

The Legal Culture of Appropriation Art: The Future of Copyright in the Remix Age

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I. INTRODUCTION

In 2013 the United States Court of Appeals for the Second Circuit decided a fascinating fair-use case, *Cariou v. Prince*.¹ Patrick Cariou claimed that photographs from his 2000 book *Yes, Rasta* were used by Richard Prince² to create thirty compositions called the *Canal Zone*

* © 2014 Richard H. Chused. Professor of Law, New York Law School. Thanks to the faculties at Suffolk Law School, Georgetown University Law Center, and New York Law School who graciously commented on and critiqued presentations of earlier versions of this Article at faculty colloquia. Similar gratitude is due Parsons: The New School of Design for asking me to participate in a colloquium on Authorship in the Digital Age. My colleagues Brian Choi and Ari Waldman also read this Article and provided comments for my use. But the most important comments about creativity, art, and law come regularly from my artist wife Elizabeth Langer—not just verbally but in the sights and perspectives she constantly presents to me in her paintings, collages, drawings, and prints.

1. 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

2. There is a companion website to this Article with relevant images and other materials. *Appropriation Art: Law and Culture*, RICHARD H. CHUSED, <http://www.rhchused.com> (last visited Oct. 6, 2014). A ¶ in the text means you can find related material online. A footnote will be dropped with the appropriate link. Here the links are to <http://www.rhchused.com/Page1.html> and <http://www.rhchused.com/Page2.html>. The first page has pictures of Cariou and Prince and the second pictures of Cariou's book *Yes Rasta* and the Gagosian book for Prince's exhibition. In

Series. The latter is a mixture of female nude figures and redone, often collaged, images from *Yes, Rasta*—a collision of styles challenging the cultural values displayed in Cariou’s photographs.³ In March 2011, Judge Deborah Batts of the United States District Court for the Southern District of New York concluded that Prince and his gallery, the famous Gagosian in New York City, were infringers.⁴ During the Prince exhibition, Gagosian sold eight of the Canal Zone series for \$10.48 million! The court ordered that the unsold works be impounded and turned over to the plaintiff for disposition as he wished, and the owners of the sold works were barred from publicly displaying them.⁵ The Second Circuit reversed, concluding that the material Prince took from *Yes, Rasta* was fairly used in twenty-five works.⁶ The case was remanded for further consideration of whether the five other compositions were fairly used.⁷

The central legal issue in the case was copyright law’s fair use rule.⁸ Vastly oversimplifying an extraordinarily messy batch of precedents, fair use allows a creator to employ materials protected by copyright if the new use is transformative and does not negatively affect the market for

general, if you have the website open while reading, you can move from page to page using the “Next” link on the bottom right of each page. There also are links on each page to the site’s home page, the table of contents, and the previous page.

3. See *id.* at 6 (<http://www.rhchused.com/Page6.html>). Cariou spent quite some time gaining the trust of the Rastafarian community. The juxtaposition of some of his images with nudes of white women is both jarring and, perhaps in the eyes of some, demeaning.

4. *Cariou v. Prince*, 784 F. Supp. 2d 337, 350-51 (S.D.N.Y. 2011), *rev’d in part, vacated in part*, 714 F.3d 694 (2d Cir. 2012). Gagosian took 40% as its fee. *Id.* Seven other paintings were traded for art estimated to be worth between \$6,000,000 and \$8,000,000. *Id.*

5. *Id.* at 355-56.

6. *Prince*, 714 F.3d at 698-99.

7. *Id.* at 712.

8. The vague, complex rule is stated in § 107 of the Copyright Act:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Copyright Act of 1976, 17 U.S.C. § 107 (2012).

the original work.⁹ For example, Prince significantly altered some of Cariou's pictures, usually mixing them together with dramatically different human images in ways that radically changed the mood of the original photographs.¹⁰ Such transformations, the court concluded, created a strong basis for claiming fair use.¹¹ Prince also (as is his wont) dramatically increased the scale of the works—as can be seen in an image of the *Canal Zone Series* exhibition at the Gagosian gallery.¹² The scale change was so great that it certainly enhanced the fair use arguments.¹³

In this Article, I am much less interested in the copyright intricacies of this particular fair use dispute than in what it, or more precisely the work of the artist Richard Prince and some of his peers, tells us about the state of art, culture, and copyright law in the opening decades of the twenty-first century. Richard Prince was a major standard bearer for the world of appropriation art in the 1980s and remains so to this day.¹⁴ Using his work as a starting point, I want to explore three overlapping

9. The literature on the subject is enormous. Anyone looking for a workable summary might check out 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 10:2 (2010).

10. There are three comparisons of Cariou and Prince images online. *Appropriation Art: Law and Culture*, *supra* note 2, at 3-5 (<http://www.rhchused.com/Page3.html>, <http://www.rhchused.com/Page4.html>, and <http://www.rhchused.com/Page5.html>).

11. *Prince*, 714 F.3d at 706-08.

12. *Appropriation Art: Law and Culture*, *supra* note 2, at 6 (<http://www.rhchused.com/Page6.html>).

13. The unfortunate breadth of the district court's opinion also eased the way to reversal of the lower court result. The lower court required that in order to be fair, a use must "comment on, relate to the historical context of, or critically refer back to the original work." *Prince*, 714 F.3d at 704. Such a requirement seems particularly inappropriate, especially in a case like this one, where the party claiming fair use is principally interested in wholly altering the way we perceive preexisting materials. The grant of summary judgment to Cariou without careful exploration of the role appropriation art plays in contemporary culture was surely unwise. But a similar critique can be made of the Second Circuit's result. While the court was quite conscious of the ways Prince played with Cariou's work, the distinctions they made between those works where the fair use exception applied and those where it did not were just as arbitrary. *Id.* at 706-11. It is worth looking at six images involved in the case. The images may be found at *Appropriation Art: Law and Culture*, *supra* note 2, at 7-12 (<http://www.rhchused.com/Page7.html>, <http://www.rhchused.com/Page8.html>, <http://www.rhchused.com/Page9.html>, <http://www.rhchused.com/Page10.html>, <http://www.rhchused.com/Page11.html>, <http://www.rhchused.com/Page12.html>). Items 1, 2, 3, and 5 were remanded for further consideration; Items 4 and 6 were not. Are the differences significant enough to justify such a result? In addition, the Second Circuit's willingness to allow Prince to transform the original mood of Cariou's photographs ignored the ways in which those changes may have offended the people in the photographs and their culture. While such moral right issues may raise important legal questions in other parts of the world, photographs are not protected by moral right in the United States unless they are for exhibition and limited to an issue of 200 copies. *See* 17 U.S.C. §§ 101, 106A.

14. Prince maintains his own site. RICHARD PRINCE, <http://www.richardprince.com> (last visited Feb. 5, 2014). As the items on his personal site indicate, Prince's work includes a number of items that are wholly or mostly original.

questions. Since the 1970s, some artists have become blatant and unapologetic about their use of others' works. They both revel in their takings and often decline to publicly acknowledge the sources of the images they use. Over the course of the twentieth century, much avant-garde art shifted from collage and use of everyday forms and objects to unacknowledged reuse of prior artists' works. The first question asked by this Article, therefore, is, from an art history and culture perspective, why did this happen? Part II explores this question.

Second, and perhaps most importantly, why did appropriation artists become so blatant and unapologetic about their tactics? Though the ease of copying in the digital age is certainly part of the story, that is an inadequate explanation for the culture of this part of the contemporary art world. Culture, creativity, and law often interact in interesting ways. I argue in Part III that, in addition to the historical currents of the art world, the structure of copyright law itself encouraged the development of appropriation art.¹⁵ Just as appropriation art became a widespread practice during the middle decades of the twentieth century, courts opened the doors to widespread duplication and distribution of copyrighted works by those using technology like cassette decks, videotape recorders, and reprography machines. That synergy dramatically altered the ways average users of copyrighted material viewed legal constraints and significantly enhanced cultural acceptance of appropriation.

Finally, are there any interesting legal and policy issues beyond the obvious fair use problems that surface in what sometimes appear to be simple plagiarism disputes under copyright law?¹⁶ In Part IV, I suggest that as a result of the shifts in both art culture and intellectual property law during the last century, the level of reuse and remixing of protected material, by both artists and nonartists, became so pervasive that traditional copyright enforcement strategies lost much of their utility. Copyright law must be reconstructed to create a world in which remunerating owners of protected materials widely used by others is accomplished without the need to file litigation seeking traditional monetary or injunctive relief from infringers. The goal is to define and

15. It also encouraged the rise of sampling and other forms of using previously recorded music by the widespread practice of making "covers" of previously recorded compositions. Though, in general, royalties were and are paid to the original artist for covers performed by another artist, the notion that music created by one artist may be used by another without seeking permission first has become a well-accepted part of the business.

16. The strength of this Article arises not simply because many appropriation artists boldly copy the material of another person, but also because they give no recognition to their sources.

construct a system—not just for artists, but also for other standard copyright areas—in which we accommodate ourselves to the frequency and cultural power of appropriation without losing the incentives we have traditionally used to encourage the making and distribution of original creative works. This can be done by pooling funds from taxes on electronic and digital equipment to compensate the owners of works that have been remixed and widely distributed online.¹⁷ The final segments of this Article discuss such a system.

II. APPROPRIATION ART CULTURE

Many of the pictures at issue in *Cariou*, though obviously containing copied material, were artistically more nuanced than some of Prince's earlier work. Beginning in the 1970s, he took photos of print advertisements, edited out product logos and ad copy, and blew the photos up to large sizes. While the works offered fairly overt commentary on consumer culture, the images displayed little new material except for some minor color changes and the substantial increase in size. There were none of the collage effects seen in the *Canal Zone Series* shown at the Gagosian. Nonetheless, Prince's enlarged pictures of images from Marlboro ads made him famous. The *Cowboy Series*, which he began to make in 1980, was a prominent part of a major retrospective exhibition of his work at the Guggenheim Museum in New York in 2007. The image used in the show's outdoor banner advertisement was a revised version of a photograph called *Stretchin'*

17. This Article is not the first to urge use of such a levy system, though it is unique in the breadth of its recommendations. I have previously written on the issue. See Richard H. Chused, *Rewrite Copyright: Protecting Creativity and Social Utility in the Digital Age*, 38 *ISR. L. REV.* 80 (2005). At about the same time, WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004) was published. Fisher proposed a device taxation system to support a royalty-pooling system for digital sound recordings monitored with the use of government provided product codes. *Id.* In this Article, I reject such a government-monitored pooling system and recommend that all digital equipment be taxed and that copyright owners be given the choice of continuing to operate in the existing copyright regime or opting for a royalty-pooling system. I intentionally use art as the takeoff point to emphasize the breadth of contemporary copyright issues that extend far beyond the often-voiced angst over sound-recording duplication. Various device and media taxation systems have existed in other parts of the world for quite some time. See generally P. BERNT HUGENHOLTZ, LUCIE GUIBAULT & SJOERD VAN GEFFEN, *THE FUTURE OF LEVIES IN A DIGITAL ENVIRONMENT: FINAL REPORT* (2003) (reporting on dozens of device-taxing and royalty-pooling systems around the world). The United States enacted the Audio Home Recording Act to handle anticipated copying by digital audio tape recorders. That story is recounted well in Katerina Gaita & Andrew F. Christie, *Principal or Compromise? Understanding the Original Thinking Behind Statutory License and Levy Schemes for Private Copying*, 4 *INTELL. PROP. Q.* 422 (2004). Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (2012). The Audio Home Recording Act is now used to distribute a small amount of royalties for digital copying devices that use media other than tape.

Out, taken by Jim Krantz for Philip Morris Company, the maker of Marlboro cigarettes.¹⁸ Richard Prince slightly altered the colors of Krantz's photo, cropped it, and dramatically increased its size.¹⁹ The treatment of *Stretchin' Out* was typical of work in the entire *Cowboy Series*.²⁰ No credit was given in any of the works to those who were responsible for creating the original pictures.

Prince was not the only person blatantly appropriating the creative work of others in the 1970s and 1980s. Sometimes there were no artistic pretensions—just greed and bad karma. Ford Motor Company may take the prize for questionable advertising ethics by hiring one of Bette Midler's backup singers to mimic her voice—a voice Midler consistently refused to hire out to advertisers—in a 1985 TV ad for the Mercury Sable.²¹ Others at least claimed the more respectable mantle of Prince-like artistic inspiration rather than the sin of greed as their avatar. Sherrie Levine, for example, hit it big in 1979 with photos of photos by Walker Evans. In 1936, pictures taken by Evans, along with text written by James Agee, were published in the iconic book *Let Us Now Praise Famous Men*.²² Images from that volume became synonymous with the

18. *Appropriation Art: Law and Culture*, *supra* note 2, at 13-14 (<http://www.rhchused.com/Page13.html>, <http://www.rhchused.com/Page14.html>).

19. *Id.* at 15 (<http://www.rhchused.com/Page15.html>).

20. There are three pages of *Cowboy Series* images available online on the website: *id.* at 16-18 (<http://www.rhchused.com/Page16.html>, <http://www.rhchused.com/Page17.html>, <http://www.rhchused.com/Page18.html>). The photograph used in the advertisement on Page 17 of the website was taken by Norm Clasen and is available on his website. NORM CLASEN PHOTOGRAPHY, <http://www.normclasen.com/Marlboro-Images/82/caption/> (last visited Nov. 4, 2014).

21. The song used in the ad was *Do You Wanna Dance?* A nice version of Bette Midler singing it in Las Vegas can be found at *Bette Midler—Do You Want To Dance*, YOUTUBE (June 11, 2006), <http://www.youtube.com/watch?v=nV5KGvQGAMY>. The Mercury Sable television ad sung by the voice imitator is available at *2008 Mercury Sable Commercial*, YOUTUBE (Aug. 12, 2007), <http://www.youtube.com/watch?v=YUimiox0WP0>. Midler sued Ford and prevailed. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). In an earlier case, Nancy Sinatra sued Goodyear Tire and Rubber Company for an ad campaign for its “wide boot” tires that used what Sinatra claimed was a voice imitator to sing a version of her 1966 pop hit *These Boots Are Made for Walkin'* with revised lyrics. *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970). She lost, in part, I suspect because the imitation—if that's what it was—was not very good. *Id.* at 717-18. You can watch Sinatra sing the song at *Nancy Sinatra—These Boots Are Made for Walkin'*, YOUTUBE (Mar. 27, 2010), <http://www.youtube.com/watch?v=SbyAZQ45uww>. The Goodyear ad can be found at *Goodyear Wide Boots GT Vintage Commercial*, YOUTUBE (Aug. 18, 2000), <http://www.youtube.com/watch?v=HiKqHdh37dE>. In both cases, the companies had purchased the rights to use the underlying song without obtaining right-of-publicity permission from the singer. *Midler*, 849 F.2d at 461-62; *Sinatra*, 435 F.2d at 712-13.

22. *Appropriation Art: Law and Culture*, *supra* note 2, at 19 (<http://www.rhchused.com/Page19.html>). Agee's essay in the book was a pared-down version of the original article written for *Fortune Magazine*, which the magazine did not publish due to disagreements with the author. The full version of the essay, edited by John Summers, was published in 2013 under the title

misery of the Great Depression. The pictures from the Evans and Agee book that Levine rephotographed, hung in a gallery, and sold were still in copyright.²³□

Other examples abound. During the 1960s, Roy Lichtenstein began using, without attribution, cartoon and comic book images in many of his pop-art paintings. David Barsalou spent twenty-five years tracking down, finding, and posting online the original images Lichtenstein utilized in his work.²⁴□ Andy Warhol inserted images of cartoons, objects, and famous people in his work beginning in the 1960s, though he often copied colors much less slavishly than Lichtenstein. His iconic copies of Campbell soup cans and of a Gus Korman photograph of Marilyn Monroe are only two examples of the dozens of Warhol's appropriations.²⁵□ And, of course, there is the famous—or infamous—Jeff Koons, who was the subject of a now classic copyright fair use case about Art Rogers' photograph of six puppies in the laps of a man and a young woman.²⁶ Koons reportedly tore the copyright notice off a greeting card with the Rogers photograph on the front. He then instructed Italian wood carvers to make sculptures that vastly enlarged the scale, added touches like flowers in the hair of the main figures, and painted the assemblage quite odd colors.²⁷ Though Koons clearly was poking fun at sappy greeting cards like the one containing Rogers' photograph, he lost his fair use claim. The case was only one of several appropriation disputes naming Koons as a defendant.²⁸□

All of these artists—Koons, Warhol, Lichtenstein, Levine, Prince, and their many other peers—claim to be cultural messengers who display the banality of modern life, the futility of distinguishing the creative work of one soul from that of another, the impoverished nature of

Cotton Tenants: Three Families. Christine Haughney, *A Paean to Forbearance (the Rough Draft)*, N.Y. TIMES, June 4, 2013, at C1.

23. You can compare two of the images—an iconic one by Evans and the copy made by Levine on the companion website. *Appropriation Art: Law and Culture*, *supra* note 2, at 20 (<http://www.rhchused.com/Page20.html>).

24. *Id.* at 21 (<http://www.rhchused.com/Page21.html>).

25. *Id.* at 22-23 (<http://www.rhchused.com/Page22.html>, <http://www.rhchused.com/Page23.html>).

26. *Rogers v. Koons*, 960 F.2d 301, 303 (2d Cir. 1992).

27. *Id.* at 304-05.

28. *Appropriation Art: Law and Culture*, *supra* note 2, at 24 (<http://www.rhchused.com/Page24.html>). The definitive article on the “puppies case” is Louise Harmon, *Law, Art and the Killing Jar*, 79 IOWA L. REV. 367 (1994). Harmon, with both wit and dyspepsia, harshly critiqued the refusal of the court to find Koons a fair user. Other cases involving *Koons* include *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); and *Campbell v. Koons*, No. 91Civ.6055(RO), 1993 WL 97381 (S.D.N.Y. Apr. 1, 1993).

traditional artistic categories, and the perverse, if not tragic, humor that is embedded in the human condition. Such cultural commentary is obvious in Jeff Koons' work. At times, his wit is both sharp and camp to the point of hilarity. In a work called *Niagara*, he copied the lower part of a woman's legs from a picture taken by Andrea Blanch and used in a Gucci advertisement.²⁹ *Niagara* referenced Andy Warhol's famous (and previously referenced) appropriation of a headshot of Marilyn Monroe, which was originally taken by Gus Korman to publicize a movie of the same name.³⁰ The movie *Niagara*, released by Twentieth Century Fox in 1953, was Marilyn Monroe's first major movie and catapulted her to fame.³¹ Koons' tongue-out-of-cheek use of Odie in his work *Wild Boy and Puppy* had a stark comical edge. His fair use defense succeeded in the Gucci case but failed in the Odie setting.³² Finally, the 2011 exhibition of his work on the roof of the Metropolitan Museum of Art in New York drove the point home big time. It starred one of his oversized shiny balloon dog sculptures,³³ leaving an observer little choice but to chuckle at Koons' devilry and marvel at the willingness of the typically staid Metropolitan to stage the exhibition.³⁴ Koons and the other appropriation artists of his generation deliver important cultural commentary. Though easy for some to dislike or label as artistically meaningless, these artists are the natural descendants of many others who have used the work of others over the centuries.

That artists have used the work of others for a long time is clear. Indeed, that reality causes a deep and probably insoluble problem for present day copyright law. The basic notion that work must have some level of originality to claim copyright protection is constantly in tension with the reality that virtually all creative persons work on the shoulders of those who preceded them. With perhaps the exceptions of some American primitive artists and certain jazz and "blues" musicians, our

29. *Blanch*, 467 F.3d at 247-48.

30. See *Appropriation Art: Law and Culture*, *supra* note 2, at 23 (<http://www.rhchused.com/Page23.html>).

31. *Marilyn Monroe Biography*, BIO., <http://www.biography.com/people/marilyn-monroe-9412123> (last visited Nov. 3, 2014).

32. See *Blanch*, 467 F.3d at 250; *United*, 817 F. Supp. at 379. Images of the objects at issue in these disputes may be found at *Appropriation Art: Law and Culture*, *supra* note 2, at 25 (<http://www.rhchused.com/Page25.html>).

33. *Appropriation Art: Law and Culture*, *supra* note 2, at 26 (<http://www.rhchused.com/Page26.html>).

34. My wife and I went to see the exhibition. We chuckled. It certainly was an example of the ridiculous decorating the sublime. For more information on the Metropolitan Museum of Art's Koons exhibition, see *Jeff Koons on the Roof*, METRO. MUSEUM ART, <http://www.metmuseum.org/en/exhibitions/listings/2008/jeff-koons> (last visited Oct. 6, 2014).

own artistic giants have always looked to their forebears for guidance.³⁵ Thomas Jefferson, perhaps our first important intellectual, artistic and cultural genius, relied upon classical architectural rotunda motifs when designing buildings for the University of Virginia and Monticello.³⁶ Modern architects continue to use the rotunda form as a basic theme in their work. One of the most interesting examples is the interior Queen Elizabeth II Great Court Rotunda designed by Foster & Partners and placed in the old reading room of the British Museum—originally built in the 1840s according to the designs of brothers Robert and Sydney Smirke.³⁷ Art and architecture often mirror similar styles. The aesthetics of Piet Mondrian's spartan, geometric paintings were tightly related to some of the buildings designed by Frank Lloyd Wright, Ludwig Mies van der Rohe, and Philip Johnson. Look, for example, at Mondrian's *Composition in Black and White* from 1934,³⁸ Wright's Ward Willets House, designed in 1901,³⁹ and Philip Johnson's Glass House, built in 1949.⁴⁰ The similarities are striking. And it is well known that artists sometimes influenced each other in quite basic and fundamental ways, even working together for periods of time. Pablo Picasso and Georges Braque, for example, collaborated and worked together in the development of Cubism between 1908 and 1913.⁴¹

35. The arguments about primitive art and jazz could go on indefinitely. Simple art forms have been known for millennia. And some aspects of jazz may well emanate from modalities known in Africa and the Americas before the jazz idiom arose here in the nineteenth century.

36. The Rotunda at the University of Virginia, for example, was based in large part on the Pantheon in Rome. See *Appropriation Art: Law and Culture*, *supra* note 2, at 27 (<http://www.rhchused.com/Page27.html>).

37. *Id.* at 28 (<http://www.rhchused.com/Page28.html>); see also *Great Court at the British Museum*, FOSTER & PARTNERS, <http://www.fosterandpartners.com/projects/great-court-at-the-british-museum> (last visited Nov. 6, 2014). Another example is the rotunda in the Williams Library at Georgetown University Law Center. The architects, Hartman & Cox, quite overtly relied upon Jefferson's work when they designed the building. See *Edward Bennett Williams Law Library (1989)*, HARTMAN-COX ARCHITECTS, <http://www.hartmancox.com/projects/projects.php?pid=41> (last visited Oct. 6, 2014).

38. *Appropriation Art: Law and Culture*, *supra* note 2, at 29 (<http://www.rhchused.com/Page29.html>).

39. *Id.* at 30 (<http://www.rhchused.com/Page30.html>).

40. *Id.* at 31 (<http://www.rhchused.com/Page31.html>). Ludwig Mies van der Rohe's Lake Shore Drive Apartments built between 1949 and 1951 and Crown Hall at the Illinois Institute of Technology completed in 1956 are other important examples of aesthetic cousins to Piet Mondrian, Frank Lloyd Wright, and Philip Johnson. See *Lake Shore Drive Apts.*, ARCHITECTURE WEEK GREAT BUILDINGS COLLECTION, http://www.greatbuildings.com/buildings/Lake_Shore_Drive_Apts.html (last visited Oct. 6, 2012); *Crown Hall*, ARCHITECTURE WEEK GREAT BUILDINGS COLLECTION, http://www.greatbuildings.com/buildings/Crown_Hall.html (last visited Oct. 6, 2012).

41. See *Appropriation Art: Law and Culture*, *supra* note 2, at

None of this aesthetic influencing, of course, is either shocking or subject to criticism. It is the stuff from which culture is built. The use of prior styles and motifs is one thing. Slavish, large-scale, unacknowledged copying is quite another. The stunning similarities in the Cubist works of Picasso and Braque certainly do not suggest that they would approve of Sherrie Levine's literal copying of Walker Evans' photographs.

So how did the shift from stylistic similarity and artistic influence to appropriation without acknowledgment of original artists occur in western culture? The path began in earnest during the late nineteenth and early twentieth centuries with the arrival of collage and the shocking (at least to many living at the time) use of everyday objects as artistic subjects. Collage was in many ways the grandparent of the contemporary appropriation art movement. Picasso was one of the earliest collage makers, with a brilliant set of compositions made in the early twentieth century.⁴² His inclusion of newspaper and other everyday materials was revolutionary. Contemporary collage artists like my wife Elizabeth Langer continue to make use of other's objects and ordinary materials in their work.⁴³ Many famous artists like Robert Rauschenberg and Larry Rivers continued to develop the collage tradition during the last century.⁴⁴

But the most important of the early appropriators probably was Marcel Duchamp. His well-known *Bicycle Wheel* and (in)famous *Fountain*,⁴⁵ created at about the same time as Picasso's early collage work, were stunning confrontations of traditional notions of what can be art. For *Bicycle Wheel*, Duchamp placed part of a bicycle frame and a wheel upside down on a stool.⁴⁶ With *Fountain*, he placed a urinal on a pedestal.⁴⁷ His ribald redoing of the *Mona Lisa* was equally perverse.⁴⁸

32 (<http://www.rhchused.com/Page32.html>) (comparing two stylistically similar works by Picasso and Braque).

42. See *id.* at 33 (<http://www.rhchused.com/Page33.html>) (showing *Glass and Bottle of Suze*, created in 1912).

43. *Id.* at 34 (<http://www.rhchused.com/Page34.html>). In this collage, she cut up a printed version of a publicity card for a Larry Rivers exhibition and mounted the pieces with other materials to make the composition. *Id.*

44. *Id.* at 35-36 (<http://www.rhchused.com/Page35.html>, <http://www.rhchused.com/Page36.html>). Larry Rivers worked with the poet Kenneth Koch, who wrote various lines on the piece. *Id.* at 36.

45. *Id.* at 37 (<http://www.rhchused.com/Page37.html>). The name *Fountain* itself resonates with the suggestion that all art begins with mundane, everyday objects—even (or perhaps especially) those used for waste disposal in smelly public spaces.

46. *Id.*

47. *Id.*

At least all three of the items used—wheel, urinal, and *Mona Lisa*—were in the public domain when he did his work. Nevertheless, Duchamp set the baseline for many famous twentieth-century artists. Responding to the Impressionists' focus on everyday life, dance halls, circuses, prostitutes, workers, and still-life compositions, the early twentieth century avant-garde took the natural step of making any object a subject for inquiry. The use of everyday, appropriated items literally reached enormous proportions (à la Richard Prince's blow ups of ad photos) in the work of Claes Oldenburg,⁴⁹ the scrap wood sculptures of Louise Nevelson, and Peter Greenaway's use of digital images of DaVinci's *The Last Supper* in a massive installation at the cavernous Park Avenue Armory in New York City in 2010.⁵⁰

Perhaps the state of this part of the art world—especially the use of found objects in art—is best summed up by Sherrie Levine's *Fountain (After Marcel Duchamp)*, a shiny bronze cast of Duchamp's *Fountain* made over twenty years ago.⁵¹ There being nothing new to do, Levine felt she was left only with the choice of appropriating Duchamp's commentary on the lack of anything new to do. Making fun of those who make fun of artistic pretension itself became art—tongue-in-cheek to be sure, but art nonetheless. The shift from Picasso's collages to the brazen reuse of others' work without attribution was almost, but not quite, complete. The only remaining form of appropriation—hinted at by Levine's earlier photographic copies of Evans' work and Prince's reuse of advertising images—was simply to copy *protected* items rather than appropriate from the public domain, not worry about attributing sources, and ignore copyright law. From an artist's perspective, it makes no difference whether the reference reused in a “new” work is an everyday public domain object like a bicycle wheel or an odd copyrighted

48. *Id.* at 38 (<http://www.rhchused.com/Page38.html>). In this piece, Duchamp drew a mustache and a goatee on the face of the *Mona Lisa*. He also wrote “L.H.O.O.Q.” across the bottom of the print. If written out phonetically in French and translated, it would mean, “She has a hot tail.” See Jonathan Jones, *L.H.O.O.Q., Marcel Duchamp (1919)*, *GUARDIAN* (May 25, 2001), <http://www.theguardian.com/culture/2001/may/26/art>.

49. Check three pictures of everyday objects supersized: a typewriter eraser, a clothespin, and a pair of binoculars. *Appropriation Art: Law and Culture*, *supra* note 2, at 39 (<http://www.rhchused.com/Page39.html>).

50. *Id.* at 40-41 (<http://www.rhchused.com/Page40.html>, <http://www.rhchused.com/Page41.com>).

51. *Id.* at 42 (<http://www.rhchused.com/Page42.html>). The cast of Levine's work pictured here sold for \$440,000 at Christie's in 2008. *Sherrie Levine (B. 1947): Fountain (After Duchamp)*, CHRISTIE'S, http://www.christies.com/LotFinder/lot_details.aspx?intObjectID=5143482 (last visited Oct. 6, 2014).

photograph of a string of puppies sitting in human laps. Either referenced work can inspire extraordinarily creative responses.

By the 1960s and 1970s, bold and unacknowledged appropriation became not only artistically meaningful but also culturally plausible. Giving appropriate credit to the original artists was not the point; social commentary and criticism was. That fit the age. Attacking standard norms, making fun of old-style artistic modes, claiming to own that which was not yours,⁵² and outraging those with traditional artistic sensibilities was standard fare during the raucous decades that were the 1960s and 1970s. Many cultural and moral boundary lines were blurry if not invisible.

We reached the point in the history of western art where appropriation and remixing of the old became a standard part of our creative, artistic sensibilities. And, of course, no one should be surprised that the digital realm is now in the center of America's imaginative stew. There are many examples, some already classic, of the ways digitization has been used to reorder, remix, and mash up traditional understandings of classic artistic works. Jackson Pollock's drip paintings became fodder for an award-winning website that allows anyone to use a mouse to simulate making a Pollock-like digital work.⁵³ Or look at the way a classic Dali wilted clock painting was digitally altered and posted online.⁵⁴ Maybe the best example is a website where Van Gogh's masterpiece *Starry Night* is digitally morphed in sync with motions moving across a browser window while music plays in the background.⁵⁵

As an aside, the zaniness of this world—perhaps stirred by the egos of those making the most money from it and the adversarial natures of agents and lawyers—has shown up in odd ways. Those appropriating the work of others are sometimes the most brazen in claiming their intellectual property rights. The level of chutzpah⁵⁶ can be breathtaking,

52. Who can forget Abbie Hoffman's classic publication—*STEAL THIS BOOK* (1971)?

53. It is a lot of fun. *Jackson Pollock by Miltos Manetas*, JACKSONPOLLOCK.ORG, <http://www.jacksonpollock.org/> (last visited Oct. 6, 2014).

54. *Salvador Dali: The Persistent Memory Recreation*, DIGITAL MEDIA 2011 (Feb. 16, 2011, 3:32 PM), <http://jscdigi2011.blogspot.com/2011/02/salvador-dali-persistent-memory.html>. The two Dali images also may be seen at *Appropriation Art: Law and Culture*, *supra* note 2, at 43 (<http://www.rhchused.com/Page43.html>).

55. For one page of remixes, see Joe Berkowitz, *Get Mesmerized by an Interactive Remix of Van Gogh's Starry Night*, FAST COMPANY (Feb. 10, 2012, 2:12 PM), <http://www.fastcocreate.com/1679838/get-mesmerized-by-an-interactive-remix-of-van-goghs-starry-night>. The Van Gogh remix can also be seen at *Starry Night of Vincent Van Gogh—Interactive Animation by Petros Vrellis*, YOUTUBE (Feb. 17, 2012), <http://www.youtube.com/watch?v=XtNXuMo-DrY>.

56. The best "analysis" of chutzpah is provided in a wonderful review of the use of Yiddish in court opinions by Alex Kozinski and Eugene Volokh. See *Lawsuit, Shmawsuit*, 103 YALE L.J. 463 (1993).

as when a representative of Lichtenstein's estate wrote the rock group Elsinore demanding that they not use on a record cover an image much like one Lichtenstein previously took without attribution,⁵⁷ or when an agent for Jeff Koons demanded that the household goods design company Park Life halt the sale of balloon dog bookends.⁵⁸ Both demands were later withdrawn after snarky public commentary.⁵⁹ Joining in the fun after its run-in with Koons, Park Life marketed a T-shirt with a picture of a blindfolded balloon dog.⁶⁰

III. COPYRIGHT LAW CULTURE

The transition from collage to emulation to analog appropriation to digital remixing is understandable as a matter of art history. But how can it survive in a world with copyright laws? My perverse answer is that copyright law actually encouraged the trend. That is the next part of the story—a tale of some not very prescient judging and legislating in a world of rapid technological change. Let us begin this part of the account with mimeograph or “ditto” machines—devices invented in the latter decades of the nineteenth century that used stencils stretched over ink-filled drums turned by hand cranks at first, and electric motors later,

57. *Appropriation Art: Law and Culture*, *supra* note 2, at 44 (<http://www.rhchused.com/Page44.html>). The story, as told on the Elsinore website, goes like this:

The painting we are using for our album cover was done by Brittany Pyle in a college painting course. She told us initially that it was a piece influenced by Pop art, but didn't mention anything about her source image. After we received the email from Shelley Lee [from the Lichtenstein estate] I talked to Brittany again and she told me that she hadn't appropriated from Lichtenstein. Her professor had instructed the class to do an appropriation piece, and Brittany chose the same original graphic novel piece that Roy Lichtenstein used when he created his piece *Kiss V*.

A Copyright Violation???, ELSINORE (May 6, 2010), <http://www.elsinoremusic.net/2010/05/>. Pyle's work also is posted on this page. *Id.* The demand not to use Pyle's work on the cover later was dropped. *Id.*

58. *Appropriation Art: Law and Culture*, *supra* note 2, at 45 (<http://www.rhchused.com/Page45.html>). For the *New York Times* story on the Koons bookend dispute, see Kate Taylor, *In Twist, Koons Claims Rights to 'Balloon Dogs'*, N.Y. TIMES (Jan. 19, 2011), <http://www.nytimes.com/2011/01/20/arts/design/20suit.html>. This dispute was later dropped by Koons. See *Koons Backs Down*, LEG OF LAMB (Feb. 8, 2011), <http://lamblegs.wordpress.com/2011/02/08/koons-backs-down/>.

59. Mike Masnick, *Jeff Koons Drops Silly Lawsuit over Balloon Dog Bookends . . . But Not Before Helping To Sell a Bunch*, TECHDIRT (Feb. 6, 2001), <https://www.techdirt.com/articles/20110203/22582312959/Jeff-Koons-drops-silly-lawsuit-over-balloon-dog-bookends-not-before-helping-to-sell-bunch.shtml>.

60. *Appropriation Art: Law and Culture*, *supra* note 2, at 46 (<http://www.rhchused.com/Page46.html>).

to print words or images on sheets of paper fed into the equipment.⁶¹ Some contemporary readers must be familiar with this now “ancient” tool that moved complex printing from factories to schoolrooms. Cheap offset printing techniques and Xerox copy machines were introduced in the 1960s. The first desktop copying machine from Xerox hit the market in 1963⁶² and revolutionized the copying business during the rest of the twentieth century. The same sort of expansion in the ability to make copies of audio recordings occurred with the arrival of reel-to-reel tape decks for household use after World War II, cassette tape recorders in the mid-1960s, and high fidelity double cassette tape decks a bit later. The first important videotape recorder (VTR) for home use was the eventually ill-fated Sony Betamax, introduced in 1975.⁶³

Note well that the most important of these dramatic technological inventions—the copy machine, cassette tape recorder, and VTR—occurred just as appropriation art gathered steam. Not surprisingly, this new technology produced significant litigation. Entertainment business operatives saw the handwriting on the wall and did not always care for the way it read. The most important and famous case involved the Betamax.⁶⁴ When the videotape recorder evolved into a consumer item—cheap enough that it became a standard feature of middle class homes—moviemakers and TV networks had an anxiety attack. The dyspepsia was generated in part by Sony ad campaigns emphasizing the ability of Betamax owners to set a timer to record a program while the user was away, watching a different show, or doing something more important.⁶⁵ “Watch Whatever Whenever” was one of the sales pitches.⁶⁶ Concerned that VTRs would allow consumers to make and keep copies of televised shows and movies, motion picture companies sued manufacturers of the devices and a consumer who admitted copying television shows.⁶⁷ They argued that consumers infringed copyrights when using VTRs and that device manufacturers were responsible for the

61. *Id.* at 47 (<http://www.rhchused.com/Page47.html>). I could have started with other late nineteenth-century duplication devices as well. The phonograph player is an obvious example. Voice appropriation was its forte.

62. *Id.* at 48 (<http://www.rhchused.com/Page48.html>).

63. Jonah Volk, *The Short Life, Slow Death, and Broad Impact of Betamax*, NYU (Nov. 20, 2008), http://www.nyu.edu/tisch/preservation/program/student_work/2008fall/08f_2920_Volk_a1a.doc.

64. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

65. *Appropriation Art: Law and Culture*, *supra* note 2, at 49 (<http://www.rhchused.com/Page49.html>).

66. *See Watch Whatever Whenever with the Sony Betamax*, RETROIST (Apr. 22, 2010), <http://www.retroist.com/2010/04/22/watch-whatever-when-ever-with-the-sony-betamax>.

67. *See Sony*, 464 U.S. 417.

actions of their customers as vicarious or contributory copyright infringers.⁶⁸

Unfortunately—at least in hindsight—the structure of the litigation was quite strange. The proofs at trial demonstrated that the primary use for videotape machines was to “time shift.”⁶⁹ That is, consumers used the timer on the machine to make a copy of a show while they were not watching so they could view it later. That sort of copying, the consumer defendant claimed, was protected by the copyright fair use rule. The manufacturers claimed the benefit of their consumers’ fair use and argued that standard vicarious and contributory liability rules did not ensnare them.⁷⁰

Responding to these issues, the United States Supreme Court constructed its opinion to answer two narrow questions. First, was “time shifting” protected by fair use? And second, if it was, were manufacturers of VTRs responsible for unlawful utilization of the machines if the recorders were capable of “substantial non-infringing uses?”⁷¹ Having narrowly structured the issues in the case, the Court concluded that time shifting was fair use, that videotape machines therefore had substantial noninfringing uses, and that, as a result, the manufacture, sale, and use of the machines was permissible.⁷²

Given the historical moment when the case was decided, the structure imposed on the analysis by the Supreme Court made sense. Though traditional secondary liability theories arguably applied, there

68. *Id.* at 419.

69. *Id.* at 423-24.

70. *Id.* Under American copyright law, vicarious liability is imposed on parties who both control the venue or system used to copy, perform, or otherwise infringe a work and receive financial benefit from the activity. A classic case is *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F.2d 304 (2d Cir. 1963), which involved a chain of department stores selling counterfeit recordings. Contributory infringement arises when a party knowingly contributes to or induces unlawful activity. A leading case in this area is *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), in which the operator of a flea market was found responsible for the actions of parties renting space in the market and selling counterfeit recordings. On its face, contributory infringement theory seemed to apply to *Sony*. But as noted in the text, the Supreme Court evaded the issue by first asking whether the device itself had enough noninfringing uses to justify its presence in the market. *See Sony*, 464 U.S. at 440.

71. The Court viewed this formulation of the question as the best balance between protecting the interests of copyright owners and creating appropriate incentives for industrial inventors to bring new products to market. *See Sony*, 464 U.S. at 450-51.

72. *Id.* at 455-56. The literature on the case is enormous. Quality writing about it began while the case was pending. *See* 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 (1982). Much of the literature about the case is referred to in Matthew W. Bower, Note, *Replaying the Betamax Case for the New Digital VCRs: Introducing TiVo to Fair Use*, 20 CARDOZO ARTS & ENT. L.J. 417 (2002).

were good reasons for evading their use. Very few individuals or companies involved in the movie or VTR business were interested in policing the private use of videotape machines in peoples' homes. And if time shifting was the primary use of the machines, the prospect of harm to owners of copyrights in TV shows was minimal. Indeed, the Court was justified in thinking that time shifting would produce *more* rather than fewer viewers of some shows.⁷³ Those not around when the shows were broadcast could watch them and the accompanying advertisements later. Therefore it was not surprising that the Court looked for a way to minimize the impact of copyright law and maintain incentives for the invention and distribution of new technology. And because technology was so central to the litigation, using patent law—the staple article of commerce doctrine—to structure its analysis of secondary liability also was a natural move.⁷⁴

The Court, of course, was neither able to predict all the future consequences of its decision nor to control the way their opinion would be read by the culture at large. After a time, it became clear that VTRs enhanced both the broadcast TV market for movies and the nonbroadcast, TV-based film market. As time shifting proliferated, the number of people viewing television shows broadcast over the air rose and videotape rental businesses like Blockbuster blossomed. Consumers also purchased large quantities of recorded movies from the studios. While some VTR owners duplicated television shows or rented tapes and created movie libraries, the quality of those tapes never matched the originals. The technology was not good enough to accomplish that. Overall, the existence of the tape rental business created another way for movie and television companies to make money. Tape rental became a third run movie “theater” allowing films to be seen by those who never managed to get to a first or second run or who simply liked the film enough to watch it multiple times. Rentals also provided an outlet for movies never shown in theaters. In short, the results were largely positive for the industry—a boost for the wisdom of protecting the right to time shift and copy movies at home.

But these positive consequences of the *Sony* case for the movie industry in both its broadcast and nonbroadcast modes were not

73. See Bower, *supra* note 72, at 480-81.

74. For a review of that move and a critique of its use, see Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941 (2007). For a bit more on the history of the doctrine's use, see Matthew Helton, *Secondary Liability for Copyright Infringement: BitTorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1 (2006).

permanent. The result had other, more subtle, long-lasting, and potentially subversive cultural effects. It created the widely accepted notion that each of us had the “right” to use video recording machines as we wished in the confines of our homes.⁷⁵ As devices permitting much more extensive duplication of copyrighted works appeared in the marketplace over the following decades, that perception became the cornerstone for arguments that consumers were free to use any personally owned device as they pleased—that they had the *right* to do what they wished to entertain themselves in the privacy of their homes or, later, in the privacy of their mobile, ear-budded reveries. As digital devices capable of high-quality recording or storing of music, words, and images became available, the cultural sensibility that taking copyrighted works was not just okay but a “right” blossomed into Napster, Kazaa, Grokster, and other Internet file transfer systems. This resulted in a deluge of ear-budded music lovers dancing and singing their way down the streets of America and a bevy of artists freely taking the digital materials of others. All of this was bolstered by the simple observation that “taking” a digital work sometimes created new markets and rarely deprived others of access. In that sense it was not the same as traditional theft—in either legal or moral terms.

The same basic legal trajectory can be recounted for areas of copyright law other than movies and fine art. Use of copy machines, not only in homes, but also in offices, became routine. And early on, courts approved large-scale copying, especially in educational and research institutions.⁷⁶ Google Books arguably is one contemporary consequence. The trend in music was even more pronounced. From early in the twentieth century, any performer had a right, on the payment of a statutory royalty, to make a “cover” of a musical composition after it first was recorded with the permission of the composer. Though royalties were paid—a distinctly different paradigm from either pure appropriation art or fairly using the work of another—the making of “cover” recordings became routine. It created a sensibility that recording the music of others without permission was a standard part of cultural life. Therefore, it was not totally surprising when in more recent times—not long after the rise

75. Use of the word “right” is entirely intentional. I do make the claim that many thought the result of the *Sony* litigation gave them freedom to copy as they wished in their homes.

76. The most important early case was *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975). One of the most important recent cases adds additional ammunition to my point that fair use encourages a significant level of appropriation. In *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), the court found that a consortium of major university libraries acted fairly when they digitized books and made segments available to those using search engines. *Id.* at 97, 101.

of appropriation art, videotape recorders, copy machines, and double cassette tape decks—digital sampling became the rage in rap and other musical genres and downloading became routine in dorms and homes across the nation. For after the rise of “covers” came cassette libraries, sampling, mash-ups—the sophisticated digital melding of sometimes lengthy excerpts from various pieces of music to create new compositions—and vidding—a similar mode using digital video. “Girl Talk”—the stage name of Gregg Gillis—is only one important example among a bevy of popular mashup artists. He gives away his compositions online for free and makes money by entertaining large crowds of dancing, arm-waving fans in arenas and halls.⁷⁷ The genre is now common in the electronic dance music realm, with well-known composers like Anton Zavlski, a.k.a. Zedd, reworking older compositions. For example, Zedd recently used the theme music from the video game *Zelda* in one of his pieces.⁷⁸

In all of these areas, large amounts of copying have been judicially approved as fair use.⁷⁹ Note well that I am not quarrelling with these results. Most of the legal decisions arguably were correct, given the inconsistent run of fair use cases rendered over the years. Many of the creative endeavors in the digital world significantly transform the works, forming the foundations for the new productions.⁸⁰ Indeed, that is my point! When combined with the widespread cultural sensibility that we all have the *right* to freely use significant amounts of copyrighted work and the growth of systems to digitally store and cleverly manipulate copyrighted materials, there was no easy way to cabin the extent to which creative people felt free to use copyrighted materials in their work.⁸¹□

77. For more on Girl Talk, see *Girl Talk*, ILLEGAL ART, <http://illegal-art.net/girltalk/> (last visited Oct. 5, 2014). Girl Talk’s most recent work, *All Day*, available for download on this site, is widely recognized as a brilliantly creative mashup.

78. See Ben Sisario, *Prodigies Leaping Beyond Electronic Dance Music*, N.Y. TIMES (Aug. 24, 2012), <http://www.nytimes.com/2012/08/26/arts/music/prodigies-leap-beyond-electronic-dance-music.html>. You can listen to Zedd’s take on the *Zelda* theme song at *Zedd—The Legend of Zelda (Original Mix)*, YOUTUBE (Mar. 21, 2011), http://www.youtube.com/watch?v=zLzaZ_HXmjw.

79. A prime example in the music area is *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), involving 2 Live Crew’s adaptation of Roy Orbison’s song “Oh, Pretty Woman” with new lyrics. The Supreme Court ruled that the song was a parody protected by fair use. *Id.*

80. For example, one website solicits users to submit digital remakes of fifteen-second segments of *Star Wars* and combines these segments into a new film. The clips used are dependent on user preferences, so the online movie changes constantly. *A New Hope*, STAR WARS UNCUT, <http://www.starwarsuncut.com/newhope> (last visited Oct. 6, 2014).

81. One signal that these issues have seeped into the psyche of the general public is the large number of cartoons about copyright routinely appearing in various hard copy and online publications. See, e.g., *Appropriation Art: Law and Culture*, *supra* note 2, at 50 (<http://www.rhchused.com/Page50.html>) (showing two cartoons concerning copyright laws).

Today, millions of people have the equivalent of major publishing houses on their desktops at home and at work. Once large numbers of people concluded that they had the right not only to buy such equipment, but also to use it, we reached a paradigm shift. Even if a great deal of our private activity—whether at home or at work—is illegal, the scale of activity—both lawful and not—has become so enormous that it is unstoppable. There is no turning back. If one speaks with art and design students these days, one will find that many, if not most, of them routinely use the works of others in their own creative endeavors without a second thought.⁸² My, and perhaps the reader's, "archaic" sense of moral limitation and ethical concern, as well as anxiety about the future economic viability of certain forms of artistic endeavor, are not deeply etched in their frames of reference.⁸³ Rather, they are deeply interested in working with the digital world to enhance community participation in creativity, develop techniques for group projects, comment on the work of others, and integrate themselves deeply into digital creativity.⁸⁴

So, we have reached an ironic or perhaps perverse point—one where the cultural sensitivities of much of the artistic and creative world, as well as the cultural claims of average citizens owning digital equipment, are no longer in sync with the world of copyright law—a world that itself helped legitimate appropriation. Congress and the courts have responded to the deluge of digital copying by pulling back on the Betamax decision and the culture it helped create. The Supreme

82. I do not claim to have a solid database for this proposition, but discussions with faculty and students at Parsons: The New School for Design confirm it.

83. Apparently all sensibilities about protecting artistic integrity are under challenge. Uriel Landeros has been accused of using spray paint and stencils to deface the Picasso painting *Woman in a Red Armchair* while it was hanging at the Menil Collection in Houston, Texas. Cicely Mitchell, *Man Accused of Vandalizing Picasso Extradited to Houston*, CBS HOUS. (Jan. 14, 2013), <http://Houston.cbslocal.com/2013/01/14/man-accused-of-vandalizing-picasso-extradited-to-houston/>. Landeros' act was caught on a smart phone and posted on YouTube at *Vandal Spray Paints Priceless Pablo Picasso Art Painting Woman in Red Armchair, Caught on Video*, YOUTUBE (June 19, 2012), <http://www.youtube.com/watch?v=wMQm6HShz9U>. According to a blog on the *Houston Press*, Landeros absconded to Mexico after being charged with two felonies. Terrence McCoy, *Houston Art Vandal, Uriel Landeras, Planning an Art Show: Milking Every Last Drop of Fame from Vandalism*, HOUS. PRESS (Oct. 8, 2012, 1:30 PM), http://blogs.houstonpress.com/artattack/2012/10/uriel_landeros_planning_art_show.php. James Perez, a gallerist who has mounted a show of Landeros' work called *Houston, We Have a Problem*, reportedly said that the defacement was like a remix. "It's just taking something and making it your own. . . . I like what Uriel did. That makes it yours." Allan Kozinn, *Art Show for Accused Picasso Vandal*, N.Y. TIMES (Oct. 26, 2012), <http://artsbeat.blogs.nytimes.com/2012/10/26/picasso-vandal-gets-his-own-art-show/>. To say the least, the analogy is troubling.

84. The communal, cooperative ways in which artistic work now is produced online are legion. Collaborative art projects present an array of copyright problems not covered in this Article, which is mostly about the nature of authorship and ownership of intellectual property rights.

Court pushed the *Sony* article-of-commerce analysis aside to find Grokster—a provider of software allowing peer-to-peer file exchanges—responsible under common law inducement theory.⁸⁵ Major entertainment businesses have constantly, and with much success, urged Congress to take arguably draconian steps to suppress online copying.⁸⁶ At times, as in the case of some art appropriators, the chasm between the cultural claims of artists and the legal claims of copyright owners is enormous. One of the best examples of the chasm is represented by the work of Shepard Fairey, the creator of the famous Obama “Hope” Poster.⁸⁷ It is not that he appropriated more blatantly or frequently than many other artists—though the Obama poster is only the tip of the Shepard Fairey appropriation iceberg; he is just an appropriation artist who hit the big time.⁸⁸ The most important point for my purposes is not his perhaps fleeting fame, but how he describes his work. When speaking about using the work of others he does not credit, he calls the appropriated images “references.”⁸⁹ This is very clever—and also very revealing of the appropriation frame of mind.

So what is to be done about all of this? One response, of course, is nothing. That is more like inserting heads in the sand than it is an effort to thoughtfully respond to the cultural trends. The digital genie cannot be put back in the cultural bottle, even if some are desperately trying to do so. Nonetheless, both sides of the debate make telling points. Copyright owners claim that their materials are being unfairly used in ways that previously provided royalty streams.⁹⁰ Copyright owners presumably will continue to pursue those who they think are unlawful appropriators and will sometimes win big judgments and shut down major file sharing websites. Copyright users complain that such enforcement efforts inappropriately constrain their freedom. They opine that suppression is

85. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

86. The most important example is the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). For a summary of its provisions, see *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, U.S. COPYRIGHT OFFICE (Dec. 1998), <http://www.copyright.gov/legislation/dmca.pdf>.

87. See *Appropriation Art: Law and Culture*, *supra* note 2, at 51 (<http://www.rhchused.com/Page51.html>).

88. *Id.* at 52 (<http://www.rhchused.com/Page52.html>).

89. See, e.g., William W. Fisher III et al., *Reflections on the Hope Poster Case*, 25 HARV. J.L. & TECH. 243, 270-75 (2012).

90. The most recent contest is over whether digital rights management (DRM) capacities should be built into the next version of HTML—the standard coding system for writing webpages. The issues are described in a paper written by the Electronic Frontier Foundation. *EFF Makes Formal Objection to Druin HTM 15*, ELEC. FRONTIER FOUND. (May 29, 2013), <https://www.eff.org/press/releases/eff-makes-formal-objection-drm-html5>.

likely to be both a hopeless and misdirected battle over the long haul and a serious limitation on the creative energies of those who fairly use modern technology. It is hopeless because digital copying is very difficult, if not impossible, to suppress. It is misdirected because suppression of access to websites, service providers, and files ignores the high level of creativity generated by the openness of the Internet.⁹¹ Nor does it easily accommodate traditional users' rights of fair use and browsing inherent in the compromises that have long strengthened support of copyright law.⁹² So the cultural and linguistic divisions between those clamoring for stricter copyright laws and those demanding a wide-open Web are at a standoff. The debates sometimes echo the Dr. Seuss story about the north-going Zax and the south-going Zax, where both sides are right!⁹³

The use of one-on-one litigation to suppress digital copying is often inefficient and costly to both sides in the debate. Tracking down those digitally using materials in ways that violate existing law is expensive and often unsuccessful. Enforcement costs are high, causing particularly harsh consequences for smaller creative enterprises. Steps taken by Congress and some nations around the world to suppress digital file storage, copying, and sharing have driven some practices underground or overseas, or have forced practitioners to run from digital hiding place to digital hiding place like fleeing felons (which some of them may be). Actions to place materials behind paywalls have worked in some settings, though once a work has been purchased it is often easy for the buyer to post it online outside a paywall. But all of these steps have failed to stem the reuse tide while imposing significant costs on traditional copyright norms.

The “takedown” system is a perfect example of the costs now being imposed on both copyright owners and users.⁹⁴ Under the extant regime,

91. The classic article on this point is Jonathan Zittrain, *The Generative Internet*, 119 HARV. L. REV. 1974 (2006).

92. The framing of these issues is best done in a series of articles by Jessica Litman: *The Public Domain*, 39 EMORY L.J. 965 (1990); *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29 (1994); and *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y 325 (2011).

93. *The Zax* is one of four stories in DR. SEUSS, *THE SNEETCHES AND OTHER STORIES* (1961). *The Zax* involves two creatures—the north-going Zax and the south-going Zax—walking toward each other across the wilderness and stubbornly refusing to move out of each other's way. They stay in place as the world develops around them, still standing face-to-face as the tale ends with buildings and highways swirling over their heads. The relevance of Dr. Seuss's imagery to law was made clear in a symposium held on that very subject on March 1, 2013, at New York Law School. My introduction to that event—*Exploring Civil Society Through the Writings of Dr. Seuss*—may be found at Richard Chused, *Dr. Seuss as a Vehicle: An Introduction*, 58 N.Y.L. SCH. L. REV. 495 (2014).

94. See 17 U.S.C. § 512(c) (2012) (describing the “notice and take down” system).

Internet hosting services and media posting systems like YouTube must take down infringing materials once they are notified of its presence on their servers.⁹⁵ Though the Copyright Act creates a safe harbor for certain Web services when their users first post materials online, the offending items must be removed when the services are notified that protected items have been posted. Millions of takedown notices are received from copyright owners every week around the world.⁹⁶ Sending and handling them has become a major and costly nightmare for both copyright owners and hosting companies. In addition to the enormous volume of notices, the system is a cat-and-mouse game. As quickly as one URL is taken down, another will pop up. Taking down entire file sharing sites produces similar results, with new locations replacing the defunct ones. Even if file sharing sites are forced off the Internet, there is no practical way for those claiming infringement to recover damages from a judgment-proof company no longer taking in ad revenues or membership fees. It simply is not surprising that digital copying is endemic in both the worlds of creative artists and intellectual property consumers. A huge amount of material is taken for free in the wild world of the Web.

On the other side of the debate, when systems designed to suppress digital copying do work, they sometimes function inappropriately. Takedown notices are sent erroneously or for less than salutary reasons. They may lead to removal of materials that should be left alone.⁹⁷ Most significantly, efforts to suppress online illegality generally operate with minimal deference to fair use rights or the traditional ability of consumers to browse among protected works before deciding whether to purchase an item.⁹⁸ Additionally, when items go behind paywalls, those selling copyrighted materials are unable and unwilling to distinguish between those intending to fairly use material, those browsing to find material to support their creative activity, and those unlawfully intending to pass copies along to others for free or for a fee.

95. *Id.*

96. The load is staggering for Google. Google received almost 35,000,000 requests to take down URLs during September 2014 alone! See *Transparency Report*, GOOGLE, <http://www.google.com/transparencyreport/removals/copyright/> (last visited Oct. 28, 2014).

97. Perhaps the most important study is Jennifer Urban & Laura Quilter, *Efficient Process or "Chilling Effects"?: Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, CHILLING EFFECTS, <http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf> (last visited Nov. 6, 2014).

98. One of the first to raise these issues was David Nimmer, A Riff on Fair Use in the Digital Millennium Copyright Act, 148 U. PA. L. REV. 673 (2000). See also Julie E. Cohen, A Right To Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace, 28 CONN. L. REV. 981 (1996).

All of this makes it understandable why much of the contemporary debate about copyright tends to sound like the north-going Zax and the south-going Zax. Each has valid arguments that fail to dissuade the other. Efforts to find common ground within the parameters of the existing copyright regime appear doomed to failure. This all suggests that copyright law itself must be rethought in basic and fundamental ways. A path must be found for both the north-going Zax and the south-going Zax to mutually use the same ground—for both copyright owners and copyright users to accommodate their mutual needs while still obtaining benefits from the operation of copyright law.⁹⁹

IV. THE DIGITAL FUTURE OF COPYRIGHT LAW

There are a number of important issues that must be resolved before copyright law can exist comfortably in the digital world. First, are there areas of extant copyright law that function reasonably well? If so, creating an interface between those areas and the digital world is critical. Second, once past the large observation already made that cabining digital copying is difficult, if not impossible, without using draconian methods to suppress abuse, what rights may realistically be retained by those creating original works of authorship that are either in the digital world from the beginning or can be easily moved there? Third, if copyright owners who have lost effective control over digital versions of their work may still be entitled to some form of remuneration, is there any way to establish a payment system that avoids the problems discussed in this Article? Fourth, because the very nature of both the Internet and the growing array of devices capable of digitizing material seriously diminishes the ability of intellectual property owners to manage use of their works, what should be done with the traditional rule that copyright owners control the right to make and distribute derivative works? Finally, what impact does fair use have on the reconstruction of copyright law in the digital age?

To work through these issues, consider a traditionally formed copyrightable work of art that is the focus of the opening segments of this Article. With the permission of my wife, Elizabeth Langer, I will use a work we both like a great deal that is original to her. It is a figure

99. I certainly am not the first to claim that the existing copyright statute needs to be substantially, if not totally, rewritten. Two recent articles make the issue obvious by their titles alone. See Justin M. Kaufman, *The Creative Rights Act of 2020: A New Deal for Promoting the Progress of Creativity*, SOC. SCI. RESEARCH NETWORK, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2135862 (last visited Oct. 6, 2014); Jessica Litman, *The Copyright Revision Act of 2026*, 13 MARQ. INTELL. PROP. L. REV. 249 (2009).

composition in acrylic paint and chalk called *Holding On* , displayed in color on the next page and on her art website.¹⁰⁰ As with many creative endeavors, it has relatives and aesthetic ancestors in the history of Western art. But she did not literally appropriate anyone else's material when she made it.¹⁰¹ It easily fits into the existing copyright world—an original work fixed in a tangible medium of expression that obviously is copyrightable subject matter. In its first incarnation the work was not digitized. But after taking a digital photo of the work, she asked me to place it on her webpage—as a practical matter diminishing her ability to effectively control its Internet future. So what should be the intellectual property status of *Holding On* ? Are there aspects of its “life” that can be dealt with reasonably well under existing law? What rules should govern the digital use, reuse, distribution, alteration, and remixing of the work? What arenas of control, if any, should my wife retain now that a digital image of the composition is online? Should she have access to any royalty stream if the painting is digitally copied, reused, altered, or redistributed, either with or without her permission?

100. See *Holding On* , ELIZABETH LANGER, <http://www.elizabethlanger.com/figures10.htm> (last visited Nov. 6, 2014).

101. Perhaps this needs some clarification. She made this work in part from a picture in a newspaper. The end product is unrecognizably different from the original. If you want to call that appropriation, be my guest. And of course, the idea of painting or drawing a figure starting from a model or another picture is as old as the earliest human art forms.



Elizabeth Langer, *Holding On* (Acrylic and Chalk on Paper, 30" x 30")

A. *More of the Same Old, Same Old?*

Does the existing copyright scheme work well with *Holding On*? Surely the answer is “yes.” If we return to those thrilling days of yesteryear, before the rise of the Web, copyright law dealt with two-dimensional art reasonably well.¹⁰² Standard reuse or copying of the original to make, display, or distribute nondigital versions of the work were and are dealt with tolerably under the existing structure. Enforcement certainly is not perfect. Discovering nondigital infringe-

102. Pardon my appropriation. Some readers may remember the yesteryear line from the TV series *The Lone Ranger*. “Return with us now to those thrilling days of yesteryear! From out of the past come the thundering hoof beats of the great horse Silver! The Lone Ranger rides again!” So intoned the narrator as the show began. A radio version premiered in 1933. Its popularity generated an equally popular television series that ran from 1947 to 1959. You can view the introduction at *The Lone Ranger: 75th Anniversary DVD Box Set Trailer*, YOUTUBE (Dec. 15, 2008), <http://www.youtube.com/watch?v=Fe5nD7BEBIY>.

ment has always been a problem. Enforcement costs have long precluded some from pursuing infringers. Protecting *Holding On* in the analog world presents no greater or lesser problems than have existed for over a century. If inappropriate use of the work comes to light, demand letters and perhaps litigation are available to obtain relief. While enforcement costs can be high, the Copyright Act lightens the burdens for some by making statutory damages available when actual harm is difficult to measure and allowing courts to award attorney fees to prevailing parties.¹⁰³ In addition, the likelihood of nondigital infringement is very low for material like two and three-dimensional fine art. After all, the artist or other party holding the work retains control over access to the unique original object that others may wish to copy, at least until it is shown publicly.

On the other side of the equation—those wishing to use works like *Holding On* in their own creative or mundane endeavors—obstacles to creative reuse in the nondigital world are not intolerably difficult to overcome.¹⁰⁴ Obtaining permission may not always be easy, but tracking down a copyright owner in the absence of notice and registration requirements, seeking permission once the owner is identified, and paying any requested fees are generic hurdles in the copyright world that have existed for a very long time. They simply are part and parcel of the way the United States, and most other nations, have dealt with intellectual property rights in a nondigital world for generations. The system has never been perfect. Transaction costs for enforcing rights or obtaining permission to use works have never been zero. But in the nondigital world these transaction costs are not so high that they break the system. Such enforcement costs are similar to those extant in many private property schemes. This is true not only in the fine arts realm, but also in many other areas where use of digital systems is incomplete. Live performances of drama, dance, music, and comedy, and publication of hard copy books and other works, to suggest a few, are significantly less likely to become digitized than works originally created and distributed online. In short, standard copyright rules, normal permission processes,

103. These remedies are available in settings where a work has been registered. See 17 U.S.C. §§ 412, 504-505 (2012).

104. It is true that the permissions system under the Copyright Act is a major transaction cost. That is a standard criticism of copyright law that deserves consideration. But this long-standing issue does not arise because of digitization. It was here well before the Web arrived. The arrival of digitization, however, has vastly exacerbated the problem by dramatically expanding both the volume of copyrighted material and the ease of its distribution.

and one-on-one lawsuits provide adequate, if imperfect, protection for many traditional creative endeavors.¹⁰⁵

B. Entry into the Digital World

As a result, there clearly is a transition problem—how to treat the movement of a protected work from a nondigital to a digital environment. The two worlds present dramatically different situations for both copyright owners and users. Though it is plausible to think about a traditional artist maintaining intellectual property control over her work in a nondigital realm, there is no guarantee that such control will last very long once a work is publicly displayed or digitized. *Holding On* might be digitized in a variety of ways—either by the artist or by someone else. Pictures may surface after the work is shown at an exhibition. Copies could be circulated if the artist uses it in an email, on a social networking site or, as in real life, on a website.¹⁰⁶ While going viral is unusual, there is little to prevent its occurrence in a variety of settings. My wife could place the image behind a secure, password protected wall, but that would defeat the purposes she has for putting the image online in the first place. Artists routinely set up websites and use images—often, but not always, thumbnails—in emails and in social media to spread knowledge of their talents. Nonuse of electronic systems is quickly becoming the exception rather than the rule, even in the most traditional parts of the artistic world. In short, it is obvious that the forms of control available over art in a nondigital world are easily lost by the normal day-to-day digitizing behavior of either the artist or those seeing her work. Even if continued use of traditional copyright law can be justified in nondigital settings, the profound structural change created by digital devices and the Internet thrusts a surprising question upon the

105. Obviously, I am not suggesting that the standard copyright regime is all that great—only that the structure of the Copyright Act provides tolerably good protection to creative artists in nondigital realms while allowing arguably appropriate levels of use by others seeking either fair or licensed use. This Article is not designed to deal with any number of long-standing criticisms of the Copyright Act's operation in the nondigital realm. Attempting to grapple with some of these issues here would send me down an enormous frolic and detour. The "orphan work" problem alone—exposed for all to see by litigation against Google Books—is big enough to write many monographs about. Three recent articles on these issues include Giancarlo F. Frozio, *Google Books Rejected: Taking the Orphans to the Digital Public Library of Alexandria*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 81 (2011); Libby Greismann, *The Greatest Book You Will Never Read: Public Access Rights and the Orphan Works Dilemma*, 11 DUKE L. & TECH. REV. 193 (2012); James Grimmelmann, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC'Y 497 (2011).

106. For example, my wife frequently places an image below the signature line of her emails. Though not yet using Facebook, we have discussed whether it is worth maintaining an open art page there in addition to her regular website.

intellectual property world: should an artist retain the right to control entry of her work into the digital domain? Or, put in more standard copyright prose, should a copyright owner have the exclusive right to control initial display or distribution of a literal digital copy of a work to a third party or to the world on the Internet?¹⁰⁷ The quick, stock answer is yes. In reality, however, the question is surprisingly difficult and presents deep challenges to standard copyright norms.

In the absence of fair use, the owner of a traditional copyright in an artwork holds control over the first publication or display of her work.¹⁰⁸ Standard justifications for the existence of copyright—the utilitarian notion that some level of incentive for the making of original work is required for society to obtain an appropriate amount of creativity or the natural rights idea dominating European law that creativity deserves reward for its own sake—support that result.¹⁰⁹ Display and publication of a painting or other traditional artwork are standard ways to seek payment and reward for creativity from interested purchasers. Preempting such actions by seizing control over first digital use challenges the vitality of traditional, core copyright values. Therefore, at first glance, it is instinctively appropriate to conclude that a copyright owner should retain the right to control the introduction of a work into the digital world, especially if that owner is also the creative force behind the work.

It turns out, however, that granting a copyright owner complete control over the transition to digital is extremely difficult to defend as the only available remedy for infringement. While allowing a copyright owner to obtain relief from those who digitize a work without permission is worth inserting into any new or substantially amended copyright code, such a rule may at times be of little use. Surreptitious digitization is easy.

107. I am totally putting aside issues associated with some varieties of online copies, such as caching, temporary or fleeting storage, and other similar problems associated with the operation and maintenance of the Internet. They are in an arena not covered in this Article.

108. First publication rights were central to the fair use analysis in *Harper & Row, Inc. v. Nation Enterprises*, 471 U.S. 539 (1979). Without appropriate permissions, *The Nation* published excerpts from an autobiography of Gerald Ford after obtaining a prepublication copy of the book in an arguably suspect way. Harper & Row had previously contracted with Time, Inc., to publish important excerpts from the book just prior to its release. The value of that contract was nullified by *The Nation's* actions. When sued, *The Nation* unsuccessfully claimed fair use. See *id.* (describing why *The Nation's* use was not fair under the Copyright Act).

109. There is a great deal of literature on the norms underlying copyright. Two of the most interesting are Litman, *The Public Domain*, *supra* note 92, and Wendy J. Gordon, *A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993). The first concentrates on the difficulties inherent in a utilitarian incentive based theory of copyright and the second on issues surrounding claims of right in the creative spirit.

Use of cameras, recording devices, and other digital tools is sometimes barred at exhibitions, shows, and public events.¹¹⁰ But posting a no-camera rule on a wall or reciting it over a public address system and enforcing it are altogether different undertakings. Bag and body searches can be done but the hassles associated with taking devices from customers, storing them during a show, and returning them later to owners—to say nothing of objections by patrons to physical intrusions and to temporary separation from their expensive digital gadgets—are major impediments to use of such measures. If patrons are not required to store their digital devices, it is often impossible to impose limits on use of cameras and recording equipment. Many places, including galleries and museums filled with copyrighted works and entertainment spots where music and other protected works are performed, have simply given up trying.¹¹¹ And in museums or other institutions that have not given up, the no-camera policy may be widely ignored.¹¹²□

110. Copyright law, of course, is not the only area placed under strain by the digital world. One example is the recent privacy invasion hullabaloo surrounding the topless pictures of Kate Middleton taken by a photographer for a French version of *Closer*, their later publication in Irish, Italian, and Norwegian publications, the further distribution of the photos around the Internet, and the failure of injunctive relief issued by a French court against the original digitizer to stem the tide. See Alan Cowell, *Royals Sue over Photos of Duchess, Top Bared*, N.Y. TIMES, Sept. 14, 2012, at A4; Elisabetta Povoledo, *Magazine Publishes Images of British Duchess*, N.Y. TIMES (Sept. 17, 2012), <http://www.nytimes.com/2012/09/18/world/Europe/Italian-magazine-publishes-topics-images-of-Kate-Middleton.html>. It seems quite clear that if control over privacy invasions is to be maintained, the size of damage remedies has to take into account the ease with which material may go viral. Injunctions, as in the Middleton dispute, may be of limited utility. A significant damage award, however, may have deterred future similar events.

111. For example, the general rule at the Metropolitan Museum of Art in New York bars flash photography and video cameras, but nonflash pictures may be taken. Further limitations may be imposed for special exhibitions. See *Visitor Tips and Policies*, METRO. MUSEUM ART, <http://www.metmuseum.org/visit/plan-your-visit/visitor-tips-and-policies> (last visited Oct. 6, 2014). Though reuse of images taken at the museum is barred, that is quite difficult to enforce. Flash photography is also barred at the Museum of Modern Art in New York. Taking pictures for personal use is allowed. *Visitors Policies*, MUSEUM MODERN ART, <http://www.moma.org/visit/plan/guidelines> (last visited Oct. 6, 2014). The ability to take very good digital pictures indoors without flash has only added to the difficulties of controlling distribution of copyrighted works in the digital age. Despite the hassles, some venues, including Madison Square Garden and Lincoln Center, bar large bags and prohibit photography with “professional” equipment. *Guest Relations/FAQ*, GARDEN, <http://www.thegarden.com/faq.html> (last visited Oct. 6, 2014). Presumably, consumer cameras like those found in cell phones are allowed. Since 9/11, bag searches on entry into important venues such as Lincoln Center are commonplace. However, this usually is for security purposes, not to bar entry of digital devices. See, for example, the policy for the Beacon Theater, a popular Manhattan venue for music and other shows. Patrons are warned about bag searches but not cameras on the website. *Beacon Theatre Tickets*, TICKETMASTER, <http://www.ticketmaster.com/Beacon-Theatre-tickets-New-York/venue/237665> (last visited Oct. 6, 2014).

112. For example, in 2012, my wife and I visited the Guggenheim Museum to see the Picasso Black and White Exhibition. As we entered the museum, “no camera” signs were visible

Of course, once a digital copy is made, the cat may easily escape the bag. And when it does, the owner may have no idea who was responsible for the event. Perversely, the greater the owner's enforcement efforts, the lower the likelihood of tracing the digitization pathway. Digitization is more likely to be surreptitious when policing is intense. In some settings, regardless of enforcement efforts, it is simply inevitable that digitization will happen. The innocent, thoroughly reasonable actions of a copyright owner—a simple act of publicly displaying or performing a work—may be the precipitating cause for the transfer of a work from the nondigital to the digital world. Everyone should recognize these problems. The emergence of tiny digitizing devices and nonflash cameras has allowed the reduced intellectual, artistic, and moral restraints of the art appropriation era to move out of the home and studio and into the world at large. The public display or performance of a work in any format—not just paintings, but any type of creative object—risks its transformation. To be creative in the present world is to risk being digitized. It simply is the way the world now works.

There is no reason to blame or fault an artist, performer, or copyright owner or to penalize them for their behavior if one of their works is digitized without their approval or knowledge. But, ironically, the structure of the digital world does seriously undermine the utility of the traditional norm that copyright owners have the exclusive right to exercise control over the first publication, display, or performance of their works. To state or even enact the rule neither guarantees its enforceability nor assures only authorized digitization. Even if the right to control digitization is bestowed on copyright owners, a work digitized without permission may be very difficult to recover. Sometimes it simply becomes a digital “goner.” Surely those dealing with copyrightable subject matter are fully aware that their revelation of a work in any form—even under serious access constraints—may send it flying off on an unexpected digital journey. Digitization not only makes it more difficult and impractical for rights owners to enforce their control over

in a number of spots. But the number of people using smartphones to snap shots throughout the museum was large. The institution's website notes that picture taking for personal, noncommercial use on the lobby floor is okay, but that use of cameras elsewhere is barred. *Frequently Asked Questions*, GUGGENHEIM, <http://www.guggenheim.org/new-york/visit/faqs-policies-and-procedures> (last visited Oct. 6, 2014). That policy was obeyed more in the breach than the reality. I was warned after taking one photo because I left the flash on. Later shots, some in the view of guards, went unnoticed. Most people taking pictures were not stopped by members of the staff regardless of where they were in the museum. It is not clear they would have succeeded in squelching picture taking if they had been more vigilant. Welcome to the digital world. You can see one of the shots I took from above the lobby floor at *Appropriation Art: Law and Culture*, *supra* note 2, at 54 (<http://www.rhchused.com/Page54.html>).

first digitization, but it also reduces the need for such enforcement if some now untapped source of payment for reuse can be created. If a work reaches a realm where recovery of control over its use by making a legal claim under traditional copyright law is impractical, payment of funds to the owner may become much more important than retention of first digitization rights. Finding a way of making payment possible in such circumstances is one of the major goals of this Article.

There is no perfect way to resolve these issues. But a more nuanced and intelligent system of copyright remedies is possible: a system that recognizes both the traditional economic claims of copyright owners and the inability to control the ways in which works may be used online. I suggest that once a digital version of a work is available online, regardless of how it got there, the copyright owner should be given a restricted choice between two mutually exclusive enforcement structures. The artist should have a choice between relying on the traditional copyright enforcement system in the digital world or opting into a pooled royalty system that receives money from taxes on electronic equipment and pays out funds to copyright owners based on digital use surveys. Selecting the second system would be a natural step for an owner to take after digital control over a work is lost.¹¹³ But the decision of a copyright owner to admit that the digital world controls her work and to forego use of traditional enforcement techniques also means that she must largely cede use of her creativity to the remix world. It is, in short, a decision to accept money in return for releasing control over the digital use of a work to others. The rest of this Article describes these two pathways in detail—the restraints on use of each system, the remedies available to owners, and the place of fair use and moral right in such a restructured copyright world.

1. The Limits of Traditional Remedies in the Digital World

As noted, there are situations where traditional copyright remedies might work tolerably well even in the digital age. There is therefore no reason to totally abandon them. If a copyright owner knows the unlicensed digitization pathway of a work not previously placed on a digital system under the auspices of the copyright owner, a remedy should be provided against the appropriate parties. This rule would have to be imbedded in a new exclusive right to control the first digitization of

113. Note that selection of a royalty-pooling system does not interfere with an artist's ability to sell an original work. The object—painting, sculpture, collage, or other medium—is not affected by a restructuring of digital copyright law.

a work, though subject to the limitations described below.¹¹⁴ There are a number of reasons why statutory damages should be the preferred remedy in any case where digitization of a work is widespread. While a person placing the work of another online may be misbehaving when she acts, it is unfair to impose the harm caused by all subsequent viral use on the first miscreant. At the time of litigation it may be totally unclear how much further use will be made of the work. Measuring damages in such a setting would be impossible. In addition, even if the original party digitizing material misbehaved, that would also describe the actions of those using the protected material later on. Blaming the total use level on the first to digitize is causally inappropriate. Given both the measurement difficulties and the causation issues, it makes more sense to set a payment level range of damages for the first unauthorized digitization.¹¹⁵ If a copyright owner knows the unlicensed digitization pathway of a work unlawfully placed on a digital system without the auspices of the copyright owner and it is feasible to un-digitize the work, an injunctive remedy should also be provided. This may happen, for example, when a digital image of a painting or other work is on a small number of cameras or computers but not yet on the Web or a digital version is on very few websites and apparently not widely distributed.

At the point where digital distribution has proliferated to such an extent that use of traditional copyright remedies to control digital publication, display, or performance of a work becomes impractical, however, it is sensible to reconstruct the copyright regime to allow an owner to forego access to standard remedies and seek remuneration from a generalized royalty-pooling system.¹¹⁶ Inherent in this decision is the

114. Some care is required in stating this idea, for copyright owners often digitize a work when they create it. Writing a document on a computer, "painting" a work on a screen, or placing a musical composition on a storage medium all involve access to digital systems. The issue dealt with in the text is the placement of a work on a digital system outside the direct reach of the copyright owner.

115. Consideration should also be given to removing the requirement that a work be registered in order to obtain statutory damages for its infringement in viral use cases. Digital misuse can happen so rapidly and unexpectedly that long-term planning requirements may be unfair.

116. Clearly there are settings in which work is digitized and posted online but further copies are not likely to be made in the absence of sophisticated hacking. Large databases, for example, obtain copyright protection for their original organization and presentation, but not for their content. The underlying data, as in systems like Westlaw or Lexis, are stored behind major control systems. Any copyright interests in these systems are very unlikely to go viral, both because of the underlying control systems and because the materials are not likely to become wildly popular, viral fads. There are other systems, like iTunes, which sell copyrighted material in a tightly secured market that does not guarantee the digital status of the work after it is downloaded. Much of the music on the site is not copyright protected. In addition, the songs may be available on other sites or redistributed despite any precautions and limitations imposed

assumption that efforts by an owner to control distribution of her work are no longer useful or economically productive. Rather than seeking compensation from numerous and potentially unknown or unreachable users of the work, the owner would allow general online use of the work in return for receiving a monetary stream from a royalty pool. Loss of control over digitization should not mean forfeiture of all revenue streams.

There are at least two potential problems with this proposal worth considering before reviewing the structure of the royalty-pooling system. First, drawing the line between settings where control over digitization rests with the copyright owner and those in which control has been lost is not precise. It is a potential litigation magnet if statutorily mishandled. The easiest course is to place the decision about choice of remedial structure in the hands of the copyright owner. Rather than leaving the transition from traditional to pooled remedy under judicial control, the line should be drawn by the copyright owner—the party most directly concerned with the remedial structure. At the point where the artist deems it appropriate to withdraw from the traditional copyright system and seek pooled royalties, she should simply be allowed to make the shift.¹¹⁷

Second, the system proposed here may create incentives for misbehavior. The existence of a rule allowing copyright owners to shift enforcement from the courts to a royalty-pooling system may lead some to become habitual hackers in order to increase the availability of materials in the online world.¹¹⁸ We cannot be certain this would happen. But assuming the probability is very high, should we worry about the potential consequences? Two reasons lead me to answer no. First, similar, though perhaps less enticing, incentive structures operate now. As already noted, copyright law itself allows a significant amount of copying as part of fair use. Google, for example, is arguably the largest

by iTunes. In such settings, the pooling system proposed in this Article might well be selected by a copyright owner.

117. In fact, there is no reason to limit the choice by imposing some statutory norm. If a copyright owner wishes to seek pooled royalties and allow a work to be freely remixed from the outset, I see no important policy reason to bar that behavior.

118. It is worth noting that this incentive may be quite low. If, as I propose here, funds to pay for digital use should be raised by taxing electronic equipment, the costs of digital reuse would be passed on to the public at large. Hackers might actually realize that their work would create pressure to increase the tax rate to make the size of royalty streams fair. That is not the sort of free-for-the-taking atmosphere that drives contemporary hackers. In addition, “click cheating” by copyright owners to increase their royalty streams is controllable. Search engines have developed sophisticated methods to deal with the same problem in setting advertising rates and payments.

appropriator on the Internet. With court approbation,¹¹⁹ it makes available book excerpts, image thumbnails, and an array of other copyrighted materials in its search results. In addition, while the threat of litigation now deters some digital redistributors, there is much evidence that the effect is limited. The proliferation of copyrighted materials on the Internet certainly belies the notion that extant law has successfully squelched appropriation.

Second, and more importantly, the existence of unauthorized appropriation of copyrighted material in a world where litigation is rejected in favor of a pooled royalty does not mean that copyright owners go home empty-handed. The empty pocket is the fear driving much of the antagonism of large entertainment companies to digital redistributions on the Internet. Perhaps they are being shortsighted. As discussed at length below, there are ways to structure compensation systems in an open digital environment, and there is no reason to believe that digital duplication must cause economic harm to owners. In fact, there is reason to believe that many owners would be better off by getting out of the enforcement business and into the pooled royalty collection trade. Digital uses of copyrighted materials that presently produce no income stream would become money conduits in any structure that monitors distribution and provides use-based compensation. Though it is a perverse conclusion to anyone wedded to present practices, a world that allows or even encourages digital duplication may lead to a better and more efficient royalty-streaming structure than now exists.¹²⁰

2. Royalty Pooling

Where does all of this lead? How should we respond to the changes in the economics of the copyright world wrought by the Internet? Those who complain loudly about the slow movement of large entertainment enterprises to reinvent their business models may be right. But to whatever degree financial reward for the use of prized creative work is lost to the vagaries of the digital world, distribution of funds to copyright owners, especially the small cogs in the large entertainment wheel, may be appropriate. My claim that we should allow copyright owners to cede

119. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012); *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012). *Authors Guild* does not involve Google, but very strongly suggests that what Google presents online in its book searches is permitted.

120. It also is plausible to imagine the creation of a “miscreant” rule to handle those who are large-scale redistributors of materials placed in a royalty-pooling system. Royalty-pooling organizations could be given the authority to seek damage and injunctive relief from such parties.

control over the digital distribution, display, or performance of works easily available online, does not negate the validity of claims by those owning copyrights for compensation when their work is used. No one interested in copyright issues should wish to undermine the already tenuous ability of many truly creative and artistic people to make a living. That is one reason why the traditional infringement rules have remained in place for so long. My suggestion that the scope of control over copyrightable material now held by authors and copyright owners is too large collides directly with the need to find sources of financial support for the artistic among us. Resolution of this tension is likely to upset deeply engrained business models and legal habits.

Any new copyright system must operate under a set of basic constraints. First, as noted, copyright owners, as a practical matter, sometimes lose control over the digital use of their work. Rather than forego virtually all royalty streams, owners must get accustomed to the idea of giving up control of their work in return for obtaining benefits under a royalty-pooling system. Second, once a work is in the digital realm and control over its digital use is ceded by the copyright owner, it should be freely available for anyone to use—subject only to non-copyright-based legal limitations¹²¹ and, as discussed below, a significantly revised moral right. Third, once a copyright owner has ceded control over a work, it should be unlawful for anyone else to place it behind a security system, paywall, or other system constraining access by the general community. Those electing to remain in the traditional copyright system should have to bear the enforcement costs of that decision. Double dipping would be inappropriate.

A system meeting these goals could be set up in at least two ways. First, we could emulate the process for covers of music compositions and operate in a world where, subject to payment of a statutorily mandated fee, anyone would be allowed to use another's copyrighted work once the copyright owner has either ceded digital control of a work or, more ambitiously, once it is digitized for the first time with the permission of the copyright owner. That sort of system would require a pervasive digital monitoring system using something like universal product codes to detect which protected items are being used by others and to send out bills to users.¹²² Relying on statutory rights to do the equivalent of making a cover without intensive monitoring is unlikely to work in an online world. But such a monitoring system does not now exist. Pushing

121. Defamation is one obvious constraint.

122. This is the sort of system recommended in Kaufman, *supra* note 99.

for its creation would raise a host of practical, intriguing, and perhaps scary issues. Deploying the technology would be expensive. Maintaining privacy would be difficult with a system that continually monitors the Internet for use of copyrighted materials and sends bills to users. In short, we should search for a better way.¹²³

Second, we could forget about mandating direct monitoring of product codes and billing users, create a pool of royalty funds by taxing the sale of all digital equipment of any sort,¹²⁴ and distribute payments through semi-public royalty-pooling organizations much like Sound Exchange and the American Society of Composers, Authors and Publishers (ASCAP).¹²⁵ The tax system must be pervasive. Everything digital—such as computers, blank media, routers, network servers and equipment, smartphones, tablets, and television equipment of all types—should have a fee attached to its sale. The Copyright Office should have the authority to issue regulations determining the tax rate. It should also be given the power to add any new equipment type it thinks appropriate to the system without further legislative action.¹²⁶ Given the rapidity of technological change, it would be foolish to require congressional action to alter the mix of devices subject to taxation or to change the tax rate.¹²⁷

123. I reject the proposal that Fisher suggested a decade ago for the sound recording realm. See FISHER, *supra* note 17. In the present setting, the scale of the Internet makes tracking millions of particular items an extraordinarily difficult task. It seems much more practical to create groups of users willing to share revenues in some rough proportion to the ways the creativity of the group members is digitized and distributed on the Internet.

124. It is also plausible to tax Internet service providers (ISPs) or other major players in the Internet transmission system in addition to taxing equipment. I suspect that is unwise. While ISPs and other organizations certainly are major players in the distribution and display of copyrighted works, they also purchase or rent a significant amount of digital equipment. There is no obvious reason why they should be taxed twice—once for the equipment and again for their internet role. It is hard to understand why additional fees should be imposed for the services they provide when such fees would not be imposed on other Internet-related businesses.

125. Moving to such a system would require public tolerance of imperfections inherent in royalty-pooling systems. Those paying taxes when they buy digital equipment probably would not be charged exactly in proportion with the amount of digital copying and remixing they do, and those whose material is copied or remixed would not receive payments from royalty pools that exactly match the extent to which their copyrighted items are actually used. We now tolerate these imperfections in an array of areas, including music streaming, distribution of television programming, and distribution of music composition performance royalties. There is no particular reason to suspect that our willingness to accept imprecision would suddenly become an issue if we moved to a tax-and-pay system for the digital world.

126. For example, questions would arise about whether new, fancy refrigerators with computer screens in the doors should be taxed. While I think they should, that decision would be left to the Copyright Office.

127. The United States has a history of adopting piecemeal legislation as new technology arises. The Audio Home Recording Act of 1992 is a perfect example of the imperfections of such actions. See 17 U.S.C. §§ 1001-1010 (2012). It was originally adopted to control the use of digital audio tape recorders, a technology that quickly became obsolete. Though now being used

Should joining a royalty-pooling organization be left up to authors and copyright owners? Those who prefer to release materials into the online world without receiving payments should be congratulated for their generosity and allowed to abstain from joining a royalty-pooling group. Organizations seeking to obtain and distribute part of any royalty pool should be required to apply to the Copyright Office for approval to participate in the system. Decisions about the amount of the royalty pool to be given to each organization for distribution to its members would be made using the same sort of process now operating in the cable and satellite TV systems. Mediation and arbitration procedures are likely to be the most efficient way to settle disputes between organizations or among members of an organization seeking a share of a royalty fund. In addition, each participating royalty-pooling organization should be given the freedom to develop its own monitoring methods and royalty allocation procedures. Authors and copyright owners, in turn, would then be free to select which organization to join.¹²⁸ In such a world, the various pooling organizations in the system might create different methods for monitoring digital use of materials and attracting members. Some might actually require their members to agree to use product codes. Others may not. In my view, this approach is superior to establishing a centralized, probably government operated, mandatory online monitoring and billing system.¹²⁹ The preferences of copyright owners would have a significant impact on the development of monitoring methods and the operation of pooling organizations.

There are, of course, elephants in the room. One is the international nature of the Web. If the United States adopted the pooled royalty system described here, there is no guarantee that other large-scale users of copyrighted material would follow suit. Works online under an American pooled royalty system would, as a practical matter, be freely available for use by international, as well as domestic, users. In the absence of contributions to the royalty pool by overseas device taxes or

to mandate royalty payments for other technologies capable of copying music, there is no particular reason to limit a royalty-pooling system to one particular form of entertainment. This act, by the way, imposes a 2% tax on digital equipment capable of copying music to fund the pool. *Id.* § 1003. So we do know how to do this sort of thing, even if only on a limited scale.

128. Some monitoring system organizations might elect to establish extensive monitoring systems. Others may create less intrusive survey systems. Authors and copyright owners would be free to select an organization or to move from organization to organization as they felt the need.

129. Systems similar to this exist in various parts of the world, including Europe, Israel, and Japan. See MARTIN KRETSCHMER, PRIVATE COPYING AND FAIR COMPENSATION: AN EMPIRICAL STUDY OF COPYRIGHT LEVIES IN EUROPE (2011), available at <http://www.wipo.gov.uk/jpresearch-faircomp-full-201110.pdf>.

other funding sources, Web users in other nations would simply be able to use a work as they pleased. While I certainly hope that royalty pools become common on the international scene, there are still steps the United States could take to deal with overseas bleeding. The most useful would be to bar collection in the United States of any copyright royalties for domestic digital use of any online foreign work that is beyond the ability of the foreign copyright owner to effectively control unless the foreign state makes appropriate contributions to the American royalty pool. The national treatment scheme of the Berne Convention and other international copyright arrangements typically require each nation, including the United States, to provide the same rights to both foreign and domestic copyright owners in its domestic courts,¹³⁰ but the Internet makes a mockery of such a system. Given the dramatic change in technology over the last several decades, I suggest that the United States would be justified in refusing to follow the traditional national treatment system for works that have become “internationalized” on the Web. While that would create an international tiff, the controversy would be worthwhile. The same forces that are driving the need to change copyright law in the United States are not isolated to these shores.

The other major issue is the inability to immediately know how large the device tax should be. This is one of many reasons why the Copyright Office must be given regulatory flexibility if it becomes the governing authority. It is possible, however, to describe the standard that should be used to develop a taxing system. Begin by contemplating how major actors in the entertainment world would react to a royalty-pooling system. Would they continue to rely on existing copyright enforcement schemes or would they join a pooling group and give up attempting to control what happens to their works online? If they elected to pool, traditional methods of making money on creative works would have to be eschewed. Would record companies, for example, prefer to hobble along under extant rules or seek money from a pool? Would movie companies

130. In general, nations agreeing to be bound by the main international copyright system—The Berne Convention for the Protection of Literary and Artistic Works—must provide in their laws that foreign authors be given the same rights as domestic authors. Article 5(1) provides:

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

For the full text of the Berne Convention, see *Berne Convention for the Protection of Literary and Artistic Works*, WIPO, http://www.wipo.int/treaties/en/text.jsp?file_id=283698 (last visited Nov. 3, 2014).

continue to distribute their works under contractual constraints and paywall systems or seek funds from a pool? My hope is that large entertainment enterprises would elect to pool, thereby unleashing a significant burst of digital creativity. And that should be the regulatory goal as well. Tax levels should be set to produce a royalty pool large enough to entice at least some of the major players in the entertainment world to release their products into the wide world of the Web. At a minimum the politics of this decision will be interesting. The probability that taxes would be set high enough to produce the result I prefer may be low, but that does not negate the wisdom of going forward anyway. The measuring stick for deciding whether a pooling system works is not whether most works owned by major players are moved into the new regime. Any movement toward allowing largely unfettered use of online works will likely enhance creativity, and many of those at the bottom of the entertainment world pecking order—a place where enormous creativity is now occurring—might be delighted to obtain any remuneration for their work. At bottom, that is the goal—to enhance creativity without significantly reducing the ability of copyright owners to make a living.

The results for art appropriators and other remixers would be both useful and interesting. Their payment for the digital equipment they use would include a “tax”—in essence a fee for allowing them to access and use copyrighted materials after they have been digitized and placed online outside the control of copyright owners.¹³¹ Once they pay these fees, nothing further would need to be done. Much like a recording artist making a cover, they could do as they wished with online digital materials subject only to moral right limitations or other non-copyright-based control systems.¹³² Further permissions to freely reuse the digital work of others would not be necessary. Fair use and copying would be equally frictionless and both would be picked up by any monitoring system established by royalty-pooling organizations and used to divvy up funds.

A tax and pay system is not free of imperfections. Tax payments will not be collected in exact proportion to the rate at which various consumers use copyrighted materials, and royalties will not be paid in

131. It may make sense to ask those who have opted into a royalty-pooling organization to place some sort of a marker on a digital copy of their work and to list their work in a central online index managed by the Copyright Office. Whether those steps should be required is open for debate. It might be preferable to leave such decisions to the rules established by royalty-pooling organizations.

132. Nothing said here, of course, alters extant laws on defamation, trademark, or other commercial rule.

precise accordance with the digital use of protected works. The issue posed is whether the imperfections are worth the significant reductions in permissions friction and the increased creativity generated by a more open Internet. To some extent we are quite accustomed to imperfections like these. American society has distributed pooled royalties for decades through performance rights societies like ASCAP, Broadcast Music, Inc. (BMI), and Sound Exchange, as well as under various pooling systems for cable and satellite television and for digital audio recordings operated by the Copyright Office. None of these groups distributes its funds with completely accurate knowledge of use patterns. Each organization receiving pooled royalties uses a different algorithm to distribute funds to its members. Some usage levels can be tracked fairly accurately: radio stations, cable networks, digital streaming systems, and others keep logs. But usage rates that are not closely monitored must be determined by surveys and educated guesses. Continuous cries of unfairness have not been heard. For the most part, copyright owners are satisfied with receiving imprecise royalty allocations rather than receiving little or no remuneration for the use of their works or paying enforcement costs by themselves.¹³³ The same sorts of procedures would be used to determine online usage rates. What is new here is that most users use digital equipment in different ways. Some download and remix digital materials more than others. But there is a high probability that large users will have fancier and more expensive equipment and, therefore, will pay more in taxes when they make larger purchases. While the match is certainly not perfect, the dissonance is not likely to be much greater than that present in the royalty distribution systems we have used for decades.

C. Remix: Derivative Works in the Digital World

Implicit, and perhaps explicit, in the resolution of issues surrounding initial digitization of a work and its literal online display, performance, or distribution without permission is a need for changes in traditional derivative work rules. Loss of control over a work in digital form is not unusual and is often permanent; once it has gone off into the wild world of the Web, there is little that can be done to prevent its change and manipulation by others. That presents deep challenges to our

133. This is not to say that pooling society customers stay put forever. ASCAP and BMI, for example, use different algorithms to distribute money. It is generally said that BMI favors more established artists over newbies. There is a tendency, therefore, for some composers to move to BMI later in their careers. The rise of computer tracking, however, has made it somewhat easier for composers to control their own portfolios and contract with some services privately. Competition between ASCAP and BMI has grown as a result.

long-standing practice of giving control to copyright owners over the making not only of copies, but also of derivative works. The Copyright Act defines a derivative work as one that is “based upon one or more preexisting works.”¹³⁴ In general, under existing law, those making original works have control, or licensing authority, not only over those making copies of the originals, but also over those creating works derived from the originals. That depth of control may have made sense in a world where the process of making copies—even with permission—was often arduous and difficult. But it is not always realistic in a digital world. Given the way in which modern technology operates, the statutory right of owners to veto many uses of their work sometimes suppresses originality rather than encourages it, while still failing to halt the creation of copies and derivative works without permission.

The costs imposed on both copyright users and copyright owners by maintaining the existing derivative work rules in the digital world can be enormous. Those users who prefer to do things lawfully need to ask permission to use and alter prior material—a process that sometimes is slow, inefficient, difficult, and costly. The enormous amount of digital copyrighted property now extant in the world, the difficulties of tracking its ownership, the slothful responses of copyright owners, and the sometimes unjustifiably large fees requested make the entire permissions game much more unwieldy than it was in a predigital world.¹³⁵ The use of materials online without attribution to the original source makes ownership tracking difficult, if not impossible, in some cases. On the Internet, many works may appear to be orphaned even if they are not. Perhaps the owner’s identity may be found after some hard sleuthing, but some people do not bother searching or find the process unavailing. Those wishing to act with complete legality in their use of protected digital work may not go forward either because of the license requirements or the difficulties involved in finding owners and obtaining permissions. Certainly the ability of risk averse artists to respond to on-the-spot inspiration—a normal and common event on the Internet—is suppressed by the potential need to obtain permission before doing anything. In sum, the difficulties and problems involved in obtaining permissions to copy and alter a work in the digital world encourage users already addicted to the free-wheeling distribution of online materials to

134. 17 U.S.C. § 101 (2012).

135. I received my rude awakening the first time I sought permission from a number of copyright owners for use of materials in a property textbook. It took months, many repetitive phone calls, letters, and a series of negotiations with those seeking what I thought were high, and sometimes outrageous, fees.

both copy and remix without seeking permission. And those less willing to take digital material may simply throw up their hands in frustration and grab anyway. Given the ease of copying materials on the Web and the difficulty and cost of seeking permission, the day-to-day world of the Internet creates strong incentives to simply ignore copyright law and remix as you wish.

None of this, of course, makes copyright owners very happy. Even in settings where royalties should be paid under existing law, the incentives created by the modern digital world frustrate both those seeking to pay them and those searching for ways to compel their remittance. Just as the permissions gauntlet frustrates users, owners find it difficult to monitor the online use of specific works, obtain the identity of potential infringers and seek relief. Therefore, we need to significantly rethink the way power over derivative works is routinely distributed under the Copyright Act. Not only is work subject to unexpected and widespread online remixing, but the permissions process itself can subvert the desires of owners and users alike to create a royalty stream.

Questioning the wisdom of standard derivative work rules in the online world is as challenging as recasting the traditional rule ceding control over the initial distribution, duplication, and display of literal digital copies to copyright owners. The same traditional copyright rationales—the utilitarian notion that some incentive for the making of original works is required for society to obtain an appropriate amount of creativity or the natural rights idea that creativity deserves reward for its own sake—supporting the right of owners to control the initial, literal digitization of work also support their right to oversee digital remixing of their copyrighted assets. Yet the difficulties created by the Internet also suggest that both basic rules aren't always workable. Several issues arise. First, how should reuse and derivative work issues mesh with the prior suggestions about first digitization rights? Second, are there any circumstances where derivative use should be limited or barred even after the copyright owner loses control over the digitization of a work? Finally, if the answer to the second question is yes, how should the ability to limit or bar derivative use operate? Even if I am correct that it is neither practical nor wise to give copyright owners complete control over the digital reuse or alteration of their works online, there may be settings where unbridled derivative use is inappropriate.

Basic copyright rules about digital derivative use should operate the same as those governing initial digitization. If the initial digitization of a painting, for example, creates a derivative work rather than a literal copy,

there is no reason to change the baseline rules. The same concerns justifying a right to control first literal use on digital system operate when the initial use is derivative. Indeed, given the likelihood that literal copying of a digital work sometimes precedes a remix, there is little sense in setting up different digital regimes. When establishing baseline rules, the simplicity of making digital changes in a work with a computer or portable device makes it difficult, if not impossible, to manage a distinction between digitally copying and remixing a work. As already noted it often is easy to digitize and literally copy a work without the knowledge of its owner. It is equally easy to change and manipulate it. So if the digitization pathway to first use is known but the first use is derivative, a statutory damage or injunctive remedy should be provided to the copyright owner. Otherwise, once the initial reuse or derivation is off on a Web journey, the copyright owner should be given a choice between seeking traditional forms of relief and making recourse to the generalized royalty-pooling system just described.

Despite these baseline rules, digital derivative use of a work may present significantly more difficult challenges in the ways copyright law meshes with related areas of media law than literal digital reuse.¹³⁶ While initial digitization of a work may undermine traditional copyright norms as it gets duplicated online, further use or manipulation of a work multiplies concerns if it is done in ways that offend the copyright owner or embody changes to a work that the author finds inappropriate, insulting, demeaning, or damaging. Nondigital examples are legion. Images such as *Holding On* may be placed in a TV or online commercial without permission, included in a political ad supporting people or positions the artist finds disagreeable, used to insult the artist, or palmed off as the work of another party.¹³⁷ These problems may involve other doctrinal niches—defamation, trademark, publicity rights, unfair competition, misappropriation, consumer protection, or moral right. Not surprisingly, Internet-generated difficulties are surfacing in many areas. Defamatory comments, once placed online, can have a snowball effect. Trademarks or images of personalities, once digitized, can be reattached to numerous products at the push of an enter key. Misleading consumers online has become depressingly straightforward and simple. Similarly,

136. Digital reuse that is not derivative may present some of the same problems as those about to be discussed. But since most of the examples involve derivations, it makes sense to locate the discussion here.

137. These sorts of controversies have popped up with some regularity in the most recent national campaign. For one of many stories about these issues, see Allison Brennan, *Campaigns Rock at Their Own Risk*, CNN (Aug. 16, 2012), <http://www.cnn.com/2012/08/16/politics/music-in-campaigns/index.html>.

digital alterations of a copyrighted work that threaten its moral integrity are easily sent off into the digital maelstrom. Alteration of traditional copyright norms in the digital age may also suggest the need for changes in some or all of these noncopyright arenas.¹³⁸

But in most of these situations, there is one significant, critical distinction from viral reuse of digital works. The multiplication of digital copies or remixes of a work on numerous websites leads to loss of control over the very core of value protected by copyright law: the exclusive rights to distribution, display, and performance. Once a work floats around the Internet, obtaining relief from a single source—if one can be found—becomes impractical. Suing multiple, often unknown, parties is nearly impossible. The only way to provide the copyright owner with an appropriate remedy for multiple instances of digital distribution and remixing is to establish a payment system unrelated to traditional distribution methods, contractual customs, and royalty structures. At some point, measuring the scale of a work's use over potentially lengthy periods of time and providing payment for it becomes more important than holding all involved individuals responsible to the copyright owner for their potentially infringing actions.¹³⁹ Nor is it critical that a measure of damages be fully decided upon when a suit is filed. Use levels of copyrighted works are unpredictable, and as a result, it is often better to pay out income over time from a royalty pool. As we know from existing royalty-pooling systems operated by the likes of ASCAP and Sound Exchange, such payment schemes are possible.¹⁴⁰

But in the other areas of media law mentioned above, there is more likely to be a single, identifiable, originating source for a problem and the issue is likely to be more limited in time. Even if a derogatory image has spread wildly over the Web, there is probably one party to seek out and sue for damages. While recovering the copyrighted image may not be possible, relief may be sought against the party setting a problem such as defamation in motion. It typically is one person or company that illicitly

138. This Article deals almost entirely with issues in the United States. But the problems obviously are international in scope. As noted previously, the sorts of shifts recommended here also infer the need for changes in the Berne Convention and other international copyright agreements.

139. Nothing said here reduces the ability of authorities to pursue criminal actions against digital reuse. Nor is there any bar to creation of federal civil actions for habitual use of copyrighted materials without obtaining licenses. The issue that most concerns me in this Article is providing a sensible way for copyright owners to cope with large scale digital reuse of copyrighted materials.

140. Both collect royalty streams and distribute them to copyright owners. For more information about their specific plans, see ASCAP, <http://www.ascap.com/> (last visited Oct. 6, 2014), and SOUND EXCHANGE, <http://www.soundexchange.com/> (last visited Oct. 6, 2014).

uses an image to degrade a person, market a product without permission, or otherwise misuse the copyrighted work. Later re-users are sometimes exempt from suit because they act without knowledge of the prior violation of legal norms. In contrast to copyright, retractions and confessions often have meaning in this space. In addition, issues like these are usually not long term. Typically they happen, they produce harm, a case is filed, damages (perhaps inexact) are levied, and the dispute is over. These sorts of events, though often headline grabbing, are also significantly less common than the now routine use, reuse, and remixing of copyrighted materials online. Malefactors, therefore, are a bit easier to trace; policing and enforcement costs are somewhat lower. Accordingly, the available remedies provide more viable protection than does copyright law. Put another way, nothing about the alterations in copyright law I am suggesting mandates dramatic changes or large shifts in the doctrinal content of most other areas of civil entertainment law. Regardless of what happens in the copyright realm, defamation, trademark, publicity rights, unfair competition, and consumer protection law can proceed largely unaffected or respond and change to the digital world in accordance with their own drumbeats. Indeed, the existence of these bodies of law makes it easier to argue that traditional controls held by copyright owners over the making of derivative works can be eased. As long as the most abusive forms of derivative work making are still subject to some forms of legal restraint, our concerns about the control authority of copyright owners over viral reuse can be muted.

There is one area, however, where extant American intellectual property norms are inadequate in the new, digital world. Domestic moral right law has been very weak since it was first embedded in the Visual Artists Rights Act (VARA) of 1990.¹⁴¹ The legislation protected only a limited set of traditional artistic works, used language unrelated to the digital age, relied upon archaic norms to establish the boundary lines between legitimate and illegitimate uses of work, and, contrary to long-standing rules in most of the rest of the world, allowed waiver of moral right by an author.¹⁴² Recognizing the loss of power held by copyright owners to control the widespread distribution, display, and performance of digital versions of their works exacerbates the likelihood that

141. 17 U.S.C. § 106A (2012). Indeed, a good argument may be made that the United States has never really adhered to the moral right requirements of the Berne Convention and that its claim to have done so is erroneous. A recent review of the content and shortcomings of American moral right law is Peter K. Yu, *Moral Rights 2.0*, 1 TEX. A&M L. REV. 873 (2014).

142. 17 U.S.C. § 106A.

inappropriate uses of copyrighted materials raising moral rights issues will surface.

In its present form, VARA applies to “works of visual art”—paintings, drawings, prints, photographs, or sculptures existing as single copies or as part of a signed edition of 200 or fewer copies.¹⁴³ The definition excludes diagrams, charts, movies, books, other printed materials, and electronic publications.¹⁴⁴ The statute provides authors with the right to claim authorship of a work of visual art and to prevent the use of their name on a work not theirs.¹⁴⁵ It also bars “intentional distortion, mutilation, or other modification” of a work of visual art that is “prejudicial to [the artist’s] honor or reputation” and bans “any destruction of a work of recognized stature.”¹⁴⁶ The traditional civil law motivation for protections like these is based on the ideas that artistic creation is inherently worthy, that misattribution of a work distorts the value of that creativity, and that destruction or mutilation of a work assaults the cultural significance of creative acts. The thing preserved is cultural and artistic integrity—a value set deemed so important that it is not subject to sale or waiver by the artist or the artist’s successors. The VARA provision allowing waiver by the express written agreement of an author seriously undermines these traditional moral right values.¹⁴⁷ So does the provision limiting the term of moral right protection to the life of the author.¹⁴⁸

Even the very limited form of moral right granted by U.S. law, however, does not operate in the digital realm. The work protected by VARA is the physical embodiment of a traditional artistic endeavor. Its digitization and transformation online does not in any way alter the attribution of authorship or the actual physical qualities of a nondigital work of visual art as defined in the act. Though authors might be able to claim a remedy under other laws if their work is digitized over the name of another person, the language of VARA does not provide such relief.¹⁴⁹

143. *Id.* § 101.

144. *Id.*

145. *Id.* § 106A(a)(1)(A)-(B).

146. *Id.* § 106A(2)(3)(A)-(B).

147. *See id.* § 106A(c).

148. *See id.* § 1006A(d)(1)(4).

149. The famous case of *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14 (2d Cir. 1976), is the best example. The significant cutting of Monty Python episodes when shown on American television led to claims under both copyright and trademark law. The latter theory, accepted by the court, postulated that the heavily edited shows violated the attribution rights of Monty Python. In essence, the shows were not really made by the comedy group. Though the vitality of this trademark law precedent is questionable after *Dastar Corp. v. Twentieth Century*

Nor does digitization distort, mutilate, or modify the physical qualities of the original work. For example, copying and then mutilating the online digital image of *Holding On* and posting the changed image on another website in no way disturbs the original and unique physical “work of visual art” now hanging in our living room. And if the new copyright world envisioned here operates, my wife’s only form of relief might be for money from a royalty-pooling system.

Is there anything wrong with that? Are there any circumstances where something akin to traditional moral right should operate? Certainly the existing VARA provisions or section 43(a) of the Lanham Act should be altered to clearly provide relief against those who digitally claim authorship of a work not theirs.¹⁵⁰ But the difficult nub of this discussion turns on the concept of “prejudice to his or her honor or reputation.”¹⁵¹ It is in this area where existing protections for digital use of tangible works are nonexistent and where the Web may operate with particular cruelty. In traditional moral right cases, it is an original, tangible object that is misattributed, altered, or destroyed. To present that work to the world in mutilated form both alters the underlying work and risks the artist’s reputation. But in the digital realm, neither a digital nor a nondigital original is altered by online changes. The author’s work remains entirely intact. The risk to reputation calculus therefore takes on a different guise. While many online reuses of both nondigital and digital works are either literal copies or creative remixes—reimaging, editorial, or critical rehashes; sampling; audio or video mash-ups; or collective reimaginings—a few are hurtful, nasty, and intentionally harmful. The former raise no reputational moral right issues in the digital world. The latter should be subject to narrowly drawn controls.

The language used in VARA to define “honor or reputation” is archaic and does not fully capture the contemporary anxieties and dangers of the digital world for artists and other creators.¹⁵² Nor does the restriction of moral right to traditional, tangible fine art make much sense in the digital age. I can imagine successful publicity rights claims after works and their authors’ names are used to advertise a product, an event,

Fox Film Corp., 539 U.S. 23 (2003), there is no possible way the same case could be brought under VARA.

150. The result in *Dastar* seems wrong to me, even under existing law. The Court held that *Dastar*’s sale as its own work of somewhat reworked versions of a previously issued and public domain set of films about World War II was not barred by the Lanham Act. 539 U.S. at 26-27, 38. While that result is questionable, the underlying value of giving correct credit to prior authors was ignored. Such results should not be allowed under any intellectual property regime.

151. 17 U.S.C. § 106A(2)(3)(A).

152. *Id.*

or a politician without permission. I can imagine trademark and consumer protection laws resolving cases where authorship of digital works is falsely claimed. But I cannot find a remedy or modest expansion of present doctrine in extant law for a digital distortion or mutilation of a nondigital or digital copyrighted work that significantly damages the artistic integrity of the author. Under existing copyright law, a copyright owner could prevent the distribution of such a derivative work in the absence of fair use. But if a work is digitized, gone off on its Web journey and, in accordance with the proposals in this Article, out of the control of the copyright owner, the author or copyright owner might be without any practical remedy for the digital insult. That result should be avoided. To do so, moral right laws should be significantly expanded to give authors the power to bar digital use of any copyrighted work in a way that “substantially damages the creative integrity” of the author.¹⁵³ The right should last well beyond the life of the author and should not be subject to waiver.¹⁵⁴

The expansion of moral right laws to include restraints on inappropriate derivative works is, of course, subject to the same critiques I make about copyright law in general—the practical inability of copyright authors to control the widespread use of their work online and track digitization pathways. If problems like these compel copyright owners to cede control over the making of digital derivative works in return for access to a royalty-pooling system, why should moral right violations be structured differently? For starters, digital moral right violations also involve the creations of derivative works. Their presence online would be taken into account in use surveys used to determine the size of payments of the royalty pool. In short, some minor economic relief for moral right problems is inherent in the system described here. The recommended changes in moral right laws are in addition to those built into the royalty-pooling structure. Successfully finding and sanctioning those responsible for moral right violations would provide

153. I have struggled for a long time over this phrasing. The wording still may not be right. I am not particularly disturbed that I do not know exactly what it means. Allowing the courts to fill the blank spaces over time is fine with me. But I do worry that this phrasing runs afoul of First Amendment jurisprudence, establishes too broad a test, or solves the problem of restraining only those actions that *unfairly* disturb the aesthetic preferences of an author. Suggestions of different terminology are more than welcome.

154. As previously noted in the text, traditional European moral right law lasts indefinitely. Relatives or the state are given the responsibility for enforcing the rule. That sort of regime should be established here for both the existing moral rights provisions and any extensions recommended in this Article. For a comprehensive table of international moral right provisions, see ELIZABETH ADENEY, *THE MORAL RIGHTS OF AUTHORS AND PERFORMERS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS* 720-97 (2006).

supplementary relief to artists harmed by the degrading or insulting use of their works online. While there may be times when it is difficult or impossible to find the party responsible for the initial misuse of material, there is value in allowing actual or statutory damages and injunctions to be levied against those who are discovered. It is also worth noting that the scale of moral right violations pales in comparison to the level of online remixing. While policing costs obviously exist, it is often much easier to track misuse than widespread remixing.

D. Fair Use

1. Fair Use by Remixers

One final issue begs discussion: fair use. Under the present regime, two major sets of impediments to fair use cry out for a remedy. First, the current digital system presents wildly divergent pictures to creative souls. For those with scruples against bold appropriation who honestly wish to claim fair use rights, it is difficult to predict the outcome of any legal dispute that may arise. Rather than take a chance and claim fair use, these users may actually purchase rights or forego creativity in order to avoid paying royalties or legal fees.¹⁵⁵ It may also be difficult for such users to understand why they should try to follow legal norms when so many others now flaunt them without causing a flap.¹⁵⁶ In their minds, it must seem that something is seriously off-kilter. Second, the Digital Millennium Copyright Act and other statutory constraints on the distribution of online copyrighted works make it very difficult for some consumers of copyrighted materials to actually use their fair use rights.¹⁵⁷ Efforts to breach online security systems in order to make fair use of material are not protected.¹⁵⁸ Though one may pay for access to a work and subsequently use it fairly, this significantly alters the level of access

155. Continuing the appropriation theme of this Article, music sampling is a good example of the problems. It is difficult to understand how musical parodies like that allowed in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994), can stand side by side with the hostility to music sampling displayed in *Bridgeport Music, Inc. v. Dimension Films LLC*, 230 F. Supp. 2d 830 (M.D. Tenn. 2002). The insecurity created by such divergent results has led many in the industry to routinely pay for using samples of music, even in cases where fair use probably exists.

156. One of the best-known mashup artists, Greg Gillis (better known as Girl Talk), does not obtain licenses—so far without legal repercussions. See Joe Mullin, *Why the Music Industry Isn't Suing Mashup Star 'Girl Talk,'* GIGAOM (Nov. 16, 2010), <http://www.gigaom.com/2010/11/16/419-why-the-music-industry-isnt-suing-mashup-star-girl-talk/>. Mullin takes the position that the industry does not sue because Gillis would become even more of a hero in the remix world. *Id.* Such martyrs do not help the industry's cause.

157. See 17 U.S.C. § 512.

158. *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000).

traditionally available to many fair users.¹⁵⁹ The ability to go to a library or other repository of copyrighted material, borrow or look at a work, take notes on or copy some portion of a piece, and then use material fairly in a new creative endeavor is gone in many digital settings. Free access also may be absent in secure Internet environments. In a few situations, the ability to copy or remix digital material, even on one's own computer, may be limited in the absence of hacking. Finally, digital systems containing large amounts of material may require users to join and pay subscription fees even to obtain access to a single item.¹⁶⁰ Creating secure pay systems is somewhat difficult and potentially leaky in ways that may cause the copyright owner to lose control over display and distribution rights under this Article's theory. However, fair use rights may be seriously limited when such systems work.

The bargain inherent in the traditional copyright system that both established incentives for the creation of new work and allowed for creative and transformative use of extant materials may be as broken as the literal copying and derivative work rules already discussed. This result can be altered, but only by making transformative use of digital materials as frictionless as possible. In essence, that is what the system recommended here does, at least in part. For all digitized works that are part of the royalty-pooling system, fair users need not worry about whether their actions are legitimate or whether they must pay royalties to gain access to a work. If they want to do something, they simply do it. Any remix, absent a moral right violation, is legitimate.¹⁶¹

The fair use problem, therefore, is circumscribed in a royalty-pooling world. The difficulties of discerning whether a use is fair arises only with respect to copyrighted items not embedded in the royalty-pooling system. At this juncture, it is not possible to predict with precision which works will fall into the pool structure and which will not. But it is reasonable to suppose that many copyright owners—especially those in markets where digital duplication and remixing is rife—will elect to participate in the pool and that such elections will become more common as time goes on. Weighing the present policing problems and

159. For a summary of the complex provisions of the DMCA and its impact on fair use, see *The Digital Millennium Copyright Act of 1998: U.S. Copyright Office Summary*, *supra* note 86, at 4-5.

160. Of course, gaining access to much material that is used fairly has not changed much. Buying a book or sound recording online mimics pre-digital-age purchases in brick and mortar stores. The issue here is not that fair use has been completely stifled, but that digitization has constrained access or increased the cost of access in some settings.

161. Fair users, of course, pay for this freedom like everyone else when they purchase digital equipment and pay the taxes. But once that is done, virtually all use is fair.

costs against the ability to claim royalties from a pool is likely to create significant incentives for many to cede control over digital reuse. But even if the movement of owners to the royalty pool is small, the status of fair users is improved. The existence of some frictionless fair use opportunities is better than none at all.

2. Institutions and Fair Use

As described thus far, fair users, as part of the general public using digital equipment taxed for creation of royalty pools, are in the same position as everyone else manipulating or using materials from the Internet. While fair users are freed from the need to ask for permission to use works in which the owners have ceded their authority to control remixing, that is also true of everyone else.¹⁶² As noted, this has the effect of reducing some barriers to fair use—especially those now embedded in deciding what infringement risks exist, making a decision about whether to seek permission for activity, and acting spontaneously on project ideas. Should any further steps be taken? Two issues need to be resolved: the fair use of materials behind secure paywalls or other digital barriers and the role of institutions that frequently use material fairly.

While it may not be too much to ask a potential fair user to purchase a copy of a work still controlled by the traditional copyright system, there may be settings where that cost is too high, especially if access is behind a secure paywall, browsing rights are limited, and entry costs are high. When such a system exists, fair use is unfairly restrained if access to one item is expensive or payment for all or most of the material on a site is required. Institutions operating in this way should be required to make reasonable single use fees available, much like those now charged for access to single songs or books on many websites. In addition, browsing systems like those available on many sites selling books and music should be required wherever practical.

Another issue is institutional fair use, as opposed to the fair use of materials held in large-scale organization websites. Use of equipment taxation systems to raise money for those creating digital copyrighted materials imposes a dramatically different cost structure on the use of intellectual property. The present copyright law lowers the cost of using

162. It is possible that this sort of system creates an incentive on the part of consumers of copyrighted material to “overuse” works. I do not think I care about such an incentive, even if it works. It is hard to understand what “overuse” would mean here. And even if we could figure that out, I do not think it makes any cultural sense to limit access to copyrighted works on the theory that too much creativity would result from a frictionless internet access system. It is hard to understand why creative reuses possibly could be deemed too extensive.

protected material by not requiring fair users to obtain a license.¹⁶³ The new system would not provide that benefit; everyone would have access to material in the pooling system. Organizations that are widely recognized as “hotbeds” of fair use would no longer gain the benefit of lower licensing costs presently extended to them for their legitimate use of materials. Educational institutions provide the most obvious example. Much of the duplication and online distribution they do now is considered fair use. In a world where such duplication and online distribution is frictionless and free of copyright liability for works in the pooling system, the reduction in licensing costs such institutions now receive would disappear once taxed digital equipment is paid for. Their effective tax rates would be similar to other large organizations that are not fair use “hotbeds.” The issue, therefore, is whether we should provide institutions highly likely to be traditional fair users with additional benefits by reducing the taxes they pay when they purchase digital equipment. Much like a typical sales tax system allows payment exemptions for nonprofit organizations and wholesalers, the fair use tax system could operate in a way that imposes different rates on different equipment buyers. Doing this would switch a significant part of the fair use debate from individual use to institutional operations. While tax discounts could also be bestowed on certain individuals, the administrative costs, the potential for fraud, and the difficult task of distinguishing those deserving a discount from those who do not may bar such a practice.¹⁶⁴ If we wish to encourage creativity, it makes a great deal of sense to think about classes of organizations that are particularly likely to enhance the intellectual, artistic, and creative parts of our world. Relieving educational, artistic, musical, and other similar organizations from payment of a portion of their digital equipment tax burden would be an easy way to recognize the significance of their fair use of copyrighted works.

163. That benefit is not “perfectly” distributed. There are costs to exercising fair use rights. Some judgments that use is fair will turn out to be wrong. Litigation costs and damage penalties might result. And some license fees may be “erroneously” paid to avoid the possibility of later litigation.

164. In the sales tax world, the two most widely applied standards distinguish between profit and nonprofit groups, and between retailers and wholesalers. These are both reasonably easy to administer. In the copyright world, figuring out who deserves an exemption is difficult. Should painters be favored over journalists, traditional sculptors over avant-garde installation artists, or composers over cello players? Though I suspect no one wants to make such determinations, it is possible that thoughtful regulators could develop appropriate definitions and guidelines.

V. CONCLUSION

The conclusion is short and sweet. Whatever one's view of the wisdom of reconfiguring the copyright system as recommended here may be, I hope it is clear that we cannot continue to use the current legal structure much longer. The copyright system is deeply dysfunctional. The stress in areas of copyright where digital work is now prominent is rising too high and too fast for us to sit indefinitely on the sidelines in the hope that the situation will get better.