

AN ARTIST'S PRIVILEGE

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INTRODUCTION

A. *Prologue*

American culture in this last decade of the second millennium is defined by mass media.¹ Some find this to be aesthetically or

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¹ See John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM.-VLA J.L. & ARTS 103, 103-04 (1988). In addition to the media influences of which we are conscious, many others remain largely unnoticed. So while we are aware of advertis-

politically troubling,² but there is a less visible, yet equally important, aspect of media saturation. Almost without our noticing, American culture has become private property, belonging to those generating the media tide.

The trend toward private ownership of culture has not gone entirely unremarked: artists address the questions raised by proprietary mass culture. Too often, however, they discover that to do so "can make it rain lawyers."³ The resulting litigation effectively stifles their art, and through the publicity generated and disseminated by the media, inhibits others from similar commentary. It is sadly ironic that copyright—a branch of the law intended to enhance public access to works of authorship—is the principal weapon used against artists by their cultural landlords.⁴

This Article examines visual art in light of the letter and the spirit of the Constitution's Copyright Clause⁵ and the Copyright Act of 1976 ("Act")⁶ and concludes that artists should have the

ing slogans on television and in newspapers (which, despite our awareness, embed themselves in our minds), we also take in images and statements influencing our ideals of beauty, ethics, and other cultural values. Escape from the media onslaught is almost impossible. As Mark Hosler, a member of the experimental musical group "Negativland," once put it in a conversation with The Edge (guitarist for the pop music group "U2"): "U2 is part of the media environment we live in, you know[.] I hear your songs playing in the shopping mall in the background when I'm shopping, whether I want to or not." *NEGATIVLAND, FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2* 87 (1995).

Even more than popular music, television shapes American culture. On average, teenagers watch approximately twenty hours of television per week, or nearly three hours per day. Adults have similar habits; the average adult views 15 to 18 hours per week of television. Forty percent of the leisure time of an American adult is spent before the TV. See Benedict Carey, *Turn Off the TV*, *HEALTH*, Oct. 1994, at 81, 82.

The mass media have become so pervasive that people treat them as if what they see portrayed is real. Even the devices used to disseminate media content (such as televisions and computers) are assigned human qualities. See Deborah Stead, *Sex, Lies and Semiconductors: The Human Links*, *N.Y. TIMES*, Sept. 1, 1996, at F8 (reviewing BYRON REEVES & CLIFFORD NASS, *THE MEDIA EQUATION: HOW PEOPLE TREAT COMPUTERS, TELEVISION AND NEW MEDIA LIKE REAL PEOPLE AND PLACES* (1996)).

² Television, in particular, has been roundly criticized. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 279-81 (1985) (the American viewer is steeped in the consumption-centered version of the good life that television neatly packages and delivers in continuous form); NEIL POSTMAN, *CONSCIENTIOUS OBJECTIONS* 168 (1988) (television is the principal agent of the American "intellectual suicide").

³ Rick Vanderknyff, *Pop Music: Positively Outspoken Negativland: The band takes to Bogart's the kind of electronic message of artistic freedom that got it into legal trouble with U2*, *L.A. TIMES*, May 8, 1993, at F1; see also Steven Mirkin, *Fair Use: The Story of the Letter "U" and the Numeral "2,"* *ENT. WKLY.*, Feb. 17, 1995 (music review).

⁴ See *infra* notes 16 and 19, and text accompanying notes 19 and 20. Trademark law is sometimes used for a similar purpose and to similar effect. See Robyn Meredith, *Rock Hall of Fame Asserts Ownership of Image*, *N.Y. TIMES*, June 16, 1996, at A12. Constraints on expression caused by assertion of trademark rights are addressed in Rochelle Cooper Dreyfuss, *We Are Symbols and Inhabit Symbols, So Should We be Paying Rent?*, 20 *COLUM.-VLA J.L. & ARTS* 123 (1996).

⁵ U.S. CONST. art. I, § 8, cl. 8.

⁶ 17 U.S.C. §§ 101-1101 (1994 & Supp. 1996).

freedom to copy works, not only of popular culture, but of all kinds. In other words, people creating art should be permitted to copy anything and everything. This is not to suggest that copyright serves no purpose: destroying the copyright edifice merely to protect the ability of certain artists to create would be dangerous and foolhardy. Practical limitations on an artist's privilege to copy can be imposed to preserve copyright's incentives for creation.

An artist's privilege to copy may at first seem extreme, but closer examination will reveal that both copyright theory and copyright owners can accommodate such copying. To test the proposed privilege, this Article will use a genre of art—appropriation art—that has gained some notoriety in the art and legal worlds because of its obvious and deliberate copying. Appropriation art will therefore serve as a paradigm; if the proposal can justify copying by an appropriation artist, then it will also justify less extreme copying. Let us begin, then, by examining two scenarios involving artistic appropriation as it is presently practiced.

1. Case One

A museumgoer at a New York art gallery approached an exhibited photograph of a nude by Edward Weston. Setting up a camera, she photographed the work, intending to create a photograph as close to the original as possible. Some time later, she exhibited her photograph of the work (titled "After Edward Weston") in a gallery show of her photographs. The museumgoer/photographer is Sherrie Levine, a New York artist, part of whose work once consisted of creating just such exact photographic reproductions of photographs.⁷

2. Case Two

An artist, browsing tourist-oriented souvenir shops in search of inspiration, discovered a postcard bearing a sentimental portrayal of a string of puppies spread across the laps of a couple seated next to one another. Deciding that the image captured the theme he was seeking (his work based on the card was ultimately exhibited as part of his "Banality Show"), the artist sent the postcard to an Italian studio, where artisans crafted a sculpture (and three copies) from the photograph. The artist was Jeff Koons, whose work illuminates the art inherent in the ordinary by borrowing images from popular culture and transforming them into different media.

⁷ See Carlin, *supra* note 1; Gerald Marzorati, *Art in the (Re)Making*, ART NEWS, May 1986, at 90, 97.

B. *Aesthetic Vocabulary*

Case One and Case Two are linked by the artists' using the work of others as raw material for new art. Each case describes the creation of a work of "appropriation art,"⁸ which we can define for present purposes as a post-modern technique using images fundamental to a culture (and therefore not created by the artist, who creates from the standpoint of an outsider) to make a point about that culture.⁹ Appropriation art was chosen for these examples because it often produces a clear-cut case of copyright infringement. Additional, less obvious examples exist;¹⁰ if the two selected examples are protected, however, the additional examples will be protected as well.

Aesthetic vocabulary has existed in all times and all places; only its private ownership is new.¹¹ Historically, the use of aesthetic vocabulary did not implicate copyright or other intellectual property protections because the language of art did not include trademarks, trade names, or copyrighted works.¹² The latter were simply not disseminated widely enough to become part of a culture's aesthetic vocabulary. With advancing technology, however, it has become both possible and profitable to saturate entire populations with images. As a result, privately owned images have become ubiquitous. In Sherrie Levine's words, "[t]he world is filled to suffocating. Man has placed his token on every stone. Every work, every image is leased and mortgaged."¹³ Thus, artists are deprived of their vocabulary, their source materials, and ultimately, the basic elements of their expression.

The shift from public to private ownership of aesthetic vocabulary is not merely an "arty" development. Art is essential to cultural

⁸ The evolution and significance of appropriation art is described in Carlin, *supra* note 1, at 106, 108-11.

⁹ One could debate whether an image is "fundamental" to the culture in which it originated, whether an image can be fundamental to a culture in which it did not originate (in which case it may have been appropriated by that culture), whether a work makes a point about a culture, and so on. Thus it may never be entirely clear whether a given work "qualifies" as appropriation art. Ultimately, however, the genre in which a work of art may be pigeonholed is unimportant for legal purposes; the privilege proposed in this Article is in any event substantially broader, applying to visual art in general. Appropriation art, however, furnishes an uncommonly fine example of the legal problem today, and therefore is the basis for the factual examples presented.

¹⁰ See, e.g., Thomas Hine, *Notable Quotables: Why Images Become Icons*, N.Y. TIMES, Feb. 18, 1996, § 2, at 1 (describing common uses of aesthetic vocabulary).

¹¹ See MARTHA WOODMANSEE & PETER JASZI, INTRODUCTION TO THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994).

¹² See Hine, *supra* note 10.

¹³ Carlin, *supra* note 1, at 137-38 (quoting MAGAZINE OF THE WADSWORTH ATHENEUM 7 (Spring 1987)).

health; art in society is necessary, not optional. Tyrannical governments have long attempted either to suppress art or to channel it into politically correct themes and statements. Fortunately—not only for artists but for all of us—both suppression and channeling of art have proven, in the long run, to be impossible.

To state that artists perform important functions in society, however, is not to deny the importance of intellectual property rights. Indeed, the rights asserted against artists by the owners of aesthetic vocabulary are significant. As intellectual property becomes vital to the American economy,¹⁴ its owners are increasingly inclined to enforce their rights vigorously. The cultural significance or role of an image in no way reduces this inclination. Cultural significance implies wide recognition, and therein lies a marketing opportunity. So cultural significance, if anything, enhances the likelihood of vigorous enforcement of rights. From the artist's perspective, what is happening is an Armageddon of ownership, crushing the ability of artists to comment on the very phenomenon that is taking away their tools. The dilemma, then, is that we must communicate, but more and more of the necessary words, images, and sounds are private property.

Several factors combine to create this dilemma. First, technology facilitates both the manufacture and the appropriation of culture. Sherrie Levine's art is made possible by the camera, which is needed to create both the copied and the copying works. In addition, technology has produced a centralized culture. Communication technology delivers entertainment to huge audiences from a single source, such as a television broadcaster or a cable system.¹⁵ This centralization greatly simplifies the sale and control, and thereby the exploitation, of culture. The entertainment of immense audiences is determined by relatively efficient transactions; moreover, because the audiences are so large, the sale of advertising in mass media can be a highly profitable enterprise. This causes a kind of conditioning: once the audience (which may number into the millions) has been heavily exposed to a particular

¹⁴ By some estimates, the information industry generates over \$400 billion in revenue annually. It employs seven million people. Foreign sales alone in 1990—seven years ago—are estimated to account for \$40 billion. In that year, only two economic sectors (aviation and agriculture) produced more exports. See Marshall Leaffer, *Protecting Authors' Rights in a Digital Age*, 27 U. TOL. L. REV. 1, 2-3 (1995).

¹⁵ Consider, for example, the changes in music distribution. Historically, it was delivered by living human beings, to the limited audience physically able to be present at the location of the performance. Today, MTV has an audience that, merely by virtue of its size, could not have existed as a single assembly of persons in earlier times. All forms of modern mass entertainment are likewise manufactured and delivered to an audience that, by historical standards, is enormous.

kind of content, it becomes much more difficult for new or different content to attract the audience's attention. People prefer the familiar.

But it is not merely familiarity that results in the power of images from mass culture; rather, such power is a deliberate effect of the process of image creation. Advertising agencies and other purveyors of mass entertainment know which images most powerfully evoke emotion and sensation, and they know that the use of such images will attract a mass audience. Ultimately, such images are assimilated into contemporary aesthetic vocabulary, and at this point, the images become potential tools of communication for artists. Unfortunately for artists, however, the images are simultaneously realizing their maximum value as marketing tools. Copying such images, whether or not for artistic purposes, is likely to result in litigation.¹⁶

Nor are there many appealing alternatives: effective communication requires artists to use the aesthetic vocabulary of their times.¹⁷ It is hard to imagine commenting to present-day society, about present-day society, without using a present-day aesthetic vo-

¹⁶ See, e.g., *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); *Campbell v. Koons*, No. 91 Civ. 6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993). These cases arose out of appropriation artist Jeff Koons's "Banality Show." Perhaps even more than Koons, Sherrie Levine has made it clear that copying was the point of her work. By "taking" the pictures and showing them as hers, she wanted it understood that she was deliberately undermining the most hallowed principles of contemporary art: originality, intention, and expression. See Carlin, *supra* note 1, at 137. Her works clearly state their ancestry: their titles name the author of the copied work. But Levine's copies, though precise, take advantage of randomness and happenstance to vary from the copied works. For example, she has incorporated the imperfections of the printing process into her work. *Id.* at 138. Regarding her "bookplates," she states: "I wanted to make pictures which maintained their reference to the bookplates. And I wanted them to have a material presence that was as interesting as, but quite different from, the original." *Id.*

¹⁷ Aesthetic vocabulary transcends the visual arts; its importance is, for example, quite visible in music. To illustrate: at the time of this writing, popular ("Top 40") music is commercially the most highly prized genre, notwithstanding its banality and repetition. The market for recorded popular music owes its size in part to the ability of popular music to reach people; *i.e.*, to move their emotions in a way that is ultimately experienced as pleasurable. Music of the old masters (commonly referred to as "classical" music) uses the aesthetic vocabulary of the past, and therefore, while it appeals to many people, its audience is more limited. Finally, music that completely ignores aesthetic vocabulary has been composed, mostly in this century. Such music is often referred to as "serious" music of the twentieth century, and its chief distinction is its complete opacity to most listeners (including most of the academicians at whom it is apparently aimed). See Bernard Holland, *Classical View: Composers' Whys Affect the Whats*, N.Y. TIMES, Aug. 11, 1996, at H24. Of course, whether in music or the visual arts, contemporary aesthetic vocabulary includes images from the past. See Hine, *supra* note 10. But these are outnumbered by present-day images. See *id.* This Article concerns itself exclusively with the visual arts; a counterpart privilege to copy music is interesting, but beyond the scope of this work.

cabulary. To do so, however, will infringe copyright.¹⁸ In other words, when the aesthetic vocabulary of a culture becomes private property, copyright is positioned in opposition to art.

C. *Copyright vs. Art*

There is no question that activities like those of Sherrie Levine and Jeff Koons infringe copyrights unless there is some principle exempting their works. Analyzed by conventional means, Sherrie Levine infringed Edward Weston's copyright;¹⁹ Jeff Koons, too, learned painfully that the law is unimpressed by claims of "art."²⁰

Several commentators have recognized this opposing alignment of copyright and art, and have proposed solutions to the problem.²¹ The proposals, however, have serious flaws; none, for example, adequately take into account the circumstances of the artist and of art.²² Furthermore, because the problem arises from an opposing alignment of copyright and art, a solution based only on existing paradigms of copyright protection will tend to favor the copyright holder, at the expense of the artist.²³ Other commentators appear to favor the abolition of copyright altogether, a suggestion that perhaps makes up in boldness what it lacks in elegance.²⁴

This Article proposes that copyright can—and should—be

¹⁸ [I]f you are a nineteenth-century painter, and you painted what is out there . . . you didn't inadvertently suck up any copyrighted material. But if you are a twentieth-century artist . . . and . . . you want to paint what is out there, you will infringe on somebody else's copyright, because the environment is so polluted with protected imagery.

Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion, 13 CARDOZO ARTS & ENT. L.J. 89, 99 (1994) (comments of John Carlin).

¹⁹ Certainly, attorneys for Weston's estate thought so when they saw Levine's work, and threatened to sue her for copyright infringement. See Marzorati, *supra* note 7, at 97. Levine thereafter stopped photographing Weston's work—or any work that would raise a copyright problem—limiting her subject matter to works in the public domain, those owned by the government, or those originating in countries that had no copyright agreement with the United States. See Carlin, *supra* note 1, at 137. Had she not so limited her work, an example might have been made of her, as it was of Jeff Koons. See cases cited *supra* note 16.

²⁰ See cases cited *supra* note 16.

²¹ See *infra* notes 91-106 and accompanying text.

²² Any distinction between art and non-art will inevitably be clouded by the ambiguity concerning the relationship of criticism to art and the meaning of terms like "talent" and "achievement" in the context of art. That a distinction is difficult or imprecise, of course, is no reason not to attempt it, especially when the consequences of the failure to distinguish outweigh the difficulties of the distinction itself. This Article will argue that a serviceable definition of "art" already exists (in the Visual Artists Rights Act of 1990, Pub. L. No. 101-650, Tit. VI, § 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. § 106A & scattered additional sections of 17 U.S.C. (1994))), and will adopt that definition, with some modifications, for the purpose of defining the works that will qualify for the privilege proposed here. See *infra* part III.

²³ An example of this is found in the efforts to solve the problem using an approach based on the fair use doctrine. See *infra* notes 91-98 and accompanying text.

²⁴ See *infra* notes 103-106 and accompanying text.

saved. It suggests a solution to the problem created by the private ownership of aesthetic vocabulary, a solution faithful to the nature of art, calibrated to artists' circumstances, but in full accord with copyright theory. It may be stated simply: artists should be free to copy whatever they like, whenever they wish. In part I, this Article examines the nature and the purposes of copyright, and the doctrines enabling the achievement of those purposes. It also examines the exceptions to those doctrines, and the reasons the exceptions are necessary. Part II examines the problems posed by the privatization of aesthetic vocabulary, and several approaches suggested to remedy those problems. Part III sets out the details of the proposed artists' privilege, exempting artists from copyright infringement litigation based upon both the nature of art and the underpinnings of copyright. The Article concludes that the privilege will preserve both art and copyright.

I. THE NATURE AND PURPOSE OF COPYRIGHT

A. *Copyright, Authorship, and Originality*

Authorship is fundamental to copyright. In the United States, copyright vests initially in the author; it cannot, as a constitutional matter, vest in another.²⁵ The Copyright Act defines the subject matter protected by copyright as "original works of *authorship*."²⁶ Clearly, if one is not an author, one's work is not protected by copyright. But what is meant by the term "author?" The Act provides no definition for this term.²⁷

The quintessential characteristic of copyright authorship is creation, and creation provides much of the justification for the author's exclusive rights.²⁸ But what is "creation?"²⁹ The Act tells us that a work is created "when it is fixed in a copy or phonorecord for the first time."³⁰ Thus, for copyright purposes, the act of fixation defines creation. Is the one who "fixes" then the "author?" Surely not, or at least not always: the author dictating to the stenographer remains the author, notwithstanding that the stenographer carries out the act of fixation.³¹ Perhaps the answer lies elsewhere:

²⁵ U.S. CONST. art I, § 8, cl. 8.

²⁶ 17 U.S.C. § 102(a) (1994) (emphasis added).

²⁷ Some commentators believe that "there is still no genuinely viable definition of [the term] 'author.'" See Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1338-39 (1996); Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991).

²⁸ See *infra* notes 36-39 and accompanying text.

²⁹ On the ambiguity of the term "creation," see VerSteeg, *supra* note 27, at 1338 n.92.

³⁰ 17 U.S.C. § 101 (1994) (definition of "created").

³¹ The Act says as much: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently

the Act protects that which is *original* to the author. Does the requirement of originality in fact add anything to the requirement of creation? Courts pondering this question have not always agreed.

Before the landmark case of *Feist Publications v. Rural Telephone Service*,³² most cases and commentators treated the copyright requirement of "originality" as meaning that the initial copyright holder was the person who "made," "created," or "originated" the work.³³ Such cases imposed no additional requirement of inspiration or creativity. Indeed, some viewed such a requirement as antithetical to copyright, because of the danger of federal judges functioning as art critics in passing on copyright questions.³⁴ Under this approach, a work was protected simply because it was the author's creation. As such, it was hers, much as a piece of furniture she might build would belong to her. The work merited protection simply because it was the author's labor that called it forth. No more was necessary. This approach, sometimes called the "sweat of the brow" doctrine, prevailed for much of the twentieth century.³⁵

Feist, however, squarely held that "originality" for copyright purposes means *both* that the work owes its origin to the author and that the work demonstrates a "creative spark."³⁶ The author must be more than just accountable for the work's existence; she must demonstrate at least some minimal creativity to receive the benefits of copyright.³⁷ The "creative spark" requirement implies an increased likelihood that the work will be meritorious. Under *Feist*, because the work is creative, it is protected: copyright is something that must be, earned by some enhancement of the odds that the work will have some merit.³⁸ Thus, present-day conceptions of au-

permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (definition of "fixed"). Obviously a fixation "under the authority of the author" is not the same thing as a fixation "by the author"; the former implies fixation by a person other than the author.

³² 499 U.S. 340 (1991).

³³ "'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.'" *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) (quoting *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884)); see *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109 (9th Cir. 1970); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 301 (9th Cir. 1965); *Wihtol v. Wells*, 231 F.2d 550, 553 (7th Cir. 1956). Under this approach, an author is one who creates an original work; "original" in this sense means that the work did not exist before the author originated it. See *Burrow-Giles*, 111 U.S. at 58. The work must be independently created, and not copied from other works. See *Feist*, 499 U.S. at 345.

³⁴ See *infra* note 52 and accompanying text.

³⁵ See *Feist*, 499 U.S. at 352-56 (citing cases).

³⁶ *Id.* at 345.

³⁷ *Id.* at 345-46.

³⁸ Cf. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 46 (1967) ("We can, I

thorship imply both origination and creativity, wrapped in the appellation "originality," which in turn justifies the author's exclusive rights.³⁹ We turn, then, to an examination of the rights comprised in copyright.

B. *The Nature of Copyright*

American copyright today is often described as a "bundle of rights."⁴⁰ Though it may be trite, the phrase is nevertheless accu-

think, conclude that to make the copyright turnstile revolve, the author should have to deposit more than a penny in the box").

³⁹ See *Feist*, 499 U.S. at 345; *Rogers v. Koons*, 960 F.2d 301; see also James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1415 (1992) [hereinafter Boyle, *A Theory*]; James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 632-43 (1988); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 297-305 (1992), reprinted in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE, supra note 11. This idea of the author as a solitary genius, the creator of a thing of beauty, is implicit in the *Feist* view of authorship, and has been challenged by some commentators. See, e.g., Boyle, *A Theory*, supra, at 1415, 1453, 1463; Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990). In the view of *Feist's* critics, authorship is

more akin to translation and recombination than it is to creating Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form.

Id. at 966-67 (footnotes omitted); see also Dennis S. Karjala, *Copyright and Misappropriation*, 17 U. DAYTON L. REV. 885 (1992); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993). In short, everything has been said and done before. See, e.g., *Emerson v. Davies*, 8 F. Cas. 615 (C.C.D. Mass. 1845) (No. 4,436).

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection.

Id. at 619, quoted in Alfred C. Yen, *The Interdisciplinary Future of Copyright Theory*, 10 CARDOZO ARTS & ENT. L. J. 423, 424 n.4 (1992); cf. Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control Over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y 93, 102-03 (1994) (questioning whether "the concept of romantic authorship . . . is a viable trend within American copyright culture").

⁴⁰ See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985); Hamilton, supra note 39, at 95; Leaffer, supra note 14, at 4. It was not always so. Before the adoption of the Act, copyright was considered "monolithic." Monolithic copyright cannot, in theory, be subdivided or transferred in units less than the whole; as a practical matter various ways around this impediment were found. One consequence of the theoretically indivisible copyright was the great importance attached to the distinction between an "assignment" of copyright and a mere copyright "license." The former was a transfer of the entire copyright; the latter did not amount to a transfer (as indeed it could not, since less than the entire interest was involved), but was just a contractual promise by the licensor not to sue the licensee for copyright infringement during the lifetime of the license. To-

rate: copyright comprises a number of distinct interests. Foremost among these are the owner's economic interests, each of which is premised on one or more means to exploit works of authorship. Thus, in section 106, the Act gives authors the exclusive right to reproduce the work, to adapt the work, to distribute copies of the work, to perform the work publicly, to display the work publicly, and (in the case only of sound recordings) to perform a work publicly by means of a digital audio transmission.⁴¹ Copyright is designed to make it difficult to profit from a work without the author's permission (and possible participation in the profit).

Each right in the copyright bundle may be transferred separately, and each may be divided as finely as the parties wish. Moreover, if the right (or fragment of the right) is transferred exclusively, the transferee is considered an "owner of copyright" for all purposes of the Act, thereby acquiring the ability to enforce the right in court against all comers, including the transferor.⁴² The principle applies as much to rights or fragments transferred for a limited time as to those transferred "in perpetuity" (that is, for their entire duration).⁴³

The rights we have discussed so far—the rights of exploitation—can be distinguished from another, more basic set of rights; namely, the rights of consent. While the exploitation rights give the author exclusive rights to exploit the work for profit, the consent rights give the author exclusive rights to consent to someone else exploiting the work (and, of course, the right to refuse consent if the compensation offered is inadequate).⁴⁴ Consent rights are necessary, practically speaking, because authors are themselves seldom able to exploit their works commercially; the transfer of a right to a third party better able to do so, such as a publisher, can

day, less than the entire interest in a copyright can be transferred, but an important distinction remains between exclusive and non-exclusive licenses. Non-exclusive licenses under the Act are the equivalent of "licenses" under the pre-1978 law, and do not transfer any part of a copyright. An "exclusive license" under the Act is similar to an "assignment"—that is, a transfer—under the old law. An exclusive license is limited, however, to the particular rights licensed. Under either version of the law, only an owner of copyright can sue for copyright infringement. Therefore, being found merely a "licensee" under the old statute or a "non-exclusive licensee" under the Act means that one will be unable to enforce the licensed right; rather, the licensee will have to look to the licensor to enforce the licensee's rights.

⁴¹ See 17 U.S.C. § 106(a)-(f) (1994) (enumerating the exclusive rights of authors). In addition, section 1101 adds an exclusive right of fixation for musical performances. See 17 U.S.C.A. § 1101 (West 1996).

⁴² See 17 U.S.C. § 201(d)(2) (1994).

⁴³ *Id.*

⁴⁴ The idea is expressed indirectly in the 1976 Act by giving the author the exclusive right "to do *and to authorize*" the listed actions. See 17 U.S.C. § 106 (1994) (emphasis added); see also Hamilton, *supra* note 39, at 95-96.

be analyzed as an exercise of the corresponding consent right. An author may deny consent for any reason, or none at all.⁴⁵ The right to deny consent does not depend upon any actual or threatened exploitation by a third party for profit (that is, it does not depend upon threatened infringement), and it may be asserted even against a use that society regards as desirable.⁴⁶

C. *The Purpose of Copyright*

The most obvious effect of copyright is to permit authors to charge a fee for the exercise of an exclusive right. For a work that is in demand, the potential economic value of the author's exclusive rights is intuitively clear, and the incentive to create generated by such rights seems obvious. For works not in demand, the incentive is less visible. Regardless, it appears there will always be some authors motivated by the hope of future success in the marketplace, no matter how elusive the success or unrealistic the hope.⁴⁷

Because of copyright's obvious rewards to authors, it is tempting to conclude that the purpose of copyright is to reward authors for creating their works. Copyright's primary purpose, however, is not to reward authors. Instead, as expressed in the Constitution, its aim is "to promote the Progress of Science and useful Arts."⁴⁸ This primary aim is to be accomplished "by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."⁴⁹ The emphasis is on promoting the progress of science and the useful arts, not on securing exclusive rights to authors and inventors. The point of copyright is not the reward *per se*, but rather incentive effect: the reward reaped by

⁴⁵ The exception, when consent rights are absent but exploitation rights are not, involves the mechanism called the compulsory license. A work subject to a compulsory license may be used under the circumstances specified by the license (usually found in a statute), upon payment of the specified fee. See *infra* part I.D.2. When consent rights are absent, however, the exploitation rights are no longer exclusive, but are shared with the compulsory licensee(s).

⁴⁶ There are situations when a use is considered sufficiently valuable to society, and the potential for harm to the author sufficiently remote, that the author's consent and exploitation rights are abridged. Such cases fall under the fair use doctrine. In this sense the fair use doctrine functions as a sort of "safety valve," relieving pressure created by the occasionally rigid rules of copyright. See *infra* part I.D.1.

⁴⁷ Or at least this is what the economic incentive presupposes. Not everyone accepts the economic incentive underlying copyright; some maintain a more-or-less pure "natural rights" approach—for example David Ladd, the Register of Copyrights from 1980-85. See David Ladd, *The Harm of the Concept of Harm in Copyright*, 30 J. COPYRIGHT SOC'Y 421 (1983). Others find the American idea of copyright, with its economic underpinnings, more stifling than helpful insofar as public access to works is concerned, and occasionally call for the abolition of copyright altogether. See, e.g., Jaszi, *supra* note 39.

⁴⁸ U.S. CONST. art. I, § 8, cl. 8.

⁴⁹ *Id.*

copyright holders is constitutionally significant only to the extent it "promote[s] the Progress of Science and useful Arts."⁵⁰

Notably absent from this formulation is any judgment of quality. Given the choice, most of us would probably opt to read one good book rather than a dozen (or a thousand) poor ones. Why does copyright appear indifferent to quality? The answer lies partly in the difficulty of accurately and objectively measuring something as elusive as the "quality" of a work. History is replete with examples of works, hailed today as the products of genius, but reviled by experts at their creation as worthless.⁵¹ In light of the rather dismal history of failure by critics and other experts to anticipate history's judgments, the arbiters of copyright (for example, federal judges) are unlikely to be a reliable barometer of quality in art,⁵² and copyright law requires no such determinations.

While unreliability alone would be enough reason to banish notions of aesthetic quality from copyright, judging the "quality" of art is additionally dangerous to free speech. "The marketplace of ideas which the First Amendment nurtures is . . . essentially a *copyright* marketplace."⁵³ Deciding which works are worthy of copyright, and, therefore, which authors deserve remuneration, is rife with potential for oppression of unpopular persons and suppression of unpopular ideas.⁵⁴ Thus, to permit the federal judiciary to decide copyrightability according to quality would be both aestheti-

⁵⁰ See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); Leaffer, *supra* note 14, at 5. To say that the remunerative aspect of copyright is secondary, however, is not to diminish its practical importance: the constitutional scheme depends on the continued value of the reproduction right. The exclusive rights of authors must remain sufficiently valuable to stimulate authors to produce new works, thereby ultimately benefitting the public. Thus, copyright remunerates authors, who respond by creating additional "works"; new authors, seeing an opportunity to earn a reward, continually arise to replace the old.

⁵¹ A brief list of the luminaries who were sharply criticized by their contemporaries, sometimes to the point of being disparaged as charlatans, would include James Joyce, Marcel Proust, D.H. Lawrence, Ludwig van Beethoven, and Igor Stravinsky. For more on the mutability of taste and the perception of aesthetic quality, see generally BERNHARD BERENSON, *AESTHETICS AND HISTORY OF VISUAL ART passim* (1948); Goredana Lazarevich, *The Changing Perception of the Composer*, *STRUCTURIST*, 1985-1986, 59-64.

⁵² In the words of Justice Holmes, "[i]t 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). The exception to which Holmes refers arises from the necessity of determining whether a given work possesses the requisite "originality" to qualify as a copyrightable work at all. *Id.*

⁵³ Ladd, *supra* note 47, at 426 (emphasis in original).

⁵⁴ In the words of Justice O'Connor, "it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Harper & Row*, 471 U.S. at 558.

cally undesirable and unacceptably dangerous to free speech.⁵⁵

Is the challenge of distinguishing the genius from the hack too intimidating for copyright? It is. Nevertheless, saying that copyright is indifferent to quality would be wrong. Rather, copyright takes an indirect approach: by encouraging the production of more works, copyright encourages the production of more *good* works; by not explicitly including quality in the incentive structure, copyright avoids regulating expression.⁵⁶

Copyright's purpose, then, is to remunerate authors, but not because society believes them to be inherently noble or deserving of remuneration. Instead, copyright aims to benefit society as a whole by ensuring access to more works, and thereby access to more *good* works. Copyright's essential strategy is to manipulate directly an aspect of the legal system—securing exclusive rights to authors—to accomplish a goal that cannot be achieved by direct manipulation—increasing the quantity and quality of the works to which the public has access.

D. *Exceptions to Authorial Exclusivity*

To this point, we have assumed that the author's "exclusive" right of reproduction is literally exclusive. A closer look reveals, however, that copyright "exclusivity" is more figurative than real. Manifestly, there are practical exceptions to exclusivity: the fair use

⁵⁵ There is another reason that copyright does not inquire into quality: copyright rests (at least in part) on a foundation of natural law. That is, copyright is not granted to an author so much as it naturally inheres in the author, as the creator of the work. See, e.g., Ladd, *supra* note 47, at 426 (quoting Prof. Nathaniel Shaler:

[I]ntellectual property is, after all, the only absolute possession in the world The man who brings out of the nothingness some child of his thought has rights therein which cannot belong to any other sort of property The inventor of a book or other contrivance of thought holds his property, as a god holds it, by right of creation).

Consequently, unlike a patent, copyright is not something that is applied for and granted; rather, copyright arises from the moment a work is "fixed" in a tangible medium of expression. The application to the government is for a *registration* of copyright, as distinct from a *grant* of copyright; the Copyright Office does not function as a "gatekeeper," but merely records the already-extant fact of copyright. See 17 U.S.C. §§ 102(a) ("[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression"), 408 ("[a]t any time during the subsistence of . . . copyright . . . the owner of copyright . . . may obtain registration of the copyright claim") (1994); Aff. of Copyright Office Examiner Frank Vitalos, *Whimsicality, Inc. v. Rubie's Costume Co.*, 891 F.2d 452 (2d Cir. 1990) (Nos. 527, 619, 89-7829, 89-7887) (copy on file with the author). Therefore, any work will be protected, provided it is original to the author and is fixed in a tangible medium of expression. See *Feist*, 499 U.S. at 345.

⁵⁶ Moreover, it is doubtful that there exist any feasible means to affect quality directly through legal rules. The difficulties experienced by art critics in making contemporary judgments about quality, see *supra* notes 51-55 and accompanying text, testify to the impossibility even of defining aesthetic quality in a way that transcends a narrow time and place. Certainly no one interested in art wants Congress to legislate artistic "quality" standards. As a practical matter, therefore, quality must be enhanced indirectly.

doctrine,⁵⁷ compulsory licenses,⁵⁸ and hybrids of these⁵⁹ are the basis for many common—and lawful—occasions of copying. Can such copying without the author's consent be justified under the constitutional scheme for copyright? It can, and not merely in a manner consistent with that scheme, but in fact required by it.

The exceptions to the exclusive right of reproduction arise from copyright's dominant purpose. Ultimately, increased public access to works of authorship depends on preservation of the incentive to create; the economic value of the author's exclusive rights must not be impaired. But not every unauthorized exercise of the author's rights will impair the economic incentive to create. Determining whether an exception to the author's exclusive rights should apply, then, is in part to determine whether any particular unauthorized use is dangerous because it impairs the economic incentive to create (or whether it is less dangerous, or perhaps not at all dangerous, because little or no harm is done to the creative incentive). An analysis built on this foundation provides a framework within which exceptions to authorial exclusivity can be assessed meaningfully, that is, in terms of encouraging or discouraging the production of additional works.

The analysis must begin with an axiom: copyright law should permit a use that serves copyright's ultimate goal. A use that increases public access to works, in both the long and the short term, should be permitted by copyright—even if the author's rights thereby appear to be invaded. Both the long-term and short-term perspectives are important here; alone, the short-term perspective is insufficient as a basis for principled decisions regarding exceptions to authorial exclusivity. Virtually all uses will increase short-term availability, if only by adding to existing availability the particular use in question. From a long-term perspective, however, without the author's consent, a use may function as a disincentive to authors, and thereby damage the public good by diminishing the flow of new works.

The creative incentive of copyright is not measured directly; instead, the economic impact of the use is used as a proxy. The impact of any use on copyright's economic incentive to create is directly proportional to the economic impact of that use; the greater the positive impact, the more creative incentive is provided, and the greater the adverse economic impact, the more harm is

⁵⁷ See *infra* notes 64-78 and accompanying text.

⁵⁸ See *infra* notes 79-81 and accompanying text.

⁵⁹ See *infra* notes 82-84 and accompanying text.

done to the economic incentive to create.⁶⁰ Any unauthorized use undermines copyright only to the extent that it impairs the economic incentive to create: if a use does not harm the incentive to create, it will not diminish the public's access to works of authorship, and copyright's purposes are served by the additional increment of access that the use provides.

A strong case for an exception can be made, therefore, when a use provides a significant public benefit, in the form of increased access to works, and the author's economic incentive to create new works is not, or is only minimally, impaired. Slight impairment may be acceptable because accomplishing copyright's purpose requires us to weigh, against the impairment, the public benefit accruing from the exception.⁶¹ For example, assume that a particular use enhances the public good by increasing access to works of authorship. Assume further that this use does some harm, by diminishing the author's economic incentive to create. If the use does *more* harm than it does good—for example, if it eliminates the author's economic incentive to create—we should conclude that the use does not serve the goal of copyright and should be treated as copyright infringement. But if the use provides more benefit than it causes harm, it should be treated as an exception to authorial exclusivity.⁶² In other words, the conclusion that an exception is justifiable does not require an utter lack of impact on

⁶⁰ It follows that a use with no economic impact is neutral with respect to copyright's creative incentive.

⁶¹ It may be that, as a practical matter, *any* unconsented or uncompensated use at least arguably diminishes, however slightly, the author's incentive to create. We can assume, without conceding, that this is the case.

⁶² The difficulty of measuring both the benefit and the harm counsels conservatism in declaring exceptions to authorial exclusivity. Thus, we should look for relatively clear-cut cases of benefit outweighing harm, lest the imprecision of our measurement mislead us. Moreover, the balancing of public benefit against public harm does not amount, as some have feared, to "accord[ing] lesser rights in those works that are of greatest importance to the public." *Harper & Row*, 471 U.S. at 559. As the Court recognized in *Harper & Row*, author's rights ought not to vary according to the kind of work the author produces. Rather than changing the scope of the author's rights, the balancing required by copyright is sensitive to the nature of the allegedly infringing use made of a work. It is a more precise way of measuring the rights of an author, which do not extend further than necessary to provide a creative incentive and thereby enhance public access to works of authorship. What copyright balances is public harm against public good, not detriment to the author against the social value of dissemination. *Cf. id.* (quoting Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)). Detriment to the author is not a substitute for harm to the public caused by diminished access to works, although it may be a factor in determining the likelihood of such harm. "If every volume that was in the public interest could be pirated away by a competing publisher . . . the public [soon] would have nothing worth reading." *Harper & Row*, 471 U.S. at 559 (quoting Lionel S. Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43, 78 (1971)). This is why "public harm" for our purposes is more accurately measured by harm to the creative incentive, and not by economic harm to the author. *See infra* note 65.

the author's economic incentive. Rather, it requires a balancing of public harm against public good.

Courts engage regularly, although not always consciously, in this balancing exercise. It is most visible in cases involving the fair use doctrine, which provides that in certain circumstances a work may be copied despite the absence of both consent from, and payment to, the author.⁶³

1. Fair Use

The fair use doctrine provides a judicial safety net for certain uses of copyrighted works: unauthorized use of a work does not infringe copyright, if the use is "fair." The Act notes a few examples of uses that may be fair in appropriate circumstances, including criticism, comment, news reporting, teaching, scholarship, and research.⁶⁴ Fair use is most likely to be found when the public benefit of the use is relatively clear, and the public harm (in the form of damage to the creative incentive) resulting from the use is relatively attenuated.⁶⁵

To decide whether a particular use is fair, the Act requires a

⁶³ See 17 U.S.C. § 107 (1994); *Campbell v. Acuff-Rose Music Pub. Co.*, 510 U.S. 569 (1994); *Sony*, 464 U.S. 417; see also WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1995); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

⁶⁴ See 17 U.S.C. § 107.

⁶⁵ See *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966).

The fundamental justification for the [fair use] privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, 'To Promote the Progress of Science and Useful Arts.' . . . To serve that purpose, 'courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art

Id. (quoting *Berlin v. E.C. Pubs., Inc.*, 329 F.2d 541, 544 (2d Cir. 1964)); see also, *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984):

Fair use allows a court to resolve tensions between the ends of copyright law, public enjoyment of creative works, and the means chosen under copyright law, the conferral of economic benefits upon the creators of original works. Where strict enforcement of the rights of a copyright holder . . . would conflict with the purpose of copyright law or with some other important societal value, courts should be free to fashion an appropriate fair use exemption.

Id. Reduced public access to works of authorship is not usually addressed explicitly in judicial analyses of fair use; when reduced access is considered, it is described in terms only of the reduced access to the work in dispute. However, the statute requires a court to consider the impact of the use on the market for the copied work. See 17 U.S.C. § 107(4). This is a measurement of the economic harm caused to the author of the copied work by the use, and is, as a practical matter, often but not always the same as economic harm to the economic incentive to create. For example, a very small economic harm to the author is economic harm nonetheless, but it may well leave intact the author's incentive to create. Similarly, the idea of economic harm to a person is relative; what is serious harm to an author of modest means may be trivial to a wealthy author. Surely the scope of copyright does not depend on the author's net worth; rather, what is important is the damage to the economic incentive to create caused by the use, and not merely the creative incentive of the author of the copied work, but of authors in general.

court to consider four nonexclusive factors: (1) the purpose and character of the use, including whether it is for commercial or non-profit purposes; (2) the nature of the copyrighted (the copied)⁶⁶ work; (3) the amount and substantiality of the portion used in relation to the copied work as a whole;⁶⁷ and (4) the effect of the use upon the potential market for or value of the copied work.⁶⁸ A provision was added in 1992 to state explicitly that the fact that a work is unpublished does not alone bar a fair use.⁶⁹

The weight accorded each of these factors has varied over time and with the nature of the use.⁷⁰ Of the four factors, however, two consistently rank among the most important: the market impact of the use on the author of the copied work (the fourth factor)⁷¹ and the purpose and character of the use (the first factor).⁷² The significance of market impact is easy to understand. Rational remuneration of authors depends on accurate information about both authorized and unauthorized uses of their works.⁷³ The adverse market impact of an unauthorized use is seen most clearly when the copying work functions as a perfect or near-perfect market substitute for the copied work. Market substitution is likely to severely damage, if not eliminate altogether, copyright's economic incen-

⁶⁶ Obviously, there may be (and in many cases are) two "copyrighted" works: one that was copied (the "copied work") and one in which the copying occurred (the "copying work"). The Act uses the term "copyrighted work" to refer to the former, and has no word for the latter. See 17 U.S.C. § 107. The copying work, of course, will be copyrightable only to the extent it does not infringe. *Id.* § 103(a).

⁶⁷ The portion used is compared to the copied, rather than the copying, work. See 17 U.S.C. § 107. Thus it may be infringement to use 90% of a short work, even if the use amounts only to 0.01% of the copying work. Moreover, "amount and substantiality" for purposes of the Act are both quantitative and qualitative measures; if the "best parts" of a work are taken, fair use is less likely than if unimportant parts are copied. See *Harper & Row*, 471 U.S. at 566. Although not explicitly authorized by the Act, courts on occasion examine the role played by the copied material in the copying work. See *id.*

⁶⁸ See 17 U.S.C. § 107. All four factors must be considered, but none is exclusive. See *Campbell*, 510 U.S. at 577-78; *Harper & Row*, 471 U.S. at 549.

⁶⁹ See Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145, reprinted in 1992 U.S.C.C.A.N. 2553-63.

⁷⁰ Compare *Sony*, 464 U.S. 417 (fair use analysis confined to one paragraph; significant emphasis laid on the "nature of the use"; any commercial use "presumptively unfair"), with *Campbell*, 510 U.S. 569 (extensive fair use analysis; commercial use potentially fair).

⁷¹ See, e.g., *Campbell*, 510 U.S. at 590-94; *Harper & Row*, 471 U.S. at 566 ("This . . . factor is undoubtedly the single most important element of fair use") (footnote omitted); *Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir. 1997); *Leval*, *supra* note 63.

⁷² See, e.g., *Campbell*, 510 U.S. 569; *Sony*, 464 U.S. 417; KAPLAN, *supra* note 38, at 68; *Leval*, *supra* note 63, at 1111.

⁷³ The trend in the cases is to go beyond impact on the author's actual market to assess impact on *potential* markets, sweeping in markets that the author herself may never have identified or may even have specifically avoided. *Salinger*, 811 F.2d 90, makes a good illustration. Author J.D. Salinger's avowed intention was never to permit his letters to be published. Nevertheless, the Second Circuit found an unauthorized use of his letters resulted in a market impact: while the author's intention might appear to eliminate any existing "market," it did not eliminate a *potential* market. *Id.* at 99.

tive for artists to create. But lesser forms of harm exist as well. A use may become unfair, and thus infringing, long before the creative incentive is destroyed. Any non-trivial adverse impact on the copied author's market is enough to place the fair use defense out of reach.⁷⁴

Certain uses are more likely than others to further the policy of copyright; the second factor consistently found important in fair use cases is the purpose and character of the use.⁷⁵ This factor requires an examination of the use and its tendency to further, or impede, the primary goal of copyright. Courts and commentators in recent years have stressed the idea that to be fair, a use should be "transformative."⁷⁶ A transformative use constitutes creative departure from the original work.⁷⁷ Access to such a creative departure is presumably in the public interest; if the use meets this criterion, it is more likely to be held non-infringing than if it is not transformative. This analysis dovetails well with the market-impact approach discussed immediately above, insofar as market substitution of a transformative work for the copied work is less likely than the substitution of a nontransformative work: a "transformative" work is by definition different in some important way from the copied work, and therefore is probably not a good substitute. Thus, to the extent a use is transformative, adverse market impact is less likely.⁷⁸

Fair use, then, describes the perimeter of authors' rights—a boundary beyond which neither the rights of consent nor the rights of exploitation extend. Compulsory licenses, to which we now turn, principally abridge the author's right to consent (and thus the ability to bargain remuneration), while providing at least some remuneration for the licensed use.

2. Compulsory Licensing

As in fair use, the balancing of public good against public harm is visible in compulsory licensing, but in a different form. A compulsory license is a permission, provided by law (most often by

⁷⁴ See *Harper & Row*, 471 U.S. at 566-67; *Sony*, 464 U.S. at 451, 484 n.36.

⁷⁵ See *supra* note 72.

⁷⁶ See, e.g., *Campbell*, 510 U.S. 569; Leval, *supra* note 63, *passim*.

⁷⁷ See *Campbell*, 510 U.S. at 579 (transformative use is one that "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message"). The more "creative" or socially desirable the use, the more likely it is to be deemed fair. A drawback to this approach is that courts will inevitably become bound up in questions of creativity, perilously close to artistic merit and contrary to Justice Holmes's admonition in *Bleistein*, 188 U.S. 239.

⁷⁸ See *Campbell*, 510 U.S. at 580 n.14.

statute), to use a work in a way that, but for the license, would infringe.⁷⁹ It is typically conditioned upon the payment of a fee (usually specified by statute) to the copyright holder or to some agency for distribution to copyright holders. A comparison with the fair use exception may be helpful: to the extent a use is “fair,” the copied author lacks both the right to consent *and* the right to receive remuneration. A compulsory license, by contrast, deprives the copied author of the right to consent only (and incidentally of the ability to bargain for the *amount* of remuneration). The right to *receive* remuneration, as a fee, is preserved.⁸⁰

Viewed from the perspective of balancing public good against public harm, a compulsory license suggests that the public good inherent in the licensed use is clear, and should be encouraged. This encouragement is provided by depriving the author of the right to consent to (or prohibit) the use, just as it is with fair use. The compulsory license diverges from fair use, however, in that the public harm of the former—that is, the possibility that the economic incentive to create will be unacceptably diminished—is not obviously outweighed by its public benefit.⁸¹ To tip the scales consistently in favor of the public good, a use subject to compulsory license is conditioned on payment of a license fee, providing some compensation and additional creative incentive to the copied author and protecting the public from the consequences of a more severe impairment of the economic incentive to create.

3. Hybrid Regulation

Certain uses are regulated by the Act as hybrids of fair use and compulsory license. For such uses the Act provides neither consent nor compensation rights to the author of the copied work (an approach resembling fair use), but spells out in considerable detail the requirements and limitations of the qualifying use (resembling a compulsory license).⁸²

⁷⁹ The Act provides compulsory licenses for, among other things: fixing in a sound recording and distributing to the public a musical work that has previously been recorded and distributed (*e.g.*, a performer’s “re-make” of another performer’s previously issued recording), 17 U.S.C. § 115 (1994); certain secondary transmissions to the public of television broadcasts embodying performances or displays of works, which would otherwise be actionable, *id.* § 111(d); and certain performances of published nondramatic musical works and displays of pictorial, graphic, and sculptural works by public broadcasting entities, *id.* § 118.

⁸⁰ *Cf.* Hamilton, *supra* note 39, at 96 (analogizing compulsory licensing to constitutional “taking” of real property).

⁸¹ This could be the result of the benefit being smaller, or the risk of harm being greater.

⁸² “Hybrids” of the fair use and compulsory license approaches include, for example, the provisions of the Act regarding copying in libraries and archives, see 17 U.S.C. § 108

A hybrid approach can be useful, particularly when the fair use doctrine cannot dependably exempt certain uses from infringement claims. Usually these uses are justifiable in fair use terms, meaning that the public good of the use clearly outweighs the public harm. Minor issues of doctrine, however, unrelated to the balancing of harm against good, may prevent such uses from being considered "fair." For example, the fair use defense is rarely available when the copied work is copied in its entirety,⁸³ yet sometimes the public good might clearly be served by permitting such a use. By carefully delineating a desired use in the statute, it can be encouraged without encountering the difficulties of a judicial determination of fairness.

Hybrid regulation also avoids another drawback of the fair use doctrine: the "chilling" effect on authors who might wish to use a work, but who are unable or unwilling to risk litigation to determine if their use will be considered "fair." It is difficult to predict in advance whether a particular use will be pronounced fair if challenged by the author of the copied work. This uncertainty of outcome of fair use litigation produces a "chilling" effect that may on occasion stifle the use altogether. Merely the *threat* of litigation can have a serious chilling effect on defendants of modest means. A would-be user who is financially unable to fight a fair use battle will avoid subjecting herself to the possibility of defending such a lawsuit by avoiding the use altogether.⁸⁴ This chilling effect, by inhibiting uses that would increase public access to works of authorship, directly undermines copyright's goal.

Hybrid regulation can, however, sometimes avoid the fair use chill. By carefully circumscribing the regulated use, hybrid regulation avoids damage to the author's creative incentive; by greatly reducing the likelihood of litigation over the use, hybrid regulation avoids the chilling effect of the fair use doctrine.

II. COPYRIGHT OR ART?

In our media-saturated society,⁸⁵ copyright is inevitably op-

(1994), and those concerning certain secondary transmissions in hotels, apartment buildings and the like, *see id.* § 111(a). In each of these examples, the Act provides a right to copy without payment (like fair use), but subject to elaborate requirements and limitations (like a compulsory license).

⁸³ *See infra* note 95.

⁸⁴ Thus, after being contacted by lawyers representing Edward Weston's estate, appropriation artist Sherrie Levine discontinued artistic appropriation of works that might raise any copyright problem. *See supra* note 19.

⁸⁵ *See supra* notes 1-2 and accompanying text.

posed to art. All art, and especially art that reflects back at society⁸⁶ the contents of the media deluge, is at risk. This section will examine the dilemma caused by the private ownership of aesthetic vocabulary and some possible solutions.

A. *Copyright and the Suppression of Art*

The principal copyright difficulty posed by art is that art sometimes uses (and in the case of appropriation art, *always* uses), as its raw material, images—"works"—already in existence. We have previously examined aesthetic vocabulary and the mass media, to understand why art must do this. We should remember, however, that aesthetic justification for artistic appropriation is unnecessary, whether as a condition of copyright protection or in determining infringement. In theory, at least, neither copyright nor infringement may properly be conditioned on a demonstration of aesthetic merit.⁸⁷ Nevertheless, many people instinctively react in an unsympathetic way to the works of appropriation artists. Witness, for example, the Second Circuit's harsh denunciation of Jeff Koons's work in its decision in *Rogers v. Koons*.⁸⁸

The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism. . . . [I]t is not really the parody flag that appellants are sailing under, but rather the flag of piracy Here there is simply nothing in the record to support a view that Koons produced "String of Puppies" for anything other than sale as high-priced art.⁸⁹

It seems fair to ask whether copyright requires (and if it does, *why* it requires) artists to do more than produce works "for sale as high-priced art." Quite to the contrary, American copyright, with

⁸⁶ "We claim the right to create with mirrors." Compact disc included in NEGATIVLAND, *supra* note 1, at track 10.

⁸⁷ See *Bleistein*, 188 U.S. at 251-52.

It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.

Id.

⁸⁸ 960 F.2d 301.

⁸⁹ *Id.* at 303, 311, 312.

costs, both in time and in money, will by necessity avoid using images that might force them into court. That is to say, they will abandon their art.⁹⁸ "Fair use" for these artists means "no use"; it is merely the illusion of a solution.

Plainly, fair use is not a credible solution to the conflict between copyright and art.

2. Compulsory Licensing

Like fair use, a compulsory license would permit artists to use copyrighted works as source material for art; unlike fair use, however, a compulsory license would require some payment. This would enable artists to create while protecting the authors of the copied works by providing some equitable means of payment for the use of their works. Scholars of copyright, including Professor Marci Hamilton⁹⁹ and Judge Pierre Leval,¹⁰⁰ have described such a system.

If it could assure the artist freedom from litigation and threats of litigation, a compulsory license could overcome the chilling effect of the fair use doctrine. This will only be the result, however, if the usual incidents of a compulsory license are reduced to the point that the arrangement no longer resembles a compulsory license at all. Thus, a compulsory license is normally conditioned upon the payment for use of the copied work. Demands for payment, however, have an obvious chilling effect on the creation of art. Avoiding this chilling effect requires a payment so small as to be economically insignificant, which in turn raises the question whether both society and the respective authors would be better off without the payment and the associated administrative burden.¹⁰¹

⁹⁸ Indeed, this has already happened. See *supra* note 19.

⁹⁹ Professor Hamilton's "takings model" is not explicitly termed a compulsory license, although it has all the essential characteristics of a compulsory license. See Hamilton, *supra* note 39.

¹⁰⁰ See Leval, *supra* note 63. Judge Leval's proposal, although described in terms of fair use, involves payment and therefore is closer to a compulsory license than it is to fair use. One of the chief difficulties of this proposal is Judge Leval's suggestion that the "fair" price be set by a court. *Id.* at 1124-25. Because litigation or alternative court proceedings would be required, it seems inevitable that this proposal would cause the same chilling effect as the fair use proposals.

¹⁰¹ In addition, payment for use should be linked to damage to the creative incentive. Thus, payment may be appropriate in the case of mass production and exploitation of a work (*e.g.*, distribution to the public of a recording of a musical work). Payment, however, is not called for in the case of art, which does not involve mass exploitation of the copied work. Similarly, the case for payment becomes stronger when the target market for the copied work is identical to that for the copying work, as it often is in the normal case covered by a statutory compulsory license. For example, in most of the cases covered by section 115 (providing a compulsory license for the "cover" of a musical work by a recording artist once the work has been recorded and distributed to the public), the target markets—consumers of popular music—are the same for the copied and the copying work. In

Additionally, a compulsory license is typically applied for and granted on an individual, case-by-case basis.¹⁰² The application transaction, however, would unjustifiably inhibit the creation of art and is therefore inappropriate.

3. Abandoning Copyright

Some commentators have suggested that copyright is rapidly becoming obsolete, and (responding, perhaps, to the privatization of aesthetic vocabulary) that copyright as it is now understood takes insufficient account of collaborative effort and pays inappropriate homage to notions of "originality."¹⁰³ This raises the most radical possibility, at least from the perspective of traditional copyright law, namely the abandonment of copyright altogether. This option has, at least, the virtue of simplicity. If another's legal right hinders one's own ability to do something, what could be simpler than taking away the other's right? It would also be effective; if implemented, it would eliminate any concerns an artist might have about infringement litigation.

On the other hand, to abandon copyright is unnecessarily sweeping. While one can debate the merits of copyright in the abstract,¹⁰⁴ there is nothing in the cases confronting courts today (and nothing in art, either) that requires such an extreme approach. The problem is not that art cannot exist within *any* copyright regime; the problem is that the present copyright regime treats the artist no differently than the merchandiser.¹⁰⁵ Eliminating copyright to unencumber artists is throwing out the baby with the bath water.¹⁰⁶

III. A PROPOSAL

Each approach discussed so far—fair use, compulsory license,

the case of art, however, the target market is usually different from that for the copied work.

¹⁰² See, e.g., 17 U.S.C. §§ 111, 115, 118, 119 (1994) (cable transmissions, phonorecords, public broadcasts, and satellite transmissions); see also Scott L. Bach, Note, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 385-87 (1986) (discussing history and operation of compulsory licensing).

¹⁰³ See Jaszi, *supra* note 39; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992), reprinted in THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE, *supra* note 11.

¹⁰⁴ A fascinating discussion of copyright from a number of different perspectives appears in *Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion*, *supra* note 18.

¹⁰⁵ See Marci A. Hamilton, *Four Questions About Art*, 13 CARDOZO ARTS & ENT. L.J. 119, 119 (1994) (the first question: "Why do we treat art in our legal culture like nonart?").

¹⁰⁶ In addition, only some artists would benefit from the elimination of copyright; others, such as plaintiffs in copyright litigation, obviously would not benefit.

its relentlessly economic underpinnings, would seem to be completely fulfilled by the protection of Jeff Koons's work. In any case, given the purpose of copyright—to enhance public access to works—there is a certain irony in invoking copyright to stamp out a genre of art. More importantly, if copyright is invoked to benefit primarily the authors of the raw material used by artists, rather than the public, then it is used in a way that is offensive to both art and the Constitution.⁹⁰

B. *Solutions from Within the Copyright Paradigm*

The dilemma posed by privately owned aesthetic vocabulary has not escaped all notice. Legal commentators have proposed solutions, some conventional, some radical. All, however, proceed from the existing rules and exceptions in the copyright framework. The following section examines some proposals made to date.

1. Fair Use

We have already seen that the fair use doctrine enables judges to ensure that public access is preserved, even against colorable claims of infringement. Because the fair use doctrine represents an effort to balance the primary and secondary goals of copyright, it seems at first to be a logical—perhaps even the most obvious—solution to the problem of private ownership of aesthetic vocabulary.⁹¹ Fair use has not had much success in protecting art, however.⁹² Indeed, fair use in the context of art cannot be of much value, due to factors that will be considered below.

On the positive side, fair use has the advantage that it does not require legislative action.⁹³ Fair use is decided on a case-by-case ba-

⁹⁰ Such a use of copyright is an ever-present danger in a system that seeks to achieve a primary goal (in this case, benefiting the public) by realizing a secondary goal (here, remunerating authors). Overemphasizing the secondary goal moves the primary goal out of reach. The same is true of overemphasizing the primary goal: pushing access too hard is likely to eliminate the author's economic incentive to create works, which in turn reduces access to works over the long term.

⁹¹ See Carlin, *supra* note 1; cf. Willajeanne F. McLean, *All's Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koons*, 59 BROOK. L. REV. 373 (1993).

⁹² See *Rogers*, 960 F.2d 301; *Ferrato v. Castro*, 888 F. Supp. 33 (S.D.N.Y. 1995) (artist not insulated from future lawsuits by licensees or assignees if collage using copyrighted photographs was displayed or published in the future); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988) (infringement by cutting out pages depicting art, laminating onto tiles, and selling laminated tiles); *Munoz v. Albuquerque A.R.T. Co.*, 829 F. Supp. 309 (D. Alaska 1993) (infringement by laminating notecards bearing depictions of plaintiff's works onto tiles and selling laminated tiles).

⁹³ Congress is unlikely to act quickly under any but the most pressing circumstances, and "pressing" from the Congressional perspective too often means "advocated forcefully by a well-funded industry group." Fine artists as a group have never raised a "pressing" issue under this definition.

sis by federal judges, and therefore requires action by at most nine persons to achieve results in any one case. Moreover, fair use is a matter of established legal doctrine, and thus is an inherently conservative approach.

But fair use is not useful for reconciling copyright with art. This is the case, in part, for the very reasons cited above as virtues, as well as for other reasons, both theoretical and practical. The fair use doctrine historically has frowned upon the copying of entire works. Section 107 of the Act requires a court to consider "the amount and substantiality of the portion used in relation to the [copied] work as a whole."⁹⁴ Although the language of the statute does not preclude application of the defense to the copying of entire works, the cases by and large hold otherwise.⁹⁵ Artists, however, may need or want to copy an entire work. While perhaps a court or two could be swayed by the argument that the prohibition on copying entire works arose in an earlier time, when aesthetic vocabulary was not the subject of frequent ownership claims, it is unlikely that the fair use doctrine could be amended to permit copying of entire works within a reasonable time. In addition, the availability of a fair use defense increasingly depends upon the defendant convincing the trial judge that the accused work is "transformative."⁹⁶ While most works of art probably qualify, at least in the opinion of the art community, there seems no reason to believe that the federal bench consistently will agree.

Even more problematic, however, is the fact that fair use is a judicial, rather than a legislative, solution. This means that its applicability to the particular work of a particular artist can be established only through litigation.⁹⁷ It is an unfair burden on art to require appropriation artists to establish the *bona fides* of their work each time they are challenged. Artists unable to afford litigation

⁹⁴ 17 U.S.C. § 107(3).

⁹⁵ See, e.g., *Weissman v. Freeman*, 868 F.2d 1313, 1325 (2d Cir. 1989); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Benny v. Loew's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court*, 356 U.S. 43 (1958); *Marcus v. Rowley*, 695 F.2d 1171 (9th Cir. 1983); see *McLean*, *supra* note 91. See generally 3 MELVILLE B. AND DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05D (1996). But see *Sony*, 464 U.S. 417.

⁹⁶ See *supra* notes 76-78 and accompanying text.

⁹⁷ Fair use is "an intricate and embarrassing question . . . [it is not] easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases." *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (Story, J.). Compare *Loew's, Inc. v. CBS*, 131 F. Supp. 165 (S.D. Cal. 1955), *aff'd sub nom. Benny v. Loew's, Inc.*, 239 F.2d 532 (Jack Benny parody of *Gastlight* not a fair use), with *Columbia Pictures Corp. v. NBC*, 137 F. Supp. 348 (S.D. Cal. 1955) (NBC parody of *From Here to Eternity* ("From Here to Obscurity") a fair use). See also H.R. REP. NO. 94-1476, at 65 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679 ("[N]o generally applicable definition [of fair use] is possible, and each case raising the question must be decided on its own facts.").

and abandoning copyright—has certain advantages. Nevertheless, each also has drawbacks making it unsuitable as a solution to the problems raised by the private ownership of aesthetic vocabulary. The traditional tools of copyright are ineffective for this purpose. If art will be preserved despite the private ownership of contemporary aesthetic vocabulary, alternatives to these conventional tools must be deployed.

A. *Description*

A solution may be achieved by discarding those portions of the fair use doctrine and the compulsory license that cause the disadvantages discussed above. The result of this approach would be a copyright privilege: no payment or negotiation would be required (for these would unacceptably inhibit the creation of art), but the privilege would protect an artist only if the art posed no competitive threat to the copied work. Stated in terms of the exceptions to authorial exclusivity described above, the proposal is to regulate artistic appropriation in a hybrid manner: no payment, and no application, would be required; but the use made of the copied work would be carefully circumscribed. In terms of copyright's purpose, the point of the privilege is to permit enough access to aesthetic vocabulary so that it can be used as raw material for art, but not so much as to significantly diminish copyright's economic incentive to create.

When does a work of art pose no competitive threat to the copied work? In general, works of "fine art" pose no competitive threat to copied works. The fine art market is highly specialized, and is one in which copying is quite common: "reproductions" are, after all, copies of works. Remaining to be addressed, however, is the definition of "fine art." This must be done with sufficient certainty to make clear what works are within the privilege, and to reduce substantially the likelihood—and thus, the chilling effect—of infringement litigation. In sum, we seek a definition that (i) will ensure that the work of fine art will not compete with its own raw material in the marketplace (in other words, that will not damage the economic incentive to create) and (ii) will be sufficiently predictable to avoid the chilling effect resulting from the need to decide every case on its merits.

While the task of defining fine art may seem daunting, it is a task that Congress has already undertaken, when it adopted the

Visual Artists Rights Act of 1990 ("VARA").¹⁰⁷ Under VARA, artists have rights additional to those ordinarily included in American copyright, but only in certain kinds of works. Congress wanted to be sure that only "art" in the sense of "fine art" would benefit from these additional rights. Accordingly, VARA applies only to "works of visual art," defined as:

- (1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in 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; or
- (2) a still photographic image produced for exhibition purposes only, existing 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.

A work of visual art does not include—

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii); or

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.¹⁰⁸

This definition will serve quite well to draw the line between works that might threaten the market for copied works, and works that pose no competitive threat. While it is possible to produce bad art (and non-art) in 200 or fewer copies, the small number of copies ensures that the economic incentive to create will not be diminished. This is so for at least two reasons: first, 200 copies of anything is insignificant, compared with the number needed even to dent the media audience. Second, and especially in cases where the copied work did not originate in the media (if it is a "work of visual art," for example), the audience for limited-edition art is dis-

¹⁰⁷ Pub. L. No. 101-650, Tit. VI, § 603(a), 104 Stat. 5128 (1990) (codified at 17 U.S.C. §§ 101, 106A, and scattered additional sections of 17 U.S.C. (1994)).

¹⁰⁸ 17 U.S.C. § 101 (1994) (definition of "work of visual art").

cerning. Such art is purchased by collectors who are, for the most part, knowledgeable about the works they buy; they are unlikely to mistake, for example, the Sherrie Levine photograph *After Ansel Adams* for a photograph by Ansel Adams himself.¹⁰⁹ They can be expected to know the difference between the copied and the copying works. Furthermore, the proposed copyright privilege would not affect the law of fraud; to copy a work and pass it off as the original would be forgery, and would be no less criminal (or actionable in tort) for all that it would not violate copyright.

Finally, while it is conceivable that a "pirate" would copy well-known works in editions of less than 200, thereby escaping copyright liability, this would not be an economically attractive course of conduct. A completely untransformative use of another's work would not excite much interest among art collectors or artists. Of course, the "pirate" could claim "transformation," but the art world would be under no obligation to believe her. And if such limited editions could not be sold profitably in the market for fine art, they would not be economically attractive, because there would not be enough copies to permit mass marketing of the editions.

It is thus highly unlikely that copies made pursuant to the proposed privilege would substitute for the copied work. Indeed, even the most blatant copying—in appropriation art—would be extremely unlikely to damage in any appreciable way the market for the copied work. In the cases brought against appropriation artist Jeff Koons, for example, the plaintiffs did not argue that Koons's work substituted for their own in the market. Indeed, they could not: a person seeking to send a postcard would not buy a sculpture instead.

Of course, a plaintiff might argue that even if no actual market was damaged, a potential market was affected.¹¹⁰ But such claims would not withstand even a cursory inspection. For example, suppose the plaintiff in *Rogers v. Koons* claimed harm to the market that would have arisen had he decided to make his own sculptures based on his postcard. Does anyone suppose that the art world would have treated the plaintiff's sculptures as equivalent to those of Koons? Certainly not; at least one feature making Koons's work desirable is that it is by Koons. Even when the copying work is virtually identical to the copied work, the art market is well equipped to distinguish between them. In cases where the copying

¹⁰⁹ Nor, it might be added, are they likely to mistake a sculpture by Jeff Koons for a postcard by Art Rogers.

¹¹⁰ See *supra* note 73 and accompanying text.

and copied works are not identical, distinguishing between the works is even easier (and is even less likely to damage copyright's economic incentive to create). The art world is used to being faced with two works that appear identical; it does not treat such works as interchangeable.

Thus, artists could, without damaging copyright's economic incentive to create, be privileged to copy the copyrighted works of others, as long as the exercise of the privilege results in "works of visual art" as defined in VARA. Artists (and ultimately the public) would benefit from the resulting increase in the raw materials available for the production of art, and the owners of copyright in the raw materials would not be damaged. The privilege should extend to any copyrighted materials, used in any manner and for any purpose, provided that the result is a work of visual art. The privilege need not extend to any other use, either for the author of the visual artwork or for anyone else. If the visual artwork were to lose its status as a "work of visual art" (for example, because it is reproduced in more than 200 copies), then the privilege likewise would be lost.¹¹¹

B. Policy

The VARA definition of "work of visual art" thus meets all of our requirements: it is a bright-line test, requiring for its application little more than the ability to count to 200. It leaves intact copyright's economic incentive to create. It increases public access to works of authorship, and it frees artists from the difficulties of communication with an aesthetic vocabulary that is private property. These benefits alone are probably enough justification for the privilege, but they are not the only benefits.¹¹² The privilege

¹¹¹ Such a scenario would probably constitute copyright infringement, although fair use would remain available as a defense.

¹¹² One might, of course, object that this proposal not only deprives the copied author of control over the use of her work, but does so based upon the idea that the copying works are "art," in what some would probably construe as an elitist sense. Judge Leisure warned:

The fact that the infringing copy can be classified as "art" or as being part of an "artistic tradition" cannot be used as a shield to salvage an otherwise defective fair use defense If the subjective classification of an otherwise infringing work as "art" automatically immunized such work under the fair use doctrine, the doctrine would virtually eviscerate the protection afforded by the Copyright Act.

United Feature Syndicate, Inc. v. Koons, 817 F. Supp. at 379. Judge Leisure, however, was concerned about an improper broadening of the fair use doctrine, to neutralize claims of infringement by a work that a federal judge believes is "art." The crux of the objection lay in "the *subjective* classification of an infringing work as 'art'" (emphasis added). From Judge Leisure's perspective, the danger is that the subjectivity of such a fair use exception would swallow up the copyright rule. This danger is effectively eliminated from the cur-

will also substantially reduce the number of copyright disputes in this troublesome area. Because the VARA definition of "work of visual art" is reasonably clear, relatively few disputes over whether a work is a privileged work may be expected. Obviously the VARA test is far more certain in its application than is the fair use doctrine.

C. *Technical Issues*

Congress promulgated the definition of "work of visual art" to limit the applicability of VARA's moral rights, not to limit a copyright privilege. Changes to the language of the definition are therefore necessary to make the privilege function exactly as intended. Two changes are most important; each relates to an exclusion from the statutory definition of "work of visual art." The first deals with the exclusion of all works for hire from "works of visual art." The propriety of this exclusion has been in question from its very beginning, even for the originally intended application of the definition.¹¹³ It is unclear why works for hire do not qualify as "works of visual art." There is no reason to exclude them, and they should therefore qualify both for purposes of the artist's privilege and for the moral rights protection provided by VARA.

A second exclusion from the VARA definition causes another problem: VARA excludes "any work not subject to copyright protection under this title." That is, VARA provides that a work that is uncopyrightable is excluded from the definition of "work of visual art." But suppose an artist exercises the privilege to copy: is the resulting work copyrightable? Perhaps, but only if it does not infringe the copied work. Yet, of course, it very likely *does* infringe the copied work—unless it is within the privilege. In other words, the exclusion confronts us with a "chicken-and-egg" problem: the work is not within the privilege unless it is copyrightable, but it is not copyrightable unless it is within the privilege. Fortunately, this, too, is easily solved, by expanding the category of privileged works to include all those satisfying the definition of "work of visual art," and copyrightable *but for* the fact that they copy another work.

rent proposal by the utilization of the VARA definition of "work of visual art," which, because it relies on an objective standard (*i.e.*, the number of copies), poses no similar danger to the authors of copied works.

¹¹³ See Marci A. Hamilton, *Commissioned Works As Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281 (1987); Roy S. Kaufman, *The Berne Convention and American Protection of Artists' Moral Rights: Requirements, Limits and Misconceptions*, 15 COLUM.-VLA J.L. & ARTS 417 (1991); see also Edward J. Damich, *Visual Artists Rights Act of 1990: Toward a System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990).

This, however, does not yet solve all our technical problems. There remains the question of the rights of an artist who has created a work in reliance on the privilege against a person who copies the resulting work of visual art. What if someone were to copy such a copyright-exempt work and merchandise it in T-shirts and other goods not themselves within the artist's privilege? Would the artist have a cause of action against such a person? If so, as intuition might at first suggest, wouldn't the artist (because of the *Feist* constitutional requirement) have to establish "originality" to the satisfaction of a court?

A copying artist seeking to enforce *her* copyright (if one exists) would indeed have to establish originality. For most artists, however, this will never be a problem; the originality of their work is evident. In the extreme case of appropriation art merchandised by an unauthorized third party, the owner of copyright in the copied work would have a cause of action for infringement: the unauthorized copy of the appropriation art would also be a copy of the appropriated work, which copy (unlike the appropriation art) would not have the benefit of a statutory exemption. Perhaps for the time being, this is all that can be achieved.

CONCLUSION

Artists depend upon the availability of aesthetic vocabulary to communicate with their audiences. Without access to aesthetic vocabulary, art cannot flourish and, ultimately, public access to works of authorship declines. Mass communication technologies, however, have increasingly made proprietary the images of aesthetic vocabulary. Copyright, which aims at increasing public access to works of authorship, must respond to this increasing proprietization of aesthetic vocabulary by privileging artists to use copyrighted materials without fear of litigation. As long as the works privileged are within the VARA definition of "works of visual art," such a privilege will support both the primary and the secondary goals of copyright.