAMEWORKS 41 (Lee Emery ed., 2002) (describing how art teachers have had to redefine originality in student artwork).

181 *Cf.* LAURA HOPTMAN, THE FOREVER NOW: CONTEMPORARY PAINTING IN AN ATEMPORAL WORLD 14 (Claire Barliant ed., 2014) ("Artists have always looked to art history for inspiration, but the immediate and hugely expanded catalogue of visual information offered by the Internet has radically altered visual artists' relationship to the history of art . . . .").

endless play of decontextualized and disconnected images are our new daily landscape; they are what Giverny once was for Monet.

Copying in art now extends well beyond the small segment of creators who became known in the 1980s for their "appropriation art."[182] The practice of copying now permeates art in extraordinarily diverse ways, no longer limited to the critical use of copying that characterized the appropriationist era.[183] In his 2013 book *After Art*, critic David Joselit laid bare the stakes: "[C]ontemporary art marginalizes the production of content in favor of producing new formats for existing images . . . ."[184]

We used to think of an artist as someone who sat outside in nature or in his garret, working alone to create something new from whole cloth. But now that we are bombarded by images, the most important artist may be the one who can sift through other people's art, the one who functions like a curator, an editor, or even a thief. In a world with a surfeit of images, perhaps the greatest artist is not the one who *makes* an image but the one who knows which image to *take*: the artist who knows how to sort through the sea of images in which we are now drowning and choose the one that will float. Warhol as usual was among those who saw this first. As a critic explained, Warhol realized that the most crucial piece of making art had become "choosing the right source image."[185] Copying is now so ubiquitous in art that some have complained it has become "hegemonic."[186] It is both the subject of contemporary art and its technique. Enter copyright law.[187]

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182 *See generally* Appropriation: Documents of Contemporary Art (David Evans ed., 2009) (analyzing 1980s school of art). As I contend, contemporary art now uses copying in a dizzyingly diverse range of ways, not limited to the critical uses of copying that characterized appropriation art. *See* Hoptman, *supra* note 181, at 14–15 (distinguishing contemporary artists' use of the past from appropriation art). For my discussion with artist Rachel Harrison of her distinctly nonappropriationist use of existing imagery in her art, see Adler & Harrison, *supra* note 106, at 118.

183 *See* Buskirk, *supra* note 147, at 95 (documenting varied uses of copying "as an increasingly significant technique" for making art).

184 David Joselit, After Art 58 (2013).

185 Scherman & Dalton, *supra* note 174, at 113.

186 *E.g.*, Simon Critchley, *Absolutely-Too-Much*, Brook. Rail (Aug. 1, 2012), http://www.brooklynrail.org/2012/08/art/absolutely-too-much [https://perma.cc/TT8Y-348H] (explaining that "taste for appropriation and reenactment . . . has become hegemonic in the art world").

187 I leave aside two deep questions: Why should copyright facilitate this movement in art? And, more fundamentally, what does the constitutional mandate of "progress" mean for the visual arts? I address these questions in Adler, *supra* note 26.

B. The Existing Legal Framework

[F]air use comes with fear . . . .

—Christy MacLear[188]

In recent years, a spate of copyright lawsuits ensnaring major contemporary artists has sent the art world into a "panic."[189] A 2014 report found that a climate of "self-censorship" has taken hold in the art world in response.[190] Numerous cases yielding disparate results have preoccupied the art and business worlds.[191] Two of the top ten bestselling artists of our day have become frequent defendants in court.[192] The *New York Times* recently reported what has been obvious for 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."[193] In my view, copyright law threatens art: recent developments in the jurisprudence have led to a conflicting body of caselaw that chills artistic expression.

The battles between art and copyright law have played out on the terrain of the fair use doctrine, a notoriously unpredictable defense to a claim of copyright infringement. The fair use defense starts from the premise that creativity sometimes requires copying. As the Supreme Court explained, fair use is "necessary to fulfill copyright's very pur-

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188 Christy MacLear, Response, *How to Fix the Art World: Part 1*, ARTNEWS (Nov. 18, 2016, 10:00 AM), http://www.artnews.com/2016/11/18/how-to-fix-the-art-world-part-1/ [https://perma.cc/JYV8-BZ8R].

189 Cohen, *supra* note 42.

190 *See* AUFDERHEIDE ET AL., *supra* note 36, at 8 (describing self-censorship by artists based on apprehension about fair use law).

191 *See* Daniel Grant, *In 2012's Art World, More Lawsuits than Art*, HUFFPOST (Feb. 19, 2013), http://www.huffingtonpost.com/daniel-grant/in-2012s-art-world-more-l_b_2338534.html [https://perma.cc/8VSN-LVNF].

192 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. Boucher, *supra* note 38; Embuscado, *Expensive Artists 2016*, *supra* note 5 (listing Jeff Koons and Richard Prince first and ninth, respectively, for the highest grossing single works sold between 2006 and 2016); *supra* note 11 and accompanying text; *see also* Eileen Kinsella, *Richard Prince Slapped with Yet Another Copyright Lawsuit*, ARTNET NEWS (Nov. 18, 2016), https://news.artnet.com/art-world/richard-prince-copyright-lawsuit-754139 [https://perma.cc/XBX5-QMXA]; Henri Neuendorf, *Jeff Koons Sued Yet Again over Copyright Infringement*, ARTNET NEWS (Dec. 15, 2015), https://news.artnet.com/art-world/jeff-koons-sued-copyright-infringement-392667 [https://perma.cc/X8TC-NN3Y].

193 Cohen, *supra* note 42; *see also* Ben Mauk, *Who Owns This Image?*, NEW YORKER (Feb. 12, 2014), http://www.newyorker.com/business/currency/who-owns-this-image [https://perma.cc/H57D-W3J9].

pose, '[t]o promote the Progress of Science and useful Arts.'"[194] Fair use also serves a vital First Amendment function, ensuring that copyright acts as an "engine of free expression."[195] Yet fair use has been labeled "one of the most intractable and complex problems in all of law."[196] Indeed, some scholars have lamented that the inquiry is so "impossible to predict"[197] as to be "useless."[198]

Codified in the Copyright Act of 1976,[199] the fair use defense provides an equitable four-factor test to determine whether a particular use is fair:

> (1) the purpose and character of the use . . . ;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[200]

In 1994, the Supreme Court changed the emphasis of the fair use test, effectively distilling the inquiry into a deceptively simple question: whether the work is "transformative."[201] Specifically, a court must ask whether the secondary work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[202] If the answer is yes, the use is transformative and the other factors recede in importance.[203]

As I have argued in recent work, the turn toward "transformativeness" has proved disastrous for artists; the new standard's incom-

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194 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994) (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

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

196 Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1528 (2004); *see also* 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.1 (3d ed. Supp. 2017-1) ("No copyright doctrine is less determinate than fair use."); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1667–92 (1988) (offering a seminal critique of fair use prior to the transformative test).

197 Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91, 93 (2010).

198 Madison, *supra* note 196, at 1564.

199 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of the U.S. Code).

200 *Id.* § 107.

201 The Court explained, "the more transformative the new work, the less will be the significance of other factors." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). *But see* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (questioning the prominence of the transformativeness inquiry and calling for a focus on the fourth factor). See also Adler, *supra* note 26, at 575 n.67, discussing the resurgent importance of the fourth factor.

202 *Campbell*, 510 U.S. at 579.

203 *Id.*

patibility with artistic expression has heightened rather than mitigated the notorious uncertainty of the fair use test.[204] The transformativeness inquiry requires courts to adjudicate the "meaning" and "message" of artworks, a famously difficult task, particularly in light of developments in contemporary art.[205] Worse, even if we assume that judges could conclusively adjudicate a work's "meaning," the pivotal question of how to ascertain meaning remains remarkably untheorized by courts, which have approached it in a hodgepodge, undisciplined fashion, taking three widely divergent approaches to determining meaning in fair use cases.[206]

In a landmark 2013 case involving Richard Prince, the Second Circuit had the opportunity to clarify the mess. Instead, its decision in *Cariou v. Prince*[207] led to an increase in litigation[208] and created a new set of problems for artists.[209] *Cariou* involved thirty paintings and collages by Richard Prince that incorporated, among their varied source material, altered versions of photographs taken by Patrick Cariou of Rastafarians in Jamaica. When Cariou sued, Prince asserted a fair use defense. The district court, finding Prince's work was not transformative, ordered him to turn over all thirty paintings to the plaintiff for destruction.[210] (At oral argument for the appeal, Judge Parker remarked that this order brought to mind "the Huns or the Taliban.")[211] The Second Circuit reversed, finding that twenty-five of the thirty paintings were transformative as a matter of law.[212] The court declared that the proper way to evaluate transformativeness was to engage in an "aesthetic" comparison of the works from the vantage point of the "reasonable observer."[213] Based on this new unspecified "aesthetics" test, the court found that almost all of Prince's images were transform-

204 Adler, *supra* note 26.

205 *Id.* at 562–63.

206 *Id.* at 584–605 (documenting three divergent approaches to determining "meaning" in fair use cases: the intent of the artist, the "aesthetics" of the work, and the viewpoint of the "reasonable viewer").

207 714 F.3d 694 (2d Cir. 2013).

208 *See supra* notes 38–39 and accompanying text (documenting uptick in new lawsuits filed since the decision).

209 Adler, *supra* note 26, at 608 (discussing artist Lauren Clay).

210 Cariou v. Prince, 784 F. Supp. 2d 337, 355 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

211 Brian Boucher, *Injunction in* Prince v. Cariou *Compared to Taliban in Appeal*, ART AM. (May 21, 2012), http://www.artinamericamagazine.com/news-features/news/price-cariou-oral-arguments/ [https://perma.cc/UGR2-NGRA].

212 *Cariou*, 714 F.3d at 707–08.

213 *Id.* at 706–07.

ative.[214] Yet the court still remanded five of the works to the district court.[215] In doing so, it provided no guidance, noting only that these five particular works "do not sufficiently differ from the photographs of Cariou's that they incorporate."[216] Judge Wallace wrote separately, questioning the majority's ability to draw a principled distinction between the remanded works and the other works deemed transformative.[217] The parties ultimately settled.[218]

Cariou's new "aesthetics" test has made things worse for art in several ways. Not only does it embroil judges in an inquiry for which they are distinctly ill suited,[219] but also it injects a troubling term—"aesthetics"—into the center of fair use. This term is a remarkably poor proxy for the very inquiry the transformative test is meant to resolve—the "meaning" of an artwork.[220] As we saw in the earlier discussion of authenticity, a basic feature of contemporary art is that its meaning increasingly resides in the conceptual, not necessarily the visual, qualities of a work.[221] By focusing the inquiry on aesthetic changes,[222] we look for meaning in a place that is not only beside the point to many artists, but also actually misses one thrust of their work: the use of copying and repetition to undermine the notion that art should be understood purely visually. Perhaps most importantly, on a practical level, the decision further blurred the boundary separating fair and unfair uses. Consider the mysterious line the court drew, based on "aesthetics," between the paintings it found transformative as a matter of law and the five paintings it remanded because they failed the court's unspecified aesthetics test.[223] Two Prince paintings both referenced the photograph by Cariou shown below.

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214 *Id.* at 707–08.

215 *Id.* at 710–11.

216 *Id.* at 710.

217 *Id.* at 712–14 (Wallace, J., concurring in part and dissenting in part).

218 Randy Kennedy, *Richard Prince Settles Copyright Suit with Patrick Cariou over Photographs*, N.Y. Times: ArtsBeat (Mar. 18, 2014, 6:23 PM), https://artsbeat.blogs.nytimes.com/2014/03/18/richard-prince-settles-copyright-suit-with-patrick-cariou-over-photographs/ [https://perma.cc/9W6T-Z6Y4].

219 For the famous assertion that courts are ill suited to adjudicate aesthetics, see *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903): "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."

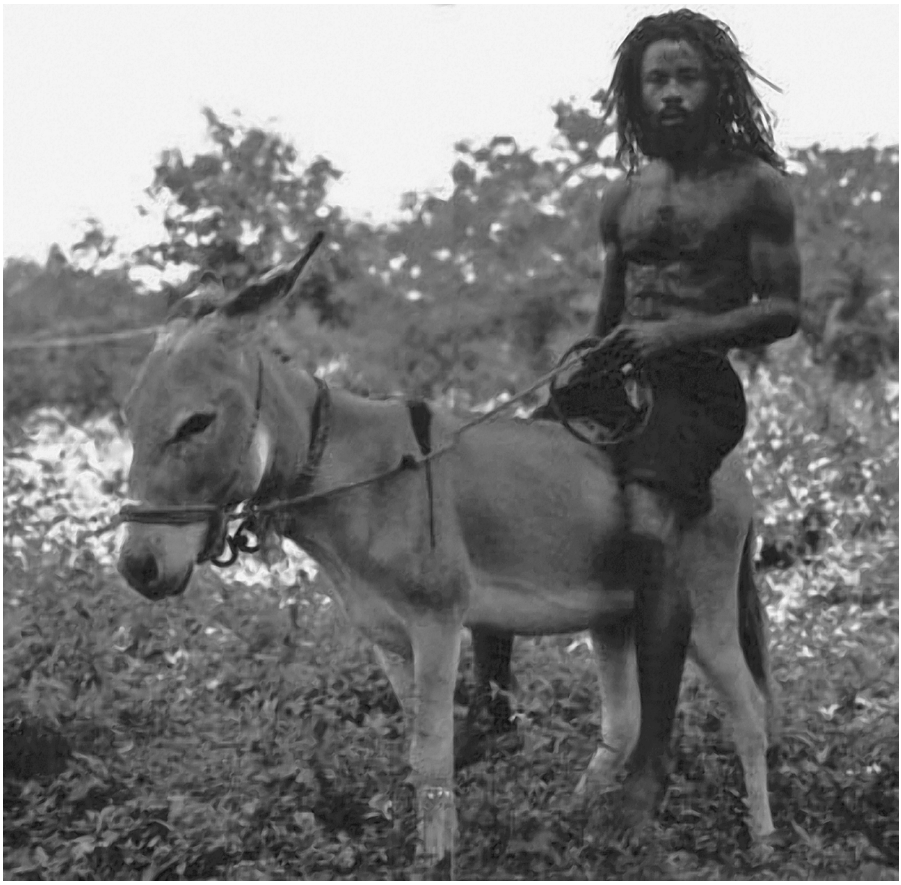
220 *See* Adler, *supra* note 26, at 599–608.

221 *See supra* notes 144–54 and accompanying text.

222 A close reading of the opinion suggests that the *Cariou* court used the term "aesthetic" as a synonym for "visual appearance." *See Cariou*, 714 F.3d at 706–11.

223 *See id.* at 698–99 (holding that twenty-five of Prince's artworks make fair use of Cariou's copyrighted photographs).

FIGURE 7. PHOTOGRAPH BY PATRICK CARIOU[224]



Below on the left is Prince's *Back to the Garden*,[225] deemed transformative as a matter of law because it presented "fundamentally different aesthetic[s]" from Cariou's work.[226] On the right is Prince's

224 Randy Kennedy, *Court Rules in Artist's Favor*, N.Y. TIMES (Apr. 25, 2013), http://www.nytimes.com/2013/04/26/arts/design/appeals-court-ruling-favors-richard-prince-in-copyright-case.html [https://perma.cc/97NT-ADXD]. This image can be viewed in color at https://gwlr.org/adler-cariou-yes-rasta/.

225 *See* Appendix, *Cariou*, 714 F.3d 694 (No. 11-1197-cv), http://www.ca2.uscourts.gov/docs/opn1197/Prince/A-780,%20Back%20to%20the%20Garden,%20Richard%20Prince.jpg [https://perma.cc/3APA-G64J]. This image can be viewed in color at https://gwlr.org/adler-prince-back-to-the-garden/.

226 *See Cariou*, 714 F.3d at 708, 710 (excluding *Back to the Garden* from the list of works to be considered upon remanded).

Charlie Company,[227] remanded because it was "similar in key aesthetic ways" to Cariou's.[228]

FIGURE 8. RICHARD PRINCE'S *BACK TO THE GARDEN* (LEFT) AND *CHARLIE COMPANY* (RIGHT)[229]

Is there a theory of aesthetics that makes these two strikingly similar paintings distinguishable as a matter of law? What was the basis for the court's distinction? Imagine being an artist trying to create new work using these two Prince images as guidance about what constitutes permissible and impermissible copying. Would you know what to do to avoid a lawsuit? It is no wonder *Cariou* has invited more litigation and chilled creativity in the art world.

As fair use battles rage, generating increasing confusion for artists who depend on copying to create, it is worth pausing to ask: Are these battles really necessary for the progress of art? The traditional copyright answer would be that this cost imposed on art by copyright comes with a benefit: without copyright law, the theory goes, artists would cease to create. Yet as I have shown, when it comes to visual art, copyright imposes costs—the fair use battles and self-censorship that we have seen—while offering no benefit in return.[230]

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227 *See* Appendix, *supra* note 225, http://www.ca2.uscourts.gov/docs/opn1197/Prince/A-779,%20Charlie%20Company,%20Richard%20Prince.jpg [https://perma.cc/9MTG-2MLG]. This image can be viewed in color at https://gwlr.org/adler-prince-charlie-company/.

228 *Cariou*, 714 F.3d at 711.

229 *See supra* notes 225, 227.

230 It is important to note that eliminating copyright for visual art would only partially mitigate this cost and would *not* eliminate it. It would not help artists who copy from non-artists. In these circumstances, however, I think some of the insights about the art market that I have

C. *The Cost Imposed on Scholarship*

The cost of copyrighting art is borne not only by artists, but also by art historians, curators, writers, and other arts professionals, for whom the reproduction of art images is integral to their work. Copyright thwarts them, either because the costs of permissions for licensing images is exorbitant relative to the project, or because rights holders simply refuse permission (sometimes because they disagree with the content of the work).[231] For example, according to a prominent 2014 study:

> Art historians have found it necessary to pay licensing fees from their own pockets—in one case, $20,000 for a single book—for permissions. They avoid writing surveys and historically oriented texts, which are permissions heavy, and often steer clear of the last hundred years of artistic production. They warn graduate students against pursuing certain topics.[232]

Because of copyright, there are now entire fields of scholarship that may be missing from the record.[233] The 2014 study found that more than a third of art historians have "avoided or abandoned work in their field because of copyright concerns."[234] In addition to inhibiting art historians, copyright also impedes publishers, editors, museum curators, and archivists. For example, museum curators now often decide what to exhibit based on copyright issues.[235] As a curator explained, "We just avoid certain artists."[236] Similarly, the 2014 study found that a majority of arts editors and publishers have "avoided or abandoned a project for copyright reasons."[237] The effect of copyright-

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offered here should be helpful to artist defendants under the fourth factor, market substitution analysis of the fair use analysis. I have previously argued that giving this factor greater prominence would offer potential advantages for artist defendants. *See* Adler, *supra* note 26, at 618–21. In Section III.C, *infra*, I address a further, widespread cost that would be eliminated entirely if we abolished copyright for art.

231 AUFDERHEIDE ET AL., *supra* note 36, at 52 (describing demands by rights holders to alter scholarly arguments or catalogue text, demands that are seen by some as censorship).

232 *Id.* at 8.

233 *Id.* at 58.

234 *Id.* at 5. It is important to note that the authors of the report believe that this self-censorship is often unwarranted and stems not from the reality of copyright law but from "confusion[,] . . . fear and anxiety" around it. *Id.* at 7.

235 *Id.* at 9.

236 *Id.*; *see also id.* (describing the cancellation of an exhibition catalogue because of copyright concerns).

237 *Id.* at 49.

ing visual art, coupled with the climate of fear that surrounds fair use law, has distorted not only art but also art history itself.[238]

Many of the uses that art historians and publishers pay for or avoid should be (at least in theory) protected by the fair use doctrine, but given the uncertainty of that doctrine and the costs of litigation, arts professionals tend to seek permissions rather than risk lawsuits.[239] Lots of attention gets paid to the problem fair use poses for successful artists who can afford to litigate. Their prominence in the conversation may lead critics to consider the fair use problem as one that affects a privileged group.[240] Yet the costs of copyright law that I am describing here are borne privately with little fanfare or attention. And these costs fall disproportionately on those with the least resources: "graduate students, junior faculty, and academics at institutions that do not cover permissions costs, along with scholars and independent curators, who only sometimes receive help from editors and institutions."[241] Ultimately, the public loses. The cost is scholarship not done, work not seen, and art history distorted.[242] All of these costs are brought about because we grant copyright to visual art, a right that I have argued is unnecessary based on the logic of copyright law itself.

IV. Reputational Interests: Copyright Claims as Disguised Moral Rights Claims

Here I briefly consider whether we could resuscitate the economic argument for copyright by looking for broader ways copyright

238 *See id.* at 58.

239 *See* Coll. Art Ass'n, Code of Best Practices in Fair Use for the Visual Arts (2015), http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf [https://perma.cc/2TGS-DGWM] (creating fair use best practices guide to encourage less risk aversion).

240 My own experience suggests that this underestimates the impact of fair use law's uncertainty on less successful artists. I often receive requests for advice from working artists or curators who are not market stars and who are chilled in my view by the uncertainties of fair use law.

241 Aufderheide et al., *supra* note 36, at 51.

242 There are some signs of change not in the law, but in the attitude of individual rights holders who have recognized the toll that copyright is taking on the arts. For example, in a much heralded move, the Metropolitan Museum of Art announced this past February that it would allow free, unrestricted use of 375,000 images that were either in the public domain or in which the Museum waived its copyright. Joshua Barone, *Met Museum Makes 375,000 Images Free*, N.Y. Times (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/arts/design/met-museum-makes-375000-images-available-for-free.html [https://perma.cc/6SZY-GYBR]. The Rauschenberg foundation decided last year to make its images available for most uses. The goal was to avert the cost copyright imposes on artists and scholars. Kennedy, *supra* note 105. Finally, the College Art Association has attempted to address the problem by introducing a code of fair use best practices for artists and arts professionals. Coll. Art Ass'n, *supra* note 239.

might be said to incentivize artistic creativity. Why do artists invoke copyright if it does not incentivize them economically (as the utilitarian argument had assumed it would)?[243] I believe that artists actually use copyright for a surprising reason: to police and protect their reputations and their artistic vision.[244] These are ends usually associated with a theory of intellectual property called "moral rights" that the utilitarian theory of copyright rejects.[245] In my view, copyright in art is therefore functioning as a stealth system of moral rights—noneconomic, personality-rooted rights traditionally disclaimed by utilitarians. This use is surprising because moral rights, European in origin, are traditionally conceived of as "the anti-copyright," acting as a "bulwark" against the very market that copyright stimulates.[246]

In a separate paper, *Stealth Moral Rights*, a future companion to this piece,[247] I analyze this phenomenon in greater depth. But for purposes of this Article, I want to explore how this use of copyright to accomplish moral rights types of goals raises an interesting question for the utilitarian theory of copyright that I have addressed so far. Can the pursuit of moral rights types of claims, although traditionally thought to be disjointed from utilitarianism, nonetheless incentivize artistic creativity in a way that can help us resuscitate the economic, utilitarian account of copyright law? And on a deeper level, can moral

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243 Lawyers who represent artists in contract negotiations have told me that most artists choose to retain copyright, suggesting that the artists value it.

244 *See* Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUS. L. REV. 549, 558–64 (2015) (exploring how copyright holders sometimes assert rights not because they care about market substitution, but to protect their privacy or reputation).

245 Moral rights are enshrined in U.S. law through VARA—the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.)—passed as an amendment to the Copyright Act of 1976. Moral rights are a centerpiece of the international Berne Convention for the Protection of Literary and Artistic Works art. 6bis, Sept. 9, 1886, S. TREATY DOC. NO. 99-27 (amended July 24, 1971) (entered into force for the United States Mar. 1, 1989). Article 6bis became part of the Convention in 1928. The U.S. Senate ratified the Convention on October 20, 1988. *Berne Convention for the Protection of Literary and Artistic Works: Senate Consideration of Treaty Document 99-27*, CONGRESS.GOV, https://www.congress.gov/treaty-document/99th-congress/27?q=%7B%22search%22%3A%5B%22Berne%22%5D%7D&r=1 [https://perma.cc/47Z7-CUAT]; *see also* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (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 5 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 16:41–44 (2017).

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

247 Amy Adler, Stealth Moral Rights (Oct. 18, 2017) (unpublished working draft) (on file with author).

rights concerns be harmonized with economic incentives?[248] I conclude that the answer to both questions is no, although the relationship between moral rights and utilitarian theory is more complex than often acknowledged.[249] While using copyright in this fashion sometimes provides an economic incentive to create and is thus sometimes compatible with the utilitarian vision of copyright, this is by no means assured. In fact, an artist's use of copyright to protect his artistic vision may sometimes be directly contrary to his economic interests, or directly contrary to the public—and free speech—interests that copyright seeks to promote.

There are at least three different ways artists invoke copyright law to protect their reputational interests or artistic vision. First, an artist might use copyright to prevent her work from being used in commercial settings that in her view would damage her stature or 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 noncommercial contexts she finds offensive or disapproves of, such as a negative review. These uses of copyright often mimic moral rights concerns. Moral rights are designed to protect an artist's personality interests—his dignity and personal connection to his artwork—as opposed to his pecuniary interests.[250] But the limited legal protection for moral rights in the United States does not extend to *copies* of artworks.[251] Because they

248 *See* Fromer, *supra* note 63, at 1746–47. Fromer argues that moral rights serve "expressive incentives" in harmony with copyright's utilitarian goals. While this is sometimes true, I argue that moral-rights types of claims also frequently undermine utilitarian goals. Thus, I ultimately reject the possibility that these two models can be harmonized.

249 For a deep look at the historical and philosophical roots of copyright and its tension with moral rights, see BALDWIN, *supra* note 246, at 14–18.

250 JOHN HENRY MERRYMAN ET AL., LAW, ETHICS AND THE VISUAL ARTS 423 (5th ed. 2007) (describing an artist's artwork 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. See generally* Adler, *supra* note 48. For some foundational scholarship on U.S. moral rights, see, for example, JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999), explaining the urgent public interest in preserving important cultural objects; Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1 (2001); and John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023 (1976), urging American adoption of moral rights before the passage of VARA.

251 The exception is New York's moral rights law, the Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 2011), which was largely preempted by the federal Visual Artists Rights Act, *see* REGISTER OF COPYRIGHTS, WAIVER OF MORAL RIGHTS IN VIS-

protect only unique or limited edition works of art, not copies, U.S. moral rights offer no protection to an artist who is personally offended by the unauthorized *copying* of his work in settings he dislikes.[252] 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 the artwork itself, not copies—copyright lawsuits sometimes function as disguised moral rights claims.

This off-label use of copyright to accomplish goals more commonly associated with moral rights may strike us as surprising because of the incompatibility of moral rights theories with utilitarianism. Commentators frequently describe moral rights as the "anti-copyright," working as a check against the very market that copyright stimulates.[253] As historian Peter Baldwin explains, "Copyright sees culture as a commodity," whereas the moral rights tradition "run[s] counter to the market."[254] Traditionally understood as being independent of "the author's economic rights," moral rights are premised on the idea that an artwork is in some ways like an artist's "child[ ]," and that mistreatment of that child personally wounds the parent/artist.[255] Built to enshrine the almost-sacred and deeply personal relationship between an author and his work, the moral rights tradition thus "protects the creator's vision from commercialization."[256] 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.[257] Authors invoke moral rights to protect their creative vision, often at the cost of undermining their economic ambitions.[258]

Even though copyright is designed to protect an artist's economic interests, artists are invoking copyright to ward off the personal or artistic anguish that a new use of a work might cause, regardless of whether such use poses an economic threat. What, if anything, is the significance of this kind of disguised moral rights claim for copyright

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UAL ARTWORKS (1996), https://www.copyright.gov/reports/waiver-moral-rights-visual-artworks.pdf [https://perma.cc/8SC2-3C2G].

252 See *infra* notes 270–74 and accompanying text for a discussion of the limited definition of art in VARA, which includes only unique and limited edition works, not copies.

253 *See, e.g.*, BALDWIN, *supra* note 246, at 29.

254 *Id.* at 15.

255 Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 102 (1997); *see* Adler, *supra* note 48, at 269 (discussing right of "paternity").

256 BALDWIN, *supra* note 246, at 15.

257 *See id.* at 17.

258 *Id.* at 29–30.

law? Is it merely a misuse of the law, to the extent that copyright is premised on a market-based, utilitarian vision? The answer is sometimes yes and sometimes no. Sometimes the use of copyright law to protect reputational or moral rights types of interests may align perfectly with an artist's economic interests. In such cases, an artist may use copyright to protect his reputation in a way that furthers his pecuniary interests in his work; such uses would seem consistent with the utilitarian goals of copyright.[259] But this is by no means assured. Artists sometimes invoke copyright law in ways that run directly counter to their economic interests and that undermine the utilitarian foundations of copyright law. For example, Patrick Cariou, in his copyright lawsuit against Richard Prince,[260] discussed in Part III, was offended by Prince's use of his imagery. Cariou said he found Prince's treatment of his work "racist."[261] 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, defacing Cariou's reverential portraits of religious figures 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 remedy[262]—indeed the value of his work probably increased from the notoriety of the lawsuit and the prominent circulation of his work that surrounded it[263]—he no doubt suffered personal harm in the sense that moral rights law traditionally addresses. (The same is true for the Suicide Girls: Prince's appropriation enriched them economically and created a market for them, even as it

259 As Henry Hansmann and Marina Santilli have shown, moral rights may sometimes protect an artist's commercial or pecuniary interests even though these rights are traditionally understood as being independent of "the author's economic rights." Hansmann & Santilli, *supra* note 255, at 102. To the extent that moral rights can ward off damage to an artist's reputation, they can protect against uses that could "lower the prices he can charge" for work he has yet to produce. *Id.* at 104.

260 Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), *rev'd in part, vacated in part*, 714 F.3d 694 (2d Cir. 2013).

261 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/ [https://perma.cc/P3CR-FBCK] (quoting Patrick Cariou).

262 *See Cariou*, 714 F.3d at 708–09 (specifically finding no market usurpation under the fourth factor of the fair use test).

263 *Cf.* Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 634–35 (2015) (describing Disney's and others' strategies of allowing or failing to litigate against unauthorized reproduction of copyrighted material because of the "discovery of the possible market benefits from tolerating unauthorized—or even merely uncontrolled—uses of its copyrighted works").

offended them personally.)[264] Yet moral rights law does not extend to copies; Cariou's only potential legal remedy was in copyright.

Thus, when an artist uses copyright to protect his artistic vision, that use will sometimes be directly contrary to the artist's market interests. Yet can 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 of which he disapproves functions to incentivize production of his work, we can see that noneconomic interests may motivate an artist to create.[265] Yet the problem with these uses of copyright law from a utilitarian perspective is that they can be invoked in ways that are contrary to the public interest that copyright must ultimately serve. This happens when an artist invokes copyright to prevent uses that may harm his artistic vision or reputation, but at the same time would have led to the production of art by others or served to enrich the public discourse around art.[266]

In a separate article, I will explore these public costs in more depth. For now, I note the incompatibility of redressing this kind of reputational harm with the market-based vision at the heart of the utilitarian justification for copyright law. Indeed, some cases suggest that redressing reputational harm in the absence of traditional market

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264 For a similar example, see Adler, *supra* note 48, at 275, discussing how violating artistic vision of artist David Smith was nonetheless a potential boon to his market. *But see* Rosalind Krauss, *Changing the Work of David Smith*, ART AM., Sept.–Oct. 1974, at 30, 31 (lamenting the harm done to the artist's vision); Richard Serra, *Art and Censorship*, 17 CRITICAL INQUIRY 574, 576 (1991).

265 This insight gives support to the many critics of copyright's utilitarian vision, who have argued that it overlooks the noneconomic reasons that motivate creators. *See supra* notes 61–62 and accompanying text.

266 *See, e.g.*, 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 [https://perma.cc/XC22-XJPR] (describing how Picasso Foundation denied permission for use of Picasso's images in a film about his life because they were offended by the script's depiction of the artist as a womanizer); Daniel Grant, *Artistic Paternity: When and How Artists Can Disavow Their Work*, OBSERVER (July 28, 2016, 10:17 AM), http://observer.com/2016/07/artistic-paternity-when-and-how-artists-can-disavow-their-work/ [https://perma.cc/CM9G-26ZM] (describing how Richard Prince has used copyright law to deny reproduction of certain works he dislikes from a very early period in his career). In both examples, copyright polices reputation in a way that has dubious market benefits but imposes a clear cost on public discourse.

harm should not be cognizable in copyright.[267] 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 that copyright redresses. In *Campbell v. Acuff-Rose Music, Inc.*,[268] 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 distinguish between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it."[269]

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 caused by the use, may still have no legitimate basis in copyright's 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 utilitarian case for copyright protection for visual art.

V. But What Is "Art"? And Other Limitations of My Argument

In this Part, I consider two significant objections to my argument. First, I turn to the notorious difficulty of defining the category of "art"

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267 *See, e.g.*, Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc). There the court emphasized the similarity of the harms the plaintiff suffered to moral rights claims, but still held that they were not cognizable in copyright because the harms she experienced were irrelevant to the market interests protected by copyright law. *Id.* at 745–46. Similarly, a court rejected a copyright claim brought by an artist who experienced personal affront at the manipulation of his artwork (resembling a claim for a violation of his moral right of integrity), but suffered no market harm from the use. *See* Mackie v. Rieser, 296 F.3d 909, 917 (9th Cir. 2002). In *Mackie*, the court observed:

> 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 . . . objective . . . . Mackie's subjective view, which really boils down to "hurt feelings" over the nature of the infringement, has no place in this calculus.

Id. at 917.

268 510 U.S. 569 (1994).

269 *Id.* at 591–92 (alterations in original) (citation omitted) (quoting Fisher v. Dees, 794 F.2d 432, 437–38 (9th Cir. 1986)).

and the problems this difficulty raises for my argument. Second, I briefly ask whether my argument leads to a different conclusion than I have suggested: perhaps it should lead us not to abandon copyright protection for art, but rather, to abandon the utilitarian theory of copyright, at least as it has so far been articulated.

One major problem with my theory is that it applies only to "visual art," and so requires us to separate out "artists" from other 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.[270] This is a daunting task. Drawing a distinction between "art" and other forms of visual expression is famously difficult. Indeed, the difficulty of defining "art" has vexed philosophers for centuries and has been a central theme of my scholarship.[271] As I noted in Part II, however, Congress has already drawn this line (for better or worse) in the copyright context. In

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270 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 NEWS (Aug. 1, 2016), https://news.artnet.com/art-world/artists-accuse-zara-stealing-designs-584951 [https://perma.cc/L9PM-WG77] (describing legal action contemplated by "designers" and "illustrator[s]" who claim their work was ripped off by Zara). While commercial artists have been ripped off with some frequency by fashion companies and other large brands, there are very few examples of this kind of theft from artists who would meet the VARA definition. Telephone Interview with Kerry Gaertner Gerbracht, *supra* note 83. For example, one of the "independent artists" appropriated by Zara describes himself as follows: "I call myself an artist because nobody has time for my multi-hyphenate reality. I'm a designer-author-illustrator-creativedirector-writer-smallpress-brand??? Many people just call me ADAMJK, the name of my a gift product line . . . ." *About*, ADAMJKURTZ.COM, http://www.adamjkurtz.com/about/ [https://perma.cc/A2Z9-6SP7]. Another prominent target of Zara's appropriation was Tuesday Bassen, whose website sells hair charms, socks, hoodies, mugs, patches, and pins. *See* TUESDAY BASSEN, https://www.shoptuesday.com/ [https://perma.cc/E56W-VH7A]. My proposal should not affect commercial artists' claims (given that it only applies to fine arts and not commercial arts), but the difficulty of drawing the distinction between fine art and commercial art has a potential to harm them by mistakenly designating them as "artists" who do not merit copyright protection. In evaluating this risk, we would have to weigh the risk of mistakenly not granting copyright to a subset of these kinds of authors against the costs I have outlined here of granting copyright to "artists."

271 Amy Adler, *The Folly of Defining "Serious" Art*, *in* THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS 90 (Christopher Hawthorne & András Szántó eds., 2003) (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* Danto, *supra* note 179, at 580 (defining art in its relationship to "an atmosphere of artistic theory, a knowledge of the history of art: an artworld"). For just a few of the abundant sources on this rich philosophical problem, see generally STEPHEN DAVIES, DEFINITIONS OF ART (1991); GEORGE DICKIE, ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS (1974); B.R. TILGHMAN, BUT IS IT ART?: THE VALUE OF ART

VARA, passed as an amendment to the Copyright Act, Congress for the first time offered moral rights protection to some creative works. As explained above, these rights extend only to a small sector of works of "visual art," narrowly defined. VARA defines visual art as "a painting, drawing, print, or sculpture, existing in a single copy, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author."[272] The statute distinguishes such work from other forms of visual expression including commercial art.[273] Photography is included in limited circumstances: 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."[274]

I have previously questioned the approach VARA takes to defining visual art,[275] primarily because its naive formalism seems ill-suited to the conceptual, dematerialized era of contemporary art.[276] 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 rigidly circumscribed.[277] 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.[278] Yet I believe the VARA definition would provide a pragmatic starting point for fur-

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AND THE TEMPTATION OF THEORY (1984); and Paul Oskar Kristeller, *The Modern System of the Arts: A Study in the History of Aesthetics*, 12 J. HIST. IDEAS 496 (1951).

272 17 U.S.C. § 101 (2012) ("work of visual art"). 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.*

273 The statute excludes from its definition of "visual art" a number of materials such as motion pictures, audiovisual works, books, magazines, electronic publications, and advertising or promotional materials. *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. NO. 101-514, at 11 (1990); *see* Kelley v. Chi. Park Dist., 635 F.3d 290, 302 (7th Cir. 2011) (noting the case raised "serious questions" about VARA's definition of art); Pollara v. Seymour, 344 F.3d 265 (2d Cir. 2003) (finding work was not "work of visual art" under VARA).

274 17 U.S.C. § 101 ("work of visual art").

275 *See* Adler, *supra* note 48.

276 *See supra* note 147 and accompanying text.

277 *See* United States v. Perry, 146 U.S. 71, 74–75 (1892); *see also* United States v. Olivotti & Co., 7 Ct. Cust. 46, 48–50 (Ct. Cust. App. 1916) (defining art for customs purposes according to strict formal criteria); *cf.* Brancusi v. United States, 1928 Cust. Ct. LEXIS 3, at *7–8 (Cust. Ct. Nov. 26, 1928) (dispensing with requirement of mimesis in defining art).

278 It is also overinclusive to the extent it might include as "art" works that do not circulate in the fine art market of museums, galleries, auction houses, and art fairs. *See infra* notes 282–84 and accompanying text (discussing an institutional and market-based approach to describing "art" that would have the potential to weed out certain visual objects that VARA might cover in a way that would be overinclusive for purposes of my theory).

ther legal line drawing if my proposal were accepted. It would allow us to build on a definition already included in the existing copyright statute. And for my purposes, the definition's underinclusiveness is a virtue: the primary 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.[279] The very limited VARA definition dramatically reduces that threat.

Let me briefly explore two particularly compelling alternative approaches to defining the kind of works I call "visual art" in this Article. First, consider the work of renowned aesthetic philosopher Nelson Goodman, who introduced the foundational philosophical division of art into two categories: autographic and allographic. This division corresponds, to a significant extent, to the division between visual arts and other forms of expression that I draw here.[280] Fittingly for my argument, forgery—and thus authenticity—were central to Goodman's categorization. Focusing primarily on the distinction between visual art and other forms of art, such as poetry or music, Goodman seized on the relevance of authenticity as a distinguishing characteristic of visual art. Goodman defined "autographic" works as those for which "the distinction between original and forgery . . . is significant," and "allographic" works as those for which the history of production is irrelevant to whether something counts as a genuine instance of a work.[281] This maps neatly onto my theory to the extent that I show how authenticity as a norm obviates the need for copyright. Goodman identifies music and poetry as works whose reception does not depend on the criterion of authenticity, but I would extend this category to include commercial visual works (the kinds of works that I wish to exclude from my definition of "visual art").

Another alternative, particularly relevant to copyright law and its market-based theoretical underpinnings, would be to focus on the institutions and markets that surround the works I call "visual art." This view is philosophically indebted to the "institutional theory of art" associated with George Dickie.[282] A recent RAND report took a prag-

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279 *See supra* note 270 (discussing the recent spate of cases in which fashion companies have appropriated from visual designers and other kinds of "artists").

280 *See* NELSON GOODMAN, LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS 113 (1968) (stating that a work is autographic "if and only if even the most exact duplication of it does not thereby count as genuine"). For important criticism of Goodman, see Jerrold Levinson, *Autographic and Allographic Art Revisited*, 38 PHIL. STUD. 367 (1980).

281 GOODMAN, *supra* note 280, at 113. Goodman placed painting, sculpture, and prints into the former category, and gave music and poetry as examples of the latter. *Id.* at 111–18.

282 *See* DICKIE, *supra* note 271.

matic (albeit circular) approach to this philosophical question by defining "art" based on how works are displayed and sold: "art" is what is sold in fine art institutions, especially museums, and distributed in a market consisting of galleries, art fairs, and auction houses.[283] The report thus distinguished "visual art" from other visual works including painting, photography, sculpture, and craft, based on who consumes and produces the work and on the "nature of the markets (size, price levels, and organizations)."[284]

In my view, these approaches (as well as others not explored here that are rooted in the philosophy of art) point to far more intellectually satisfying alternatives to VARA for capturing at least certain aspects of the elusive category "art." VARA, despite its limitations, however, offers one distinct advantage in this context. By offering a clear, categorical rule that courts can follow, VARA will allow courts to avoid the significant information costs associated with the more nuanced and, frankly, deeper approaches offered by Goodman and other aesthetic philosophers.

Still there are other limits of my definition, and, more generally, of my theory. As noted above, one risk is that despite the narrow definition of art I propose, it still may be overinclusive, thereby potentially harming creators of visual content whose incomes depend on copies. And of course, there are other risks, such as the possibility that art and the market that surrounds it will change so that authenticity no longer performs its role in policing copies.[285] Finally, my proposal to abolish copyright for visual art may strike many as simply unfair to artists whose work will no longer be protected from the possibility that others could profit by exploiting it.[286] Ultimately, this last objec-

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283 KEVIN F. MCCARTHY ET AL., A PORTRAIT OF THE VISUAL ARTS: MEETING THE CHALLENGES OF A NEW ERA 2–3 (2005), https://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG290.pdf [https://perma.cc/G856-6G8N].

284 *Id.*

285 As noted above, my theory also does not offer a complete solution to the costs that copyright imposes on artists. But it would completely eliminate the cost copyright imposes on art historians, scholars, curators, and publishers.

286 One way to address some of these problems would be to take a traditional approach: leave copyright in place for art, but tinker with it. A few compelling examples of this kind of work in copyright scholarship, although not addressing the special problems presented by art, include proposals to vary liability rules, or to provide compulsory licensing or fee shifting. *See, e.g.*, Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441 (2016) (advocating for expanded use of compulsory licensing); Peter S. Menell & Ben Depoorter, *Copyright Fee Shifting: A Proposal to Promote Fair Use and Fair Licensing* (U.C. Berkeley, Pub. Law Research Paper No. 2,159,325, 2012), https://ssrn.com/abstract=2159325 [https://perma.cc/MGD8-E6XK] (proposal to reduce costs of copying and mitigate uncertainty of fair use doc-

tion leads to deeper questions about the utilitarian theory of copyright itself.

For purposes of this paper I have accepted the utilitarian theory of copyright. My goal has been to show that it fails on its own terms when applied to art. Throughout I have suggested that the lesson we should learn from this failure is to abandon copyright for visual art; it is all cost and no benefit. But perhaps I have shown something else: not that we should eliminate copyright for art, but rather, that we should abandon the utilitarian theory of copyright, at least as it has so far been articulated, instead.[287]

Conclusion

Visual art has emerged as one of the central battlegrounds for copyright law. Several of the most revered artists of our day have been ensnared in copyright's web, sometimes repeatedly and with inconsistent results. Indeed, two of the most acclaimed living American artists have become recurrent defendants in court—each has been sued five times.[288] The fundamental purpose of copyright law is to encourage, as a public good, the constitutionally mandated "progress" of the arts.[289] Yet instead of incentivizing artists, copyright law now figures as a constant threat to them. The vast uncertainty of this area has led to an ornate and conflicting body of jurisprudence that chills artistic expression.

How did a body of law designed to unleash creativity instead come to thwart it? Normally we accept that copyright imposes some costs on creators and the public because we recognize that copyright law also generates an urgent benefit. According to the utilitarian theory of copyright, the dominant account in U.S. law and scholarship, copyright is necessary for creative works to be produced in the first place. The public cost—limits on access and limits on the use of these works to create new ones—is the necessary price we pay for their very existence. This account may be true for some realms of creativity, but it is dead wrong when it comes to the visual arts. Copyright law does not and cannot incentivize the creation of visual art. Indeed, as I have

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trine). A further, more modest option may be to leave copyright in place, but to allow the considerations I outline here to enter copyright analysis at the fair use stage.

287 Although answering this question is ultimately beyond the scope of this Article, I note here only that my previous work considering moral rights (which stem from nonutilitarian, deontological foundations) has argued that such rights do a disservice to contemporary art. Adler, *supra* note 48, at 265.

288 *See supra* note 192.

289 *See* U.S. Const. art. I, § 8, cl. 8.

shown, copyright law is almost completely irrelevant to the economic lives of artists (except that it threatens them with potential lawsuits and thus inhibits creativity and progress). To the extent unregulated copying might otherwise pose a risk to artists, the art-market norm of authenticity already nullifies that risk. Once we look at the reality of how artists actually use copyright law, we see that they invoke it not to fulfill utilitarian goals (as legal theorists assume) but instead as a stealth system of moral rights. This Article, by looking at the realities of the art market, has shown the failure of the predominant legal theory of copyright law to account for creativity in visual art. Instead, a different story about creativity emerges here. The creativity we see in the visual arts is best captured by the discourse surrounding the desire for authenticity, a concept about which copyright has virtually nothing to say.