SHARED VALUE OVER FAIR USE: TECHNOLOGY, ADDED VALUE, AND THE REINVENTION OF COPYRIGHT♦

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ABSTRACT

The protection of fair use in the arts has become an inflexible binary. Either artist Shepard Fairey has permission to use the Associated Press photograph of Barack Obama to create the Hope Poster, or he has stolen the image in violation of copyright. This legal framework is rigid, inaccurate, and creatively unsafe. Yet it is the interpretation, not the doctrine itself, that needs shifting. The copyright statute already includes an overlooked "value" test that can more accurately reflect collaboration and sampling in the digital age. And yet instead, some scholars have responded to digital copying by suggesting we throw out the copyright of art altogether. This suggestion is dangerous. It ignores both the economic contingency of artistic labor and the constitutional mandate to incentivize creativity.

The fair use test for art does not need wholesale abandonment but rather careful attention. This analysis requires us to address two errors: to refocus on the artist's, not the judge's, point of view, and to look clearly at a bias in the case law that has created unequal treatment of visual and verbal creativity. Then, an "added value" analysis—that is,

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adapting the game-theory tool of asking what happens if one actor is subtracted out—can support the legal test of "transformative use" while also framing the relative contributions of the various makers. This analysis of shared value helps everyone: It relieves judges of their awkward tour of duty as art critics. It makes artists feel safe in the moment of creativity, before value is known. It accomplishes the same outcome of so many cases—"The parties ultimately settled"[1]*—without the costs of litigation or the losses to society. Newer technologies such as blockchain make shared ownership possible. Such systems offer robust economic complements to copyright that protect speech without impeding innovation.*

INTRODUCTION

On April 27, 2006, the Associated Press (AP) sent Mannie Garcia to photograph then Senators Barack Obama and Sam Brownback in conversation with the actor George Clooney about humanitarian work in Darfur, Sudan.[2] Garcia set up his camera, spent fifty-five minutes shooting 251 photos, developed the film, and submitted sixteen of the images to the AP.[3] One photo captured Obama alone. By Garcia's own description, he was "just trying to make a nice, clean head shot."[4]

A year and a half later, in October 2007, Shepard Fairey, the RISD-trained graphic, decided he wanted to make a poster to help Obama's campaign for the 2008 U.S. Presidency.[5] Unsure whether his offer to make the poster would be welcome—Fairey was, at the time, most famous for a sticker depicting the wrestler André the Giant with

1 Amy M. Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 579 (2016).
2 William W. Fisher III, Frank Cost, Shepard Fairey, Meir Feder, Edwin Fountain, Geoffrey Stewart & Marita Sturken, *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 246 (2012).
3 *Id.* at 247.
4 *See id.* at 247, 247 n.18, 246 n.11; *see also* Transcript of Mar. 4, 2010 Deposition of Mannie Garcia at 16-19, 25-27, Shepard Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010); Transcript of Mar. 5, 2010 Deposition of Mannie Garcia at 23-24, 26, 31-34, 37-40, Shepard Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010).
5 *See* Fisher et al., *supra* note 2, at 248–49, 269–72.

the slogan "OBEY"—the artist asked a friend loosely connected with the campaign for the campaign's blessing.[6] In January 2008, the campaign responded and Fairey set to work. He performed a Google search for images of Obama and came across the "nice, clean head shot," what is now called the "Garcia Obama."[7] Fairey did not know the source or rights holder of the image.[8] Fairey spent two full days, around January 22, 2008, choosing a reference image from a Google image search and building the iconic poster.[9] During the production time, Fairey's artistic labor was an act of generosity, of volunteering his time, effort, and talent.[10] Crucially, Fairey made the poster before anyone knew it would be good or commercially valuable.

The first $95,000 of revenue came through Fairey's own merchandising enterprise.[11] By the following January, the Hope Poster image had generated roughly $1 million in revenue, in addition to cultural capital that helped elect Barack Obama as president.[12] As the poster rose to fame, a blogger named Tom Gralish discovered that the AP photo was the source material for Fairey's poster.[13] In relatively short order, the AP "contacted Fairey's office and demanded compensation."[14] Fairey offered to pay a flat licensing fee, but the AP demanded a share of revenue.[15] At that point, the AP, which may have had an interest in punitively making an example of Fairey, threatened to sue.[16] Fairey's lawyers filed for a declaratory judgment.[17] Fairey did himself no favors panicking, lying, and spoliating evidence about his knowledge of the source of the photo.[18] Lying to lawyers and judges

[6] *Id.* at 249; *see also* ANDRÉ THE GIANT, https://www.andrethegiant.com (last visited Apr. 3, 2019); *André the Giant*, WIKIPEDIA, https://en.wikipedia.org/wiki/André_the_Giant (last visited Mar. 27, 2019).

[7] The title distinguishes the work from the photo of Obama and Clooney together. At first Fairey thought the image he was working with was cropped from an image of Obama and Clooney together (called the "Garcia Clooney" in court documents). *See* Fisher et al., *supra* note 2, at 256–58.

[8] Fairey "did not think [he] needed permission to make an art piece using a reference photo." He also did not know at the outset whether the source was Reuters or the AP and had some confusion. He realized his error and then covered it up. *See id.* at 274, 276–77.

[9] For a detailed description of Fairey's process of making the images, see *id.* at 249–52.

[10] *Id.* at 248–49. Fairey also paid $6,000 to the Jack-in-the-Box restaurant chain in February 2008 to feature the poster in ninety of its restaurants. *See id.* at 253–54 n.42.

[11] *Id.* at 254.

[12] *See id.* at 254. Fairey received a letter from then Senator Obama dated February 22, 2018, thanking Fairey and stating, "[y]our images have a profound effect on people . . . ." *See id.* at 254 n.43; *see also* Hillel Italie & Associated Press, *AP Alleges Copyright Infringement of Obama Image*, SAN DIEGO UNION-TRIB. (Feb. 4, 2009, 7:39 P.M.), https://www.sandiegouniontribune.com/sdut-obama-poster-020409-2009feb04-story.html.

[13] Fisher et al., *supra* note 2, at 255.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* For a discussion of damages requested by the AP and allowed statutorily, see *id.* at 308.

[18] Fisher et al., *supra* note 2, at 256 ("At that point, Fairey made what he acknowledges was an

creates an almost certainty of losing the case. For the sake of argument, this paper ignores the lying and isolates the facts. The underlying structural creative production economics are instructive. The outcome of the case was that, after much time and expense to all, the parties settled.[19]

The fact that the case settled is emblematic of the increasing difficulty of applying the fair use doctrine to the realities of collaborative creativity.[20] Fair use is an inflexible, permissioned binary that is often not particularly useful and not particularly fair. Even if we recognize that everyone has contributed value, the court can choose between two outcomes: either Fairey is a thief who stole the Garcia Obama and must return the proceeds to their rightful owner, or Fairey is a creator who "transformed" the work and can therefore retain all of his profits. It is no wonder that most "fair use" cases settle, given that neither one of the black-or-white outcomes reflects the more nuanced reality of creation.

The binary does not fit, because more than one actor has contributed something of value. Here, "value" is used in the game-theory sense of "added value."[21] To apply an "added value" test, one mentally subtracts out each stakeholder to see how the outcome changes. By their absence, the stakeholder's contribution is visible. For instance, in the Hope Poster case, Garcia, the AP, and Fairey each have a claim on the value created. Without Garcia, the Obama headshot would not have existed. Without the AP, Garcia would not have been commissioned, or necessarily had press access to the event. Without the volunteered investment of time and creative wherewithal of Fairey, the poster would not exist. From an economic standpoint, everyone has added value.

Added value can create complex, dynamic value maps of the ecosystems around an innovative work. The either-or thinking of fair use is needed to protect speech, but beyond that, it starts to destroy the whole reason copyright exists, namely to serve as an economic incentive to creativity.[22] This larger purpose of copyright—the granting

egregious error in judgment. He should have notified his counsel immediately. . . . He did not do so. Instead, he decided to conceal his mistake. . . . He destroyed some documents and fabricated others in an effort to buttress his continued claim that the reference work had been the Garcia Clooney photograph.").

[19] *Id.* at 269.

[20] *See generally* HOWARD S. BECKER, ART WORLDS (1982) (describing the various constituents who bring art into being, well beyond the myth of the lone creator). Fair use seems to recapitulate that myth.

[21] Adam M. Brandenburger & Barry Nalebuff, *The Added-Value Theory of Business*, STRATEGY + BUSINESS (Oct.1, 1997), https://www.strategy-business.com/article/12669?gko=5c72a; *see also* JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944).

[22] *See e.g.*, Christopher Buccafusco and Christopher Sprigman, *Valuing Intellectual Property: An*

of a temporary monopoly in order to incentivize creativity—concerns the moment in which the work is actually made, shifting fair use analysis from the judgment of critics to the process of makers. This economic analysis does not replace fair use. Rather, it complements fair use by reinforcing its speech claims while recognizing the increasingly collaborative nature of production.

In proposing a re-reading of the market test as a "value" test, this paper posits productive intersections of economics and law, which developing technologies, such as blockchain, make newly viable.[23] These market models can be embedded within multiple artistic and political positions of gift economy, collaboration, profit, and trade.[24] The models do not propose that artists be capitalists, but consider ownership to be prerequisite to generosity and enable collaboration. They do not interfere with free-speech protections of the First Amendment, but only support the economic incentive for copyright in the current digital age.

Experiment, 96 CORNELL L. REV. 1, 3 n.11 (2010). Mazer v. Stein, 347 U.S. 201, 219 (1954); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–1979 (2009). WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 11–14 (2003). For discussion of the complex rationale for incentivizing *fine arts*, see Barton Beebe, *'Bleistein,' the Problem of Aesthetic Progress, and the Making of American Copyright Law*, 117 COLUM. L. REV. 319, 325 (2017) ("[F]rom its very origins in the Intellectual Property Clause, American intellectual property law has struggled to reconcile its fundamental purpose, the promotion of progress, with the aesthetic.").

[23] Blockchain is a structural and cryptographic technique for creating time-stamped, interconnected, distributed ledgers to record any kind of information without a central authority. *See* Stuart Haber & W. Scott Stornetta, *How to Time-Stamp a Digital Document*, 3 J. CRYPTOLOGY 99 (1991); Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (2009), https://bitcoin.org/bitcoin.pdf. Blockchain is commonly associated with, and sometimes conflated with, cryptocurrencies such as Bitcoin. Blockchain itself was first developed by Stuart Haber and W. Scott Stornetta in 1990.

[24] See LEWIS HYDE, THE GIFT: CREATIVITY AND THE ARTIST IN THE MODERN WORLD (2d ed. 1979), for the analysis of arts economics as a gift economy. See ALISON GERBER, THE WORK OF ART: VALUE IN CREATIVE CAREERS (2017) and OLAV VELTHUIS, TALKING PRICES: SYMBOLIC MEANINGS OF PRICES ON THE MARKET FOR CONTEMPORARY ART (2005), for analysis of broader socioeconomic theories of art and economics or investment. See WILLIAM D. GRAMPP, PRICING THE PRICELESS: ART, ARTISTS, AND ECONOMICS (1989), for economic justifications of art. In honor of long legal footnotes and writing interdisciplinarily about economics and law, I offer this passage from an essay by George Stigler, the popularizer of the Coase theorem, on the intersections and methods of legal and economic scholarship:

> Whether because of natural selection or of a triumph of education over human nature, the lawyer and the economist have very different traits. One which only scrupulous candor compels me to mention is the existence of a higher level of legal than of economic scholarship: if a lawyer cites a fact or quotes a passage, the chances that the fact or quotation is correct are higher than when the economist so cites or quotes. A second difference, which I hasten to mention, is that the lawyer views words, not merely as something without a cost of production, but even more as a food for which the reader has an insatiable hunger. The lawyer's luxurious documentation often serves no perceivable role as amplification or support, and must, I assume, be intended as a diary of peculiarly chosen reading.

George J. Stigler, *The Law and Economics of Public Policy: A Plea to Scholars*, 1 J. LEGAL STUD. 1, 1 (1972).

Value not only allows collaboration to be mapped more accurately, but also signposts the difficulty of ascertaining value at the moment of creation, which is the moment copyright exists to incentivize. Making a work of art—broadly defined as innovation in any field—is not a process of going from a known point A to a known point B, but rather *inventing point B.*[25] That process of making something of value requires the maker, here Fairey, to take a risk and to invest resources, notably his time and talent, in the point A world before he can know the value in the point B world. By definition, because it is especially hard to assign a fixed value at point A, it makes sense to assign fractions, not dollar amounts, and to think in terms of covering costs of production and sharing upside. Assigning fractions is not inherently easy, but it separates out the designation of percentage contribution from the prediction of future profits.

What was designed as a system of permission needs to be broken apart—technology now willing—and reassembled as a system of shared value. The good news is that the copyright doctrine as written includes a consideration of "value."[26] The bad news is that we will have to chiropractically and fundamentally reorient our understanding of art and copyright to restore this understanding of value to its rightful place. We will need to detach from the myth of artistic genius and allow for collaboration not just among artists but between lawyers and economists. To do so, we need to navigate the gray area between art and business and, at the same time, acknowledge a bias in the history of legal treatment of words and images—the broad categories of the visual and the verbal. The resultant system works for *making* art, not just judging art after the fact.

This reconsideration of fair use is urgent. The possibility of fair use litigation has become existentially scary for artists, who do not know whether or not their work will be infringing.[27] Eminent scholars of copyright, foremost Amy M. Adler, have suggested that the case law and framework of fair use has become so messy and uncertain, and the artistic practice of copying so ubiquitous, that we should abandon fair use.[28] Fair use *is* broken, but it needs to be fixed for everyone. The

[25] AMY WHITAKER, ART THINKING: HOW TO CARVE OUT CREATIVE SPACE IN A WORLD OF SCHEDULES, BUDGETS, AND BOSSES (2016); *see also* Martin Heidegger, *The Origin of the Work of Art*, *in* BASIC WRITINGS 139, 143–206 (David Farrell Krell ed., 1993).

[26] The fourth factor states, "the effect of the use upon the potential market for or *value* of the copyrighted work" (emphasis added). 17 U.S.C. § 107 (1992).

[27] Fairey decided to settle because if he lost the case against the AP, he would be bankrupted. *See* Fisher et al., *supra* note 2 at 277.

[28] *See, e.g.*, Amy M. Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313 (2018); Amy M. Adler, N.Y.U., Speaker at the College Art Association Annual Conference: Copyright, Fair Use, and Their Limits Part II (Feb. 23, 2018) (discussing the subject, "Why Fair Use Law Is Failing Artists"). Pamela Samuelson has argued that fair use cases have more recognizable patterns. *See* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537

doctrine needs to reflect the first-principle constitutional incentive to innovation while being more curious and empathetic to the realities of contingent labor experienced by fine artists and other gig-economy creative laborers. There is no generalizing about artists. They do not all copy. They do not all do the same thing. Everyone is an artist, or has the capacity to be one. Being an artist is the defiantly democratic capacity for independent and original thought. As a society we happen to codify that originality economically. When we do, it is *value*, not markets, that should be the guide.

I. COPYRIGHT LAW AND FAIR USE OF FINE ART

Copyright law in the United States is authorized under Article I, Section 8, of the United States Constitution, and an economic incentive "[t]o promote the progress of science and the useful arts" by granting temporary economic monopoly to "authors and inventors" for a period of time. [29] Recognizing the competing priority of protecting First Amendment speech, and the necessity of drawing, in some way, on other people's creative work in order to make new and useful discoveries, the copyright law recognizes "fair use."[30]

The four factors of the fair use test, as defined in *Folsom v. Marsh* (1841) and codified in the Copyright Act of 1976 are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (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.[31]

The four-factor fair use test derives from Judge Joseph Story's opinion in *Folsom*,[32] codified in the 1976 copyright statute.[33] The interpretation of fair use has been strongly influenced by Judge Pierre Leval's 1990 *Harvard Law Review* essay laying out a framework for "transformative use" as the essence of "fair use."[34] By art historical

(2009).

[29] U.S. CONST. art. I, § 8, cl. 8.

[30] For explanations of the rationale behind fair use, see Pierre N. Leval, *Toward a Fair Use Standard*, 91 N.Y.U. L. REV. 559, 1109 (1990); Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?: The 1999 Donald C. Brace Memorial Lecture Delivered at Fordham University School of Law on November 11, 1999*, 46 J. COPYRIGHT SOC'Y U.S.A. 513, 519 (1999).

[31] 17 U.S.C. § 107 (1992).

[32] Folsom v. Marsh, 9 F. Cas. 342, 345 (D. Mass. 1841).

[33] 17 U.S.C. § 107.

[34] Leval, *supra* note 30.

analogy, if the 1976 Copyright Act is the French Academy, Leval's essay is Marcel Duchamp's *Fountain*—a practical system turned on its head as inescapable rebuttal and new rule.

What is interesting about not only the *Folsom* case and the Leval essay, but also the fair use test itself, is that they all include notions of *value* that have gone unapplied in recent cases. Leval's essay actually gives us the grounding to deal with current challenges to fair use, from the first principle.[35]

In *Folsom*, Judge Story was weighing the relative positions of Charles Folsom, the original publisher of a twelve volume biography of President George Washington, and Bela Marsh, the publisher of a shortened two volume biography of the President, the author of which had directly used 353 pages of letters (the original Folsom work consisted of one volume of biography and eleven volumes of Presidential letters).[36] Judge Story ruled that the use was unfair.[37] We have generally accepted this up-down vote of fair or unfair use wholesale, at the same time that so many literary works have a factual basis (documentary letters), a relationship to other people's labor (the compilation of the eleven volumes of letters), and an overlapping market story (the relatability of wanting to read two volumes rather than twelve).

Creativity—whether the whole-cloth discovery or invention, or the incrementally transformative biography—is not zero-sum. Creativity is inherently generative. The economic incentive to innovation recognizes this.[38] Yet the fair use test within U.S. copyright law is black and white. One party "wins" permission or the denial of permission. In cases that settle, often everyone is worse off at the end—in time, resources, and opportunity cost of time to make the creative work.

Leval articulates the yes-no question to which fair use is the answer. That question is: Is the use "transformative?"[39] From the logic of the market, namely that the copyright system exists to incentivize invention and creativity by granting a temporary monopoly to those creators, the transformative use test is a beguilingly simple and lucid litmus test of innovation. Did we move the needle forward, yes or no?

As has been written about extensively, the transformative use test becomes exceedingly tricky in cases of appropriation art.[40] The shifting

[35] *See, e.g., id.* at 1109–11, 1122–23.

[36] *Folsom*, 9. F. Cas. at 345. For a discussion of *Folsom* and the roots of fair use in reproduction rights of abridgement, see Matthew Sag, *The Prehistory of Fair Use*, 76 BROOK. L. REV. 1371 (2011).

[37] *Id*. at 349.

[38] Leval, *supra* note 30, at 1118–19. *See, e.g.*, Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746–50 (2012).

[39] Leval, *supra* note 30, at 1111.

[40] *See, e.g.*, Amy M. Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313

technologies of artistic production—from the advent of photography to the dazzling capacities of Photoshop—complicate the process of defining fair use. While it may be true that appropriation art, digital files, and other recent changes have challenged fair use, these edge cases do not represent the variety of artistic practice nor the importance of artistic self-definition of practice.

By copyright's own logic, if there is no economic incentive to create, there will eventually and theoretically be no innovation. Even if innovation persists for whatever reasons of intrinsic motivation, gift economy or accident, the constitutional mandate still stands and thus requires a functioning statutory and doctrinal environment. All artists proverbially stand on shoulders of greatness and most individual work entails some collaborative participation, at the same time that individuals deserve economic compensation for their work.

In fact, Leval's essay provides the framework to tackle this dilemma, and it is in the treatment of "value."

II. VALUE ANALYSIS OF THE FOURTH FAIR USE FACTOR

In cases of fine art, what is commonly referred to as a "market" test is actually a test of "potential market and value."[41] As applied in the arts, the price tag on the work of art functions as a proxy for "value" in which the price tag may be relied upon unduly to conclude that Artist B has unfairly used artist A's work because artist A's sales are affected. In the case of Richard Prince's *New Portraits*, in which the artist used other people's Instagram posts, adding captions and reproducing large salable objects on canvas, the analysis has been framed in terms of the price of Prince's work ($90,000) and the price of the underlying photographic works.[42]

The price of a work of art does not represent its value, in a number of dimensions ranging from the financial to the sociological and aesthetic.[43] Many artworks that ultimately sold for high prices were not

(2018); Amy M. Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. (forthcoming); Cariou v. Prince, 714 F.3d 694, 707 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); Fairey v. Associated Press, No. 09-01123 (S.D.N.Y. 2010); Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

[41] 17 U.S.C. § 107.

[42] As mentioned in the first footnote, I am an expert witness, pro bono, in the litigation against Mr. Prince. A version of this paper was first given in spring 2018, before I became an expert. This paper draws only on public sources. For sources on the pricing of the Prince works, see, e.g., Hannah Ghorashi, *$90 vs. $90,000: SuicideGirls Are Selling Their Richard Prince-Appropriated Instagram Photos*, ARTNEWS (May 27, 2015), http://www.artnews.com/2015/05/27/90-vs-90000-suicidegirls-are-selling-their-richard-prince-appropriated-instagram-photos/; Amy M. Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. (forthcoming 2019) [N.Y.U. Sch. L., Public Law & Research Paper Series, Working Paper No. 18-36; N.Y.U. Sch. L., Law & Economics Research Paper Series, Working Paper No. 18-20], available at SSRN: https://ssrn.com/abstract=3183294.

[43] For sociological analysis of the intersection of institutional (e.g., validation by critics, curators,

considered valuable at the point in time when they were made. Most famously, Vincent van Gogh was impecunious and reliant on his brother Theo's patronage in his lifetime, but his paintings have commonly sold in the tens or hundreds of millions of dollars.[44] Art prices are often set by sociological script (i.e., a kind of conversational court dance engaged in by art dealers) or by auction theory (i.e., the reserve price of the two highest bidders in the room).[45] When sold privately, artworks are priced based on what the dealer asks. While some rules of thumb exist regarding size, medium, scarcity, and the artist's stage of career and previous price points, these prices are, in an economic sense, made up and, in a sociological sense, determined by customs of selling.[46]

Regarding financial value, Aswath Damodaran, the professor and author of textbooks including *Valuation, Corporate Finance*, and *Investment Management*, guides students who travel from all over the world to take his workshops that one should never say "value" when one really means "price."[47] He makes this point in lectures that otherwise feature the valuation of ride-sharing or oil exploration by using the Francis Bacon *Three Studies of Lucien Freud* triptych, which sold at auction in November 2013 for $142 million.[48] In a financial sense, "value" is based on knowing the growth and reinvestment rates of a company, and discounting the cash flows of the firm. Art does not have cash flows.

This reliance on price as a proxy for value is nearly ubiquitous in the arts but not any less problematic. This reliance on price as a definitive representation of worth or value is normalized but not correct, meaning we think we know the value of a work of art because we know the price, but even the prices do not really tell us accurately about the rate of return. The application of market price to copyright analysis is only one small factor within the more important question: What value is

museums) and commercial value, see Olav Velthuis, *The Venice Effect*, ART NEWSPAPER (Jun. 2011), http://www.velthuis.dds.nl/art%20newspaper_biennale%20effect.pdf. Aesthetic value is outside the scope of this paper, because it is most commonly invoked as part of critical—not maker-in-the-studio—judgment.

[44] *Brotherly Love: Vincent & Theo*, VAN GOGH MUSEUM, https://www.vangoghmuseum.nl/en/stories/brotherly-love (last visited Apr. 9, 2019).

[45] For pricing scripts see VELTHUIS, *supra* note 24. For auction theory applied to arts see Orley Ashenfelter & Kathryn Graddy, *Auctions and the Price of Art*, 1 J. ECON. LITERATURE 763, 787 (2003).

[46] In perfectly competitive markets, art dealers and buyers would be price takers, paying whatever price were set by the marketplace. Pricing in the arts is enormously complicated and fungible, in part because value is conferred to the artist and other collectors by the quality of the collector (for instance, a museum) and by the assurance that a purchaser will not "flip" the work, reselling it quickly at a mark-up and creating turbulence in an artist's market.

[47] Aswath Damodaran, EXECUTIVE EDUCATION SHORT COURSE: VALUATION (Aug. 14–16, 2017).

[48] Carol Vogel, *At $142.4 Million, Triptych Is the Most Expensive Artwork Ever Sold at Auction*, N.Y. TIMES (Nov. 12, 2013), https://www.nytimes.com/2013/11/13/arts/design/bacons-study-of-freud-sells-for-more-than-142-million.html.

contributed? We need a system based not on prices as circulating in art markets, but on a notion of value at the moment of creation—when Shepard Fairey spent two days *making* something, not when it was later sold. The narrative viewpoint of the law is not the artist in the studio but the lawyer or judge, and her art-world counterpart: the historian or critic. The intent of the artist and imagined insights of the viewer are taken at face value in artists statements and at the risk of "the right thing to say" in court.[49]

In the proverbial courtroom, the artwork is Exhibit A, intact and on an easel. In the proverbial studio, the canvas is blank and in progress. What the Constitution incentivizes is the blank canvas. It is easy to conflate time frames and to forget that what seems like a foregone conclusion now—the success of the Hope Poster—was a very messy, obscure work-in-progress then. This mess—and its potential market—is exactly what copyright law concerns: the artist in the studio, not the critic after the fact. Creativity is about the use of resources, about trial and error, about space for good-faith experimentation, and about a hopeful sense of human progress. That progress has little to do with a collectibles market based on notions of taste. Copyright law does not incentivize stamp collectors; in incentivizes makers of stamps.

If we look at value at the moment of creation, what we are essentially looking at is labor economics and investment. We are looking the time the artist spent working and developing her practice and the ways in which that time is a form of investment. When we look at fair use, we weigh whether the borrowed labor of the second artist is an act of building upon or is a *cooptation* of time and effort. Transformative use takes on a different meaning: How much does time does an appropriating artist save herself by using photographs made by another party? This labor analysis—at the point of creation—is not determinative but gives us important new information that has much more to do with value creation than later market prices. In the case of the Hope Poster, Fairey made the work at a time when one of the main demonstrated uses of the Garcia Obama was its appearance in a handful of newspaper articles about an election in Ohio.[50] The value analysis gives us very different and important new information.

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[49] Adler cites the complexity in which the viewpoint taken by the court is determinative of the outcome. Adler, *supra* note 1, at 567. The court has historically taken one of three points of view—what Adler calls the "three wildly divergent approaches": (1) "the artist's statement of intent;" (2) the "aesthetics or formal comparison" of objects; and (3) "the viewpoint of the 'reasonable observer.'" *Id.* at 563. These different approaches are narrative points of view in which the artist, the critic, and the viewer are respective protagonists. The artist is intending to "say" something. The critic is judging the merits. The reasonable observer is trying to keep up. As Adler asserts, "Contemporary art is an insider's game. . . . Indeed, contemporary art might alienate the reasonable observer." *Id.* at 610.

[50] Fisher et al., *supra* note 2, at 248.

These reconsiderations of value lead to a larger doctrinal change that incorporates added value into the fourth factor as part of the market test and incorporates related analysis of labor across the other factors, including the nature of the work and the "portion" used. The basic question of "transformative use" becomes sensitive to this question of labor. "Transformative use" through a labor lens tilts toward an artist's point of view from that of an art historian or critic. The transformative use test in the second factor also now asks: Is the second artist a net builder or a net borrower? Any work used will have some debt to the labor of others, but, from first principle, is the second work making a contribution? Is it adding more than it takes, from the perspective of all the different stakeholders? The test of the effect on the market of the first artist changes from a narrow and literal consideration of the price of that artist's work to a broader, inputs-based consideration of that artist's invested time. One can speak of dignity of labor without implying moral rights.

In fact, Leval does speak to this idea of added value and undue borrowing in ways that lay the groundwork for this labor analysis. Leval writes,

> If . . . the secondary use *adds value* to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[51]

Leval continues, "Nonetheless, extensive takings may impinge on creative incentives."[52] Leval cites stringent legal treatment of abridgments—notably a linguistic rather than pictorial form, but one with analogs to sampling images in art. He asks, when a creator is quoting a work, whether "the quotation is of the transformative type that advances knowledge, and the progress of the arts or whether it merely repackages, free riding on another's creations."[53] This passage reinforces doctrinal space for a cooption of labor test, one that seems to have been overlooked in the consideration of value. Leval's actual argument is useful now; it is the adoption of his argument that has been flawed, unduly weighted away from artistic labor to critical judgment.

Leval's notion of free riding is particularly important when considering the dignity of artistic labor without overreaching the very limited and contested notion of moral rights in the United States. To coopt artistic labor without transforming it is to free-ride. Free-riding does not serve the economic incentive of copyright. Coopted labor is a

[51] Leval, *supra* note 30, at 1111 (emphasis added).
[52] *Id.* at 1112.
[53] *Id.* at 1116.

key measure of free-riding. Leval also cites "market potential," not just known markets.[54] The idea of "potential market" is important even if it has a difficult evidentiary standpoint. Important inventions, discoveries, and artistic works were not recognized in their time.[55] In one iconic example, when Michael Faraday was conducting the 1850s experiments that would lead to the discovery of electricity, Britain's then Chancellor of the Exchequer, William Gladstone, stopped by the laboratory, perplexed at how Faraday's work would ever be useful.[56] Faraday told him, "One day, Sir, you may tax it."[57] Again, if copyright exists to incentivize creativity, the doctrine needs to grapple with the difficulty of imagining profound and transformational future value, not just making a tally of current sales prices and incremental change.

One more general reason why added value has been underexplored in art is a pervasive, if unintended, bias in the law between consideration of the visual and the verbal.[58] Because law itself is a broadly verbal practice, it makes sense that the law tends to comprehend the verbal more. Examples abound of unequal treatment of words and pictures. For instance, the 501(c)(3) statute includes "literary" but not "artistic" work as grounds for tax-exempt status (art museums operate under the "educational" remit).[59]

The legal precedent for writing seems more robust than for art. There is no such concept in the law of visual plagiarism.[60] For example, in *Salinger vs. Random House, Inc.*, the court found that a biographer of J.D. Salinger was relying unduly on the eloquence of his subject by

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[54] *Id.* at 1123.

[55] *See* ABRAHAM FLEXNER & ROBBERT DIJKGRAAF, THE USEFULNESS OF USELESS KNOWLEDGE (2017); *see also* Amy Whitaker, *The Curiosity-Creativity Connection*, LINKEDIN (Feb. 27, 2018), https://www.linkedin.com/pulse/curiosity-creativity-connection-amy-whitaker (written as part of the Merck KGaA, Darmstadt, Germany, Curiosity Initiative).

[56] FLEXNER & DIJKGRAAF, *supra* note 55.

[57] *Id.*

[58] For discussion of the visual and verbal, see, e.g., Mark P. McKenna, *Introduction: Creativity and the Law*, 86 NOTRE DAME L. REV. 1819 (2011).

[59] 26 U.S.C. § 501(c)(3) (2018). The word "literary" appears here; arts organizations such as museums tend to operate out of the educational purposes remit, as the visual arts are not mentioned directly:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals . . . .

Id.

[60] There is demonstrated humility and self-awareness to the difficult position judges are placed in when ruling on visual works. As Oliver Wendell Holmes Jr. wrote for the Supreme Court in 1903, in *Bleistein v. Donaldson Lithographing Co.*, "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." Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

quoting Salinger at length in the book.[61] One could easily argue in parallel that Prince excessively quotes photographers whose images he appropriates and that the underlying photographs have an ineffable quality akin to Salinger's "dazzling passages."[62]

Yet in the case of appropriation art, reliance on others' "dazzling" prose is harder to see. The difficulty of conjuring an appropriate hypothetical is itself instructive. If, for example, I republished 90% of Amy Adler's "Fair Use and the Future of Art" uncited, I would obviously be plagiarizing. But what if I repurposed 80% of it as a printed artwork with which I papered a wall? Adler might embrace it because she is a champion of copying, but why would that make her approval generalize to other legal writers? What if I published her argument without citing her, but published it in a popular journal and said that I am a journalist and she is a scholar and so these are different markets? The example quickly becomes unsatisfying because it is hard to "transform" literary work, apart from abridgment, without putting it into a visually different format. These fundamental questions of what is analogous across visual and verbal formats need to be addressed with care and curiosity. Basic verbal categorizations of citation and quotation need visual analogs. Ironically, we need more language to describe artistic acts of copying, borrowing, transforming, building, extracting, coopting, and referencing, and artists need to participate in forming this language and systems of thought.

In addition, we need to consider with real openness and curiosity the economic context in which work is made. This context may be extremely different for art than for legal scholarship or scientific research or other areas of intellectual and creative labor. Some artists are very financially successful, but according to the *Creative Independent*, a publication of Kickstarter, the average annual salary for an artist is below $30,000.[63] A recent research report by the Arts Council of England found similar.[64] Being a visual artist is often economically precarious. Many artists support themselves in day jobs. The artistic labor looks like *pro bono* work economically; it is really self-investment.[65]

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[61] Salinger v. Random House, Inc., 811 F.2d 90, 100 (2d Cir. 1987).

[62] Leval, *supra* note 30, at 1112; *see also Salinger*, 811 F.2d at 98 ("The taking is significant not only from a quantitative standpoint but from a qualitative one as well. . . . the 'heart of the book' . . . . The letters are quoted or paraphrased on approximately 40 percent of the book's 192 pages.") (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 565 (1985)); Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 755 (2012).

[63] *Survey Report: A Study on the Financial State of Visual Artists Today*, CREATIVE INDEP. (2018), https://thecreativeindependent.com/artist-survey/.

[64] *Livelihoods of Visual Artists: Report*, ARTS COUNCIL OF ENG. (Dec. 19, 2018), https://www.artscouncil.org.uk/publication/livelihoods-visual-artists-report.

[65] In other papers, I have argued for artists to retain fractional equity in their work so that they

For artists, designers, and other freelance, gig-economy workers, it can be extremely hard to find economic support to cover what is essentially research and development ("R&D"). Fairey's time spent making the Hope Poster is one tangible example of large swaths of invisible labor and years of training that go into works that only later come to have recognized commercial value (the AP, in contrast, was at the time of the lawsuit a $700 million organization in annual revenues, with the steadier economic model of paid member subscriptions[66]). The enduring myths of the genius artist and of the starving artist reinforce this lack of connection between fair use and the economic livelihood of artists. I have never heard anyone say that research scientists should support themselves financially off-stage until they reach their scientific breakthroughs, because their work is so useful to society, nor that law professors should give up full-time teaching appointments to write about incentives for contingent creative labor. Yet people seem to think artists are magically uneconomic actors because the arts have a public benefit. It is not that artists require special welfare considerations over other classes of people, but that artists are uniquely structurally disadvantaged in the sale of original objects whose value may change radically over time.[67]

That is not to say all art is commercial. In some ideal sense, artists do have space to create apart from making money directly from their work, meaning that the work itself is made for artistic purposes, not just commercial ones. But the larger cultural difficulty of holding an artistic thought and a commercial thought at the same time should not punish artists economically. The mere fact that some artists who have been sued for copyright infringement are doing well financially by external markers does not paint artists as a homogenous class of people, all of whom copy, sample, and have access to capital. We should not do away with copyright but figure out how to better represent creativity economically in the digital age. Fortunately, technologies, most notably blockchain, make this newly possible. Blockchain allows us to shift the economics of creativity from production to investment—from fee for

can own upside created by their own self-invested labor. *See* Amy Whitaker & Roman Kräussl, *Blockchain, Fractional Ownership, and the Future of Creative Work* (Goethe University Center for Financial Studies, Working Paper No. 594, 2018); Amy Whitaker, *Artist as Owner Not Guarantor: The Art Market from the Artist's Point of View*, 34 VISUAL RESOURCES 48 (2018).

66 Fisher et al., *supra* note 2, at 311.

67 For a critique of artists as undue recipients of welfare (by receiving resale royalties), see Guy A. Rub, *The Unconvincing Case for Resale Royalties*, 124 YALE L.J. F. 1 (2014); Christopher Sprigman & Guy Rub, *Resale Royalties Would Hurt Emerging Artists*, ARTSY (Aug. 8, 2018), https://www.artsy.net/article/artsy-editorial-resale-royalties-hurt-emerging-artists. For further argument that artists are structurally disadvantaged not specially chosen, see Amy Whitaker, *Ownership for Artists*, *in* THE SOCIAL LIFE OF ARTISTIC PROPERTY (2014)*;* Amy Whitaker & Roman Kräussl, *Artists Are Entrepreneurs. We Should Compensate Them Accordingly*, ARTSY (Aug. 14, 2018), https://www.artsy.net/article/artsy-editorial-artists-entrepreneurs-compensate.

use to shared upside.

III. ECONOMIC COMPLEMENTS TO COPYRIGHT

What blockchain can instantiate is a system of shared ownership that better represents the collaborative, open-ended nature of creative process as a system of fractional ownership.[68] This shift from permission to shared value better maps an ecosystem in which many parties can share in the upside. In the case of Shepard Fairey, if he had actually been able to find the Garcia Obama and ask the AP for permission, it could have arranged a percentage of revenue early on. At that stage, these percentages can be very small. Even a very small percentage of upside will still matter if the gains are very large. The AP can make $5 or $5,000 on an image it has only previously monetized in relatively regional news coverage. We just need a search mechanism—so that Fairey can find the work—and a clearing mechanism—so that Fairey can permission it. Crucially, these mechanisms need to have low transaction costs.

Fair use, in the legal sense, then becomes a pathway of last resort. Moreover, the processes Fairey has gone through become demonstrations of good faith in seeking permission, which may have been unduly withheld because of the content of Fairey's speech or because of the largeness of economic demands. The evidence of the labor of attempting to credit collaborators becomes part of the analysis. Courts are much better equipped to adjudicate those factors—speech and analysis of process—than art.

The following chart shows some of the shifts in thinking that go into building economic complements:

Fair Use	**Economic Complements**
Binary judgment	Shared value
Top-down permission	Peer-to-peer negotiation
Market analysis and price	Value creation and gift economies
Transaction cost and litigation	Creative safety and lower search cost
Central administration	Decentralized systems

Where copyright law offers a binary judgment of fair use, economic complements can model shared ownership. Where courts function as top-down and sometimes unpredictable adjudicators, creators can negotiate shared rights amongst themselves—at the point of

[68] *See* Amy Whitaker, *Artist as Owner Not Guarantor: The Art Market from the Artist's Point of View*, 34:1-2 VISUAL RESOURCES, 48 (2018).

creative risk not later known value. Where market analysis and price give a feeling of understanding impact, actual copyright exists to champion value creation not price. Art is adjacent enough to gift economies for artists to be allowed to share their work on their own terms. Copyright law has led to substantial litigation and enormous costs of time, and technological systems can lend clarity and lower search costs in ways that are artistically enabling.

Following from the decentralized structure of the blockchain, these systems can invert centralized consideration of art markets. Copyright law is still necessary in protecting free speech—in this case, particularly the speech of critics whose request for use could be denied.

Here, the notation of "potential market"—in Leval's essay and in the statute—not just the market, becomes important. Law as a discipline is a state-of-the-art machine for processing evidence, but it has little facility with imagination and therefore opportunity cost. Opportunity cost models the imagined, if foregone, future, not the known and quantifiable past. Artists have opportunity cost in contributing to work without credit and being robbed of the dignity of being able to offer their work as a gift. Their agency is taken away. And the pathway from obscurity to greatness, in the market sense or otherwise, is hardly a linear, vector-friendly path.

Rather than model the opportunity cost, one can simply think in terms of property rights. One can think in percentages and shares, not in dollar amounts. The most powerful work on property rights comes from Ronald Coase, whose Coase theorem was awarded the Nobel Prize in Economics.[69] The Coase theorem posits that we should worry less about what price we should put on something; instead, we should worry about turning that thing we value into a property right.[70] If we can do so, and if the transaction costs are not onerously high, then the market itself can set the price.[71] This idea forms the basis of emissions permits as a remedy for pollution. This concept can also be used to assign ownership shares to work before its value is known. In the same way that start-up teams have equity, artists can jointly own royalties or equity in work well before value is known.[72]

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[69] *See* Les Prix Nobel, *Ronald H. Coase – Biographical*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/1991/coase/biographical (last visited May 23, 2019); Patrick J. Lyons, *Ronald H. Coase, 'Accidental' Economist Who Won a Nobel Prize, Dies at 102*, N.Y. TIMES (Sept. 3, 2013), https://www.nytimes.com/2013/09/04/business/economy/ronald-h-coase-nobel-winning-economist-dies-at-102.html.

[70] *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); George J. Stigler, *Two Notes on the Coase Theorem*, 99 YALE L.J. (1989). For previous publications wherein I discuss this application of the Coase theorem, see Amy Whitaker, *Ownership for Artists*, *in* THE SOCIAL LIFE OF ARTISTIC PROPERTY 70–84 (2014); Whitaker, *supra* note 65.

[71] *Id.*

[72] *Id.*

One challenge to this idea has been transaction cost—the monitoring of these royalties or shares and the search cost of finding the rights holder. In the case of Fairey, he wanted to ask permission to use the photograph but did not know whom to ask. We do not have good systems of determining the identity of the author of an image any of us finds on the Web. If we had a registry of images, we could time travel back with Shepard Fairey and he could share a percentage of revenue or pay a flat licensing fee—crucially—at the time of creation, before the full monetary value is known.[73] In Fairey's use of the Garcia photo as raw material and an instrumental ingredient, it would have been ideal for him to have negotiated use via shared upside.

Shared upside is a peculiar problem in the economics of creativity. For creative work in any field, from art to science to industry, one must solve the "R&D Problem": One must cover the costs of development in the point A world before value is known in the point B world. In the case of Fairey, the artist could have essentially negotiated a royalty from the AP. That right would have had no value for a long time—it would have had no value unless the Hope Poster took off. This optionality is structurally accurate to the fundamental risks undertaken to make creative work. Instead of waiting to see that Fairey has made $1 million and then punitively suing, one can represent risk undertaken at point of creation—in the proverbial studio at which point Fairey is donating his time to the Obama campaign, and the use of the photo does not yet have demonstrated monetary value. In an ideal world, Mannie Garcia, the AP photographer, would also have a contract with the AP that gives Garcia rights in the image. Such contracts are more typically structured as work-for-hire in which the photographer grants the AP the full ownership of copyright.[74]

As developed in the next section, technological systems based on blockchain technology can manage systems of fractional equity in which the AP, Garcia, and Fairey own shares.

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[73] Fairey became represented by the Stanford Fair Use Project. Fisher et al., *supra* note 2, at 255 n. 47. Fairey also realized privately that the Garcia Obama and not the Obama Clooney was the actual source. He failed to tell his lawyers in a way that amounted to lying. One can see how harshly he is judged by the legal system for doing so, and I certainly understand the inviolability of telling the truth under oath. I think it is also interesting to comprehend the larger injustice that Fairey was already on the receiving end of. We do not have a legal framework for economic and other forms of bullying, but we see it occasionally, as in the case of Aaron Swartz, the hacker who was pursued doggedly and probably terrifyingly by the U.S. government before he killed himself. *See* John Naughton, *Aaron Swartz Stood Up for Freedom and Fairness – And Was Hounded to His Death*, GUARDIAN (Feb. 7, 2015), https://www.theguardian.com/commentisfree/2015/feb/07/aaron-swartz-suicide-internets-own-boy. This paper wishes neither to over or under emphasize the seriousness of Fairey's lying, but only to recognize the economic suboptimality of the value created by Fairey being eating up in legal and other costs instead of shared with others. *Id.* at 256.

[74] *See* 17 U.S.C. § 201(b) (1978).

IV. TOWARD A SYSTEM OF SHARED VALUE

The outcome of shared value looks like "the parties ultimately settled" without all the costs of litigation. It operates the way that a clearinghouse does in a financial sense—by matching willing buyers and sellers and by allowing the automation of trade at different price points. What is avoided is not only the explicit cost but the opportunity cost. Not even considering the parties to the cases, the opportunity costs in court time and amicus brief writing alone are staggering. These resource costs cascade though as a hefty tax on creative laborers. Rather than legal settlement after all of these costs are incurred, these matters could be handled by settlement in the other sense—automated trade settlement of rights management systems.

The decentralized structure of the blockchain, coupled with fractional shares and an automated system for managing permissions, would go a long way toward freeing up creative resources and encouraging innovation as copyright law intends to do. Fair use then becomes the purview of the courts either as a last resort when disputes and misunderstandings arise, or when First Amendment freedoms need production as the pillars of democracy that they are. In the meantime, the sheer attempt of creators to move toward shared value is in itself an act of good faith and an art project.

To reimagine fair use as a system of added value requires both doctrinal robustness and technological systems. Doctrinally, as argued above, the "market" test in fair use needs to be expanded to encompass shared value and investment of labor. Rather than ask what the comparative market prices are, judges—and creators avoiding litigation—can ask questions of added value: Is this work referring to or coopting the other work? Does it sample or borrow wholesale? Is it transforming or relying on the work? Is it in conversation with the work, or merely speaking over it?[75] Is work being copied in order to save time, or is the act of copying—as in the virtuosity to copy a Bernini sculpture or a Caravaggio painting[76]—being done as an act unto itself? By analogy, one might say that an athlete who runs in the 100-meter dash at

[75] Sociologists of speech and conversational patterns could offer useful analysis here as to methods of shared conversational structure and of overtalking. See, for example, DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (1990).

[76] Artists have historically copied the work of other artists, as part of their education and in order to demonstrate technological mastery. To copy some works of Renaissance virtuosity was an act of artistic achievement unto itself. *See, e.g.*, THEORIZING IMITATION IN THE VISUAL ARTS : GLOBAL CONTEXTS (Paul Duro ed. 2015). In some notable cases, only the "copy" survives as reference point, as in the case of Peter Paul Rubens' rendering of Leonardo da Vinci's mural *The Battle of Anghiari*. *See, e.g.*, NICCOLÒ CAPPONI, THE DAY THE RENAISSANCE WAS SAVED : THE BATTLE OF ANGHIARI AND DA VINCI'S LOST MASTERPIECE. (André Naffis-Sahely, trans. 2015). For further discussion of engravers copying works, see Emily J. Peters, *The Brilliant Line: Following the Early Modern Engraver 1480-1650*, Providence, RI: Rhode Island School of Design Museum of Art, 2009.

the Olympics "copies" those before her, but the copying entails serious effort. In evaluating the fourth factor, what value is being recreated and expanded by the work, and what value is being consumed in the production? What is emulation and what is extraction? These questions exist within the first three factors, but the reinterpretation of the fourth factor can create an important "value" frame as to what is really being contributed.[77]

Technologically, a system of decentralized and collaborative permissions can automate payments and clarify gifts. Here, the very term "fair use" is misleading, because use lends itself to the thinking of licensing, not the framework of property rights. As this paper argues, licensing is still necessary, but it manifests as shared ownership, not permissioned use. This logic is different from the cognitive computation of fair use. In fair use, all of the creators can add value, but then the court must decide a winner. Here, all users can create value and own upside proportionately. In the first instance, a team wins a World Cup match 4:1. In the second instance, the teams share upside in a 4:1 ration. In such a peer-to-peer system, there is not a "remix culture" idea that everything is free; in fact, someone had to pay to create it. Rather, there is radical autonomy in setting economic terms of engagement. That is scary because someone could game a system, but it is also necessary. Models from music rights may helpfully apply.[78]

Instead of a quid pro quo transactional system, a peer-to-peer system is a pooled resource in which one can borrow. As this paper argues, licenses can be zero-cost upfront but specify percentages of profit sharing. For example, instead of requesting $200 as a reproduction or use fee, the rights holder can specify 1% of revenue. Technological systems can manage for very low, or simply differential, percentages in ways that are increasingly automated and therefore not as onerous in transaction costs. Different users in such a system—individual artists, libraries, publishers—can have different rate structures, codifying into technology some of the systems already used by visual rights management entities, such as the Design and Artists Copyright Society (DACS) and Artists Rights Society (ARS). Here, crucially, the licenses are negotiated, not specified. The technology matches bid and ask in more dynamic ways, to arrive at better—meaning more representative—structural arrangements of price and value.

The structure of the blockchain aids in the building of such a

[77] *See* 17 U.S.C. § 107.

[78] See, e.g., Pip Laurenson's work on how conservators of time-based-media art can adapt music copyright notions of rights to the song and to the performance or recording of the song. Pip Laurenson, *Change and Loss in the Conservation of Time-Based Media Installations*, TATE PAPERS (Fall 2006), https://www.tate.org.uk/download/file/fid/7401.

system. The blockchain is the distributed ledger first described by Stuart Haber and Scott Stornetta in 1991 and then codified and expanded by Satoshi Nakamoto in his 2009 paper founding the currency Bitcoin.[79] The blockchain is a structure whose security is based on both cryptography (hash functions) and the presence of many distributed copies of the ledger. Instead of trusting a central authority, we trust the cryptographic math of the ledger, which cannot be falsified, because it is held in multiple copies.[80]

Over time, the blockchain has the capacity to develop into a low transaction cost platform for automated trade in intellectual rights, stemming from consideration of fractionalized property, not use licenses. This is not digital rights management ("DRM") in which digital contracts *control* the work. This is a digital system of encoding artists' autonomy to specify rights and permissions and to transact accordingly.

In stock market trading, there are structures of trade that investors specify that will trigger automatic trades at certain points.[81] We can adopt those structures here so that, for example, in a future world in which Mannie Garcia and the AP jointly own the Garcia Obama, they can list the photo on the blockchain platform. The photo will have been issued with a cryptographic identifier of its origin. Fairey will be able to find the photo through that identifier within the photo itself (this mitigation of search cost alone is vastly enabling). Fairey can put in a bid to use the photo. The AP or Garcia can either view that bid and accept it, or evaluate and negotiate it. Alternatively, they can specify ahead of time the range within which, or counterparties with whom, they are willing to transact automatically. Fairey could have granted a 3% or 10% license to the AP, which would have paid Garcia and the AP if the work had risen in value, not in lump-sum dollar terms. These shared value percentages could be based on classification for educational or commercial use (as in copyright clearance agencies), contain fee breaks at certain price levels (as with an auction buyer's premium or a general bulk discount), or be based on reviews of prior behavior (as in eBay or Airbnb).

We can collectively determine these rates in the way that the Copyright Board does for music, or we can allow creators the autonomy

[79] See Haber & Stornetta, *supra* note 23; Nakamoto, *supra* note 23. Satoshi is debatably a person, a pseudonym, or a group of people.

[80] For blockchain primers, see ARVIND NARAYANAN ET AL., BITCOIN AND CRYPTOCURRENCY TECHNOLOGIES (2016); ANDREAS ANTONOPOULOS & GAVIN WOOD, MASTERING ETHEREUM (2018); ANDREAS ANTONOPOULOS, MASTERING BITCOIN: UNLOCKING DIGITAL CRYPTO-CURRENCIES (2015); SATOSHI NAKAMOTO, JAYA KLARA BREKKE, JAMES BRIDLE, & BEN VICKERS, THE WHITE PAPER (2019).

[81] *See, e.g.*, IRENE ALDRIDGE, HIGH-FREQUENCY TRADING: A PRACTICAL GUIDE TO ALGORITHMIC STRATEGIES AND TRADING SYSTEMS (2013).

of setting these rates themselves. If rates are set onerously high, one can memorialize that failed ability to transact and use it as evidence itself in future fair use litigation, should it arise. Judges are in the position of evaluating prices set, or failed to be set, and processes of good-faith attempts to clear rights. Failure to clear rights may indicate parody or other grounds for speech.

Failure to negotiate rights may indicate privacy concerns or fear of commentary. In all these cases, judges are better equipped to judge process, diligence, and good faith than they are to judge art. While there may be astute art historians or even artists in the judicial ranks, the legal system and the Continuing Legal Education (CLE) system do not educate for judging art. In addition, panels of experts could be convened to evaluate these financial arrangements, analogous to the IRS Art Advisory Panel.[82] These systems are not perfect by any stretch, but they isolate more controllable mechanisms—is this a fair price, did this person request permission, was it denied unduly—that are rooted in procedure, not connoisseurship, guesswork, or personal taste.

These blockchain systems will take serious development, and consequential questions of governance will arise. But to the extent we can take copyright from the hands of judges and costs of litigation and put agency into the hands of creators, we can encourage innovation and find an economics of collaboration that reflects the increasingly collective nature of creativity in the digital age.

CONCLUSION

We have sheltered under a stereotype of the lone artistic genius to paint a chain of geniuses who borrow "fairly" or "unfairly" from each other, and we have pretended they do so in a vacuum independent of needing to work for money. We have disempowered the artists and projected onto the stereotype of artistic genius some of the best and most vulnerable parts of all of ourselves. The capacity for progress in the arts and sciences is a basic human potential. All people can aspire to the pursuit of creativity and contribution, like that of happiness or citizenship.

Furthermore, as society grows more complex, creativity becomes a team sport. No one person is able to master all of the information and domains of expertise required to make progress on some of the world's thorniest problems. No one has all the parts to move forward without some collaboration or borrowing; at the same time, all of us are

[82] THE ART ADVISORY PANEL OF THE COMMISSIONER OF INTERNAL REVENUE, ANNUAL SUMMARY REPORT FOR FISCAL YEAR 2017, available at https://www.irs.gov/pub/irs-utl/annrep2017.pdf; *see also Art Appraisal Services*, IRS, https://www.irs.gov/appeals/art-appraisal-services (last visited May 23, 2019); Alan Breus, *Valuing Art for Tax Purposes*, 210 J. Accountancy, 1, 30–34 (2010).

economic actors and live, hopefully, in a democratic society that needs economic complements to free speech.

The idea that we should dismantle copyright because it is too messy is part of a larger body of thought in which wealth is centralized through large technology platforms and capital allocation mechanisms and then redistributed in Carnegian benevolence as universal basic income that does not adequately cover living expenses. Instead, we can recognize a broader definition of value and a societal focus on the first principles of intellectual property: To incentive makers, not just markets.

We will never reward creative work appropriately, from an economic standpoint, but we should try. But to do so entails an interdisciplinary and curiosity-driven approach to the law itself. The orientation toward value is anchored in a respect for creative labor—and the early-stage acts of investment, risk, and generosity—that move our shared reality forward.