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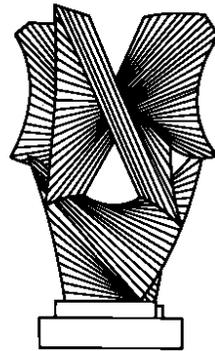
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*William M. Landes*

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# COPYRIGHT, BORROWED IMAGES AND APPROPRIATION ART: AN ECONOMIC APPROACH

*William M. Landes\**

In this paper, I examine from the standpoint of economics the relationship between copyright law, borrowed images and the post-modern art form known as appropriation art.

Appropriation art borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art.<sup>1</sup> Often, the artist's technical skills are less important than his conceptual ability to place images in different settings and, thereby, change their meaning. Appropriation art has been commonly described "as getting the hand out of art and putting the brain in." Some appropriation art does not implicate copyright law at all. For example, Marcel Duchamp exhibited readymade objects such as a urinal, bicycle wheel and snow shovel as works of art. But when the borrowed image is copyrighted, appropriation art risks infringing the rights of the copyright owner.

Artists and judges have very different views regarding how the law should treat appropriation art. The artist perceives legal restraints on borrowing as a threat to artistic freedom. The following quote is typical.

Whenever people's response is 'how dare you!' I consider that a high compliment. First of all, taking from other artists is not illegal in the art world, as it is in the music industry, and second, it is a direct acknowledgment of how we work in painting. Everything you do is based on what came before and what is happening concurrently. I don't see history as monolithic. I feel very free to take and change whatever I want, and that includes borrowing from my contemporaries. If some people are upset because my work has similarities to what they're doing, that's their problem. And if they take from me, that's great! I don't respect these artificial boundaries that artists and people around artists erect to keep you in a certain category.<sup>2</sup>

The law takes a more traditional view of appropriation art. Artists receive no special privileges to borrow copyrighted material. For example, in *Rogers v. Koons* the court held that Jeff Koons' sculpture of puppies had infringed the plaintiff's copyrighted photograph.<sup>3</sup> In rejecting Koons' fair use defense, the court stated:

Here, the essence of Rogers' photograph was copied nearly in toto, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work. In short, it is not really the parody flag that appellants are sailing under, but rather the flag of piracy.<sup>4</sup>

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<sup>1</sup> For very helpful discussions of appropriation art and copyright, see E. Kenly Ames, Note, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473 (1993) and Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1 (1992).

<sup>2</sup> Richard Rubenstein, *Abstraction in a Changing Environment*, 82 ART IN AM. 102 (Oct. 1994) (quoting the artist Richmond Burton at 103).

<sup>3</sup> 960 F.2d 301 (2d Cir. 1992).

<sup>4</sup> *Id.* at 310. Koons' sculpture was prepared for a 1988 exhibition entitled "The Banality Show." *Id.* at 304. Copyright infringement suits were also brought successfully against two other Koons sculptures from the show. See *Campbell v. Koons*, No. 91CIV.6055, 1993 WL 97381, at \*1 (S.D.N.Y. Apr. 1, 1993) (involving Campbell's copyrighted photograph of two boys and a pig); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993) (involving the character "Odie" from the "Garfield the Cat" comic strip).

I approach the law's treatment of appropriation art and the general question of borrowing pre-existing images from an economic perspective. Richard A. Posner and I have shown elsewhere that copyright law has an implicit economic logic.<sup>5</sup> Its doctrines are best explained as efforts to create rights in intangible property in order to promote economic efficiency. To some, it may appear especially odd to look at both copyright and art in terms of economics. I hope to convince you otherwise by showing that economics can illuminate a variety of legal disputes involving borrowed images and appropriation art.

This paper is organized as follows. Part I sets out a number of examples based on actual legal disputes that illustrate several important copyright problems I want to examine. Some examples directly involve artists while others involve institutions that deal in visual images. Part II reviews the basic law and economics of copyright. Part III applies the economic model to the cases, and Part IV presents some concluding remarks on how copyright law can accommodate the sometimes conflicting interests between appropriation artists and copyright holders.

## I. SOME EXAMPLES OF THE PROBLEM

Let me start with four examples outside the area of appropriation art concerning disputes over reproduction rights to works of art. These examples have in common with appropriation art the borrowing of pre-existing images for the creation of a new work. The examples also help illustrate the main theme of my paper: namely, that appropriation art poses no special problems for copyright law. The current federal statute allows one to resolve conflicts over borrowed images in an economically efficient way and requires no special consideration for artists.

1. A copies B's copy of a painting in the public domain.
2. A makes and sells a CD-ROM containing copies of B's digital reproductions of old master paintings in the public domain.
3. A museum reproduces its collection of copyrighted and public domain works in digital format. It places the reproductions on its Website. Other individuals download these images and distribute them over the Internet.
4. A purchases B's copyrighted note cards, affixes them to tiles, and sells them as decorative objects.

Example "1" comes from a lawsuit against a firm for making unauthorized copies of an engraver's reproductions of old master paintings.<sup>6</sup> Example "2" describes a case rejecting copyright for digital images of works in museum collections.<sup>7</sup> Example "3" comes from recent proposals involving educational fair use guidelines for digital images.<sup>8</sup> The final example relates to a copyright claim against a firm for affixing tiles to lawfully acquired copyrighted images and reselling them.<sup>9</sup>

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<sup>5</sup> See generally William M. Landes, *Copyright Protection of Letters, Diaries, and other Unpublished Works: An Economic Approach*, 21 J. LEGAL STUD. 79 (1992); Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67 (1992); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. LEGAL STUD. 325 (1989).

<sup>6</sup> See *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951).

<sup>7</sup> See *Bridgeman Art Library v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D.N.Y. 1998) *amended* 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

<sup>8</sup> See *The Conference on Fair Use: Final Report to the Commissioner on the Conclusion of the Conference of Fair Use*, at 33-40 (Sept. 1998).

<sup>9</sup> See *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997); *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir.

Next, I turn to a number of examples involving artist defendants who have borrowed images from preexisting works. These examples cover the range of copyright problems that appropriation artists are likely to face.

1. A creates a unique collage that includes a copyrighted photograph taken by B.
2. A creates a limited edition series of prints that incorporates B's copyrighted photograph.
3. The same facts as in the above example plus reproductions of A's prints appear on posters, calendars and other mass produced merchandise.
4. A creates a work that appropriates the outline of a nude from B's photograph, the distinctive color from C's monochromatic painting, and a miniature yellow square from D's painting.
5. A constructs several identical sculptural works based on B's copyrighted photograph or comic book character.
6. A creates a work that contains elements substantially similar to one of his earlier works owned by B who also happens to own the copyright in that work.

The first three examples are based upon lawsuits brought by photographers against, among others, Robert Rauschenberg and Andy Warhol for using copyrighted photographs in their works.<sup>10</sup> Example "4" describes a lawsuit in Germany brought by the well-known photographer Helmut Newton against the artist George Pusenkoff who claimed that his paintings "quote" rather than borrow from other artists.<sup>11</sup> Example "5" comes from several lawsuits brought against the artist Jeff Koons.<sup>12</sup> Example "6" is a special case of an artist appropriating images from his prior works.<sup>13</sup> Here, the question of copyright infringement arises because another party holds the copyright in the earlier work.

## II. THE LAW AND ECONOMICS OF COPYRIGHT

### A. *The Economic Rationale for Copyright Protection*

To begin, let me briefly set out the economic rationale for copyright protection and the basic structure of the law.<sup>14</sup> Copyright protects original works of authorship that are fixed in a tangible form. "Original" does *not* mean novel or creative but simply that the work originates with the author. Originality is a threshold question. Its purpose is to save administrative and enforcement costs by screening out works that would be created even without copyright protection.

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1988).

<sup>10</sup> Both Warhol and Rauschenberg settled out of court. Warhol paid \$6,000 cash and royalties on the print edition of *Flowers* to the photographer Patricia Caulfield who had threatened to sue Warhol over his flower paintings. Rauschenberg gave the photographer Richard Beebe \$3,000 and a copy of the allegedly infringing work worth about \$10,000. These cases and others involving the artists Sherri Levine, David Salle and Susan Pitt are discussed in Ames, *supra* note 1, at 1484-85.

<sup>11</sup> See Geraldine Norman, *The Power of Borrowed Images*, ART & ANTIQUES, Mar. 1996, at 123 (discussing the Pusenkoff case).

<sup>12</sup> See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Campbell v. Koons*, No. 91CIV.6055, 1993 WL 97381, at \*1 (S.D.N.Y. Apr. 1, 1993); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); see also *supra*, notes 3-4, and accompanying text.

<sup>13</sup> See *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, 575 F.2d 62 (3d Cir. 1978).

<sup>14</sup> For a more complete analysis, see Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 5.

Original works include, among others, books, photographs, paintings, sculpture, musical compositions, technical drawings, computer software, sitcoms, movies, maps and business directories. These works all have in common what economists call a “public goods aspect” to them. Creating these works involve a good deal of time, money and effort (sometimes called the “cost of expression”). Once created, however, the cost of reproducing the work is so low that additional users can be added at a negligible or even zero cost. Thus, the cost of making 10 or 250 copies of a print are roughly the same once the plate has been created.<sup>15</sup> It follows that in the absence of copyright protection, unauthorized copying or free riding on the creator’s expression would tend to drive the price of copies down to the cost of making them. But then the party who expended the resources to create the work in the first place will be unable to recover his costs. Hence, the incentive to create new works will be significantly undermined without protection against unauthorized copying.

In the case of unique works, such as a painting, the case for copyright protection is weaker because the main source of income typically comes from the sale of the work itself not from copies. Still, unauthorized copying or free riding on unique art works will reduce the income an artist receives from posters, note cards, puzzles, coffee mugs, mouse pads, t-shirts and other derivative works that incorporate images from the original work. And without this source of the income there will be less incentive *ex ante* to create unique works. As these examples suggest, copyright covers more than just a right to prevent unauthorized copying. It also includes rights over the distribution of copies, derivative works and public performances and displays.

To be sure, some original works will still be created even in the absence of copyright protection. There may be substantial benefits from being recognized as the creator or from being first in the market, or the copies may be of “inferior” quality. In the art market, even perfect or unsigned copies are often deemed inferior and sell for much less than original works.<sup>16</sup> A striking example of this phenomenon is the much higher price paid for vintage photographs (prints made at the time the photograph was taken) than the identical photograph printed later from the same negative.<sup>17</sup> Creators may also use contract law or other private enforcement means to discourage unauthorized copying. For example, an artist could sell his work subject to a contract term that prohibits the buyer from making unauthorized copies or derivative works. But a contract, unlike a copyright, would be difficult to enforce against third parties or subsequent purchasers of the original work.

A related point should be noted. Unauthorized reproductions of a painting or sculpture that appear on all sorts of merchandise will call greater attention to the original work. Such free “advertising” or publicity may enhance the artist’s reputation and increase the value of his works. But the reverse may also happen. Sophisticated collectors may turn away from artists whose images have become too commercial and commonplace. Because one cannot say a priori which effect will dominate, vesting adaptation or derivative work rights in the artist will create an incentive for him to license his work only in those instances where he expects the overall effect to be positive.

In short, given the speed and low cost of copying as well as the difficulty of employing private measures to prevent copying, we would expect a decrease in the number of new works created in the

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<sup>15</sup> For prints, as opposed to photographs, there will be some deterioration in quality as the number of prints increases.

<sup>16</sup> And if copies are good substitutes for an original work, the creator may be able to charge a higher price for his work to reflect the benefits from subsequent uses that are not protected by copyright.

<sup>17</sup> Consider the following two examples. Dorothea Lange’s widely reproduced 1930s vintage photograph known as “Migrant Mother” recently sold at a Sotheby’s photography auction October 7, 1998 for \$244,500. See Peter Lennon, *Whatever Happened to All These Heroes?*, THE GUARDIAN, Dec. 30, 1998. An exhibition quality print of “Migrant Mother” from the original or a copy negative can be obtained for less than \$50 from the Library of Congress Photoduplication Service at <http://www.loc.gov/rr/print/guide/price.html>. An Edward Weston’s vintage photograph from the 1929 entitled “Pepper” sold at a Christie’s photography auction on October 6, 1997 for \$74,000. A print from the same negative printed later by the photographer’s son, Cole Weston, sold at an auction at Swann Galleries (Apr. 24, 1996) for \$1,840.

absence of copyright protection. This leaves open the question how extensive copyright protection should be. The answer depends on the costs as well as the benefits of protection. Two costs, in particular, should be noted.

### B. *The Costs of Copyright Protection*

First, copyright protection generates access costs related to the public goods aspect of copyrighted works. Access costs fall on consumers who value the work by more than the cost of making additional copies but less than the price being charged. Access costs also fall on creators who are deterred from building upon prior works because they are unwilling to pay the price the copyright holder demands. Copyright protection, therefore, raises the cost of creating new works. Paradoxically, too much copyright protection can reduce the number of new works created. To be sure, the copyright owner has an incentive to lower prices to potential customers initially denied access. But information costs and arbitrage may make price discrimination infeasible.<sup>18</sup> In contrast, access costs are not a significant problem for most tangible goods.<sup>19</sup> In a competitive industry, the price of a tangible good equals its marginal cost. Only individuals who value the good at less than its price or, equivalently, its marginal cost are denied access.

The second major cost of a copyright system are administrative and enforcement costs. These include the costs of setting up boundaries or erecting imaginary fences that separate protected and unprotected elements of a work. They also include the costs of excluding trespassers, and apprehending and sanctioning violators. These costs tend to be greater for intangible than tangible property.<sup>20</sup>

### C. *Doctrines that Limit Copyright Protection*

Because copyright tends to be a costly system of property, economics predicts more limited rights for copyrighted works than for tangible or physical property. Positive economic analysis of copyright law aims to show that various copyright doctrines that limit protection can be best ex-

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<sup>18</sup> One possibility is a two-part pricing scheme where users pay entry fees that cover the costs of expression and a separate "small" charge that covers the marginal cost of making copies. Note that two-part pricing can generate access costs as well if some parties are unwilling to pay the initial fee but more than willing to pay the marginal cost of copying. In theory, these access costs can be eliminated by lowering the up-front charge to those parties though information costs may make this infeasible. A particular ingenious example of two-part pricing is the blanket license that users pay for public performance rights to copyrighted music. Since the marginal cost of performing already created music is zero, access costs would be minimized by charging a zero price for additional performances. Under the terms of the blanket license a user pays a fixed fee for right to perform any of the millions of songs in the repertory of the performing rights society as many times as he wants during the term of the license. In effect, this is a two-part price: an initial fee plus a zero price for additional uses corresponding to the zero marginal cost of additional performances. The two major performing rights societies in the U.S. are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). For additional information on the performing rights societies, see ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT: CASES AND MATERIALS* 575-83 (5th ed. 1999).

<sup>19</sup> Two exceptions are monopolies and "public goods" where prices or other means of rationing may exclude some individuals who value the good by more than the cost of their use.

<sup>20</sup> To see why these costs tend to be greater, consider the kinds of questions that must be answered in deciding the scope of, say, a photographer's copyright. Suppose A first creates a photograph and B later creates a similar photograph after having studied A's photograph. Does B's photograph of the same subject matter, say a portrait of Tiger Woods, infringe A's photograph? If not, imagine that B's photograph also employs the same background, angles, lighting, colors, and so on. Does B's photograph now infringe A's work? Or suppose C creates a collage that combines parts of A's photograph with other materials. Does the collage infringe A's copyright? Would it make a difference if the collage involves painting over A's photograph so only Tiger Woods' eyes are recognizable? Would a commercial or television program that reproduces A's copyrighted photograph even for a few seconds infringe A's copyright? What about a critical review of A's work that reproduces one of A's copyrighted photographs? Suppose A's photograph is based on an earlier photograph of Tiger Woods in the public domain. Is A's photograph still copyrightable and if so, how much is protected? This also raises difficult evidentiary questions. For example, suppose B had access to both A's photograph and the public domain photograph. How does one decide whether B copied from the public domain or from A's photograph or from both? And even if B copied from A, has B infringed A's copyright? Maybe B just copied unprotected elements of A's work including what A had copied from the public domain. Answering these questions requires fixing abstract boundary lines that separate protected from unprotected elements of a work and then determining if the alleged infringer has violated these boundaries.

plained as efforts to achieve the optimal balance between incentive benefits and access and other costs in order to promote economic efficiency.<sup>21</sup> Consider the following copyright doctrines.

### 1. *Protection of Expression*

Copyright protects expression but not ideas.<sup>22</sup> Protecting original ideas would involve substantial administrative and enforcement costs. It is far simpler to determine if B has copied A's original expression than A's original idea. In addition, most original ideas in copyrighted works are trivial and involve small expenditures of time and effort relative to the cost of expressing them. Hence, the added incentive benefits from protecting ideas would likely be swamped by the resulting access and administrative costs.

### 2. *Protection against Copying*

Copyright protects against copying but not independent duplication.<sup>23</sup> Here the element of free riding is missing, so independent duplication will not significantly undermine the incentives to create new works. Two other points reinforce this result. First, independent duplication should be rare for most works. Second, if independent duplication were actionable, authors would spend less time creating new works and more time checking earlier works to avoid copyright liability. This would lead society to expend greater resource on administering the copyright system in order to enable authors to search records, compare their work to prior works and determine how likely an infringement would be found.<sup>24</sup> In short, since independent duplication is probably rare, it is unlikely that the added incentive benefits from making independent duplication actionable would be worth the extra costs it would entail.

### 3. *Right of Adaptation*

Copyright gives the creator adaptation rights on his work. This right, called the derivative works right, is broader than the right to prevent unauthorized copying for it covers "any other form in which a work may be recast, transformed or adapted."<sup>25</sup> Painting a mustache on the Mona Lisa or cutting up an original Picasso painting into a thousand pieces and reselling each piece as an "original" Picasso are examples of derivative works. But destroying a painting, say by torching it, is not.<sup>26</sup>

The economic rationale for giving the original copyright holder rights over derivative works depends both on the added incentives to create original works and on the savings in transaction and enforcement costs that result from concentrating property rights in a single party. Consider first the incentive argument. One might reason that any added incentive benefit would be negligible, since

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<sup>21</sup> See Landes & Posner, *An Economic Analysis of Copyright Law*, *supra* note 5.

<sup>22</sup> See 17 U.S.C.A. § 102(b) (2000).

<sup>23</sup> See *Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49, 54 (2d Cir. 1936), (Judge Learned Hand stated that "if by some magic a man who had never known it were to compose anew Keat's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's. But though a copyright is, for this reason less vulnerable than a patent, the owner's protection is more limited, for just as he is no less an 'author' because others have preceded him, so another who follows him, is not a tort-feasor unless he pirates his work.") (citations omitted).

<sup>24</sup> It is worth observing that the present copyright registration system involves minimal time and cost. Registration creates a public record of the basic facts of the copyright. An applicant seeking to register his work submits a \$30 filing fee and fills out a short form listing the work's title, author, year of creation, and date and place of publication (if published). The applicant must also deposit a copy of the work (or, in cases where this is not feasible, a photograph of the work). Registration is optional and is not a condition for copyright protection. The Copyright Office makes no effort to search prior copyrighted works for similarities with the applicant's work before registering the copyright. Registration information and forms are available online from the U.S. Copyright Office Website at <http://www.loc.gov/copyright>.

<sup>25</sup> See 17 U.S.C.A. § 106(2) (2000) and the definition of a derivative work in 17 U.S.C.A. § 101 (2000).

<sup>26</sup> See 17 U.S.C.A. § 106A(3)(B) (2000). Intentionally destroying a work of recognized stature can violate the moral rights of the creator of a work of visual art under the Visual Artists Rights Act of 1990, which is now part of the Copyright Act. *See id.*

only a few successful copyrighted works will generate income from derivative works. Moreover, there is likely to be a substantial time lag between the date of the original work and the later derivative works. This, however, confuses *ex ante* and *ex post* returns. Even if the number of artists who receive substantial income from ancillary products is small, the *ex ante* return, which depends on both the small probability and the potentially large income from ancillary products, could be large relative to the artist's other expected earnings.<sup>27</sup>

Turning to transaction and enforcement costs, consider the late artist Andy Warhol. Several hundred ancillary products ranging from umbrellas to condoms incorporate images from Warhol's works.<sup>28</sup> By concentrating the copyrights in the Warhol Foundation rather than having each creator of a derivative work hold a separate copyright, the court avoids potentially burdensome lawsuits involving multiple plaintiffs. For example, how would a court decide, among many similar and widely accessible works, which one the defendant copied from? Licensing costs would also rise because a potential licensee would be well advised to seek licenses from many parties to avoid the risk of being sued by one of them. Finally, the copyright on the original Warhol image is sufficient to prevent unauthorized copying of the various derivative works since a party copying from a derivative work will still infringe the copyright on the original work.

#### 4. *Doctrine of Fair Use*

My final example is the fair use doctrine.<sup>29</sup> Fair use limits the rights of the copyright holder by allowing unauthorized copying in circumstances that are roughly consistent with promoting economic efficiency. One such circumstance involves high transaction costs. For example, copying a few pages from a book probably does not harm the copyright holder because the copier would not have bought the book. But if copying were prohibited, transactions costs would prevent an otherwise beneficial exchange from taking place. Here fair use creates a net social gain. The copier benefits, and the copyright holder is not harmed.<sup>30</sup>

Another circumstance that justifies fair use may be termed implied consent. Consider a newspaper or television review of art exhibition that reproduces a few copyrighted images from the show. This will provide useful information to consumers that on average will tend to expand the demand for the underlying works. Moreover, if the law required the reviewer to obtain the artist's consent to reproduce these images, readers would have less confidence in the objectivity of the review. In these circumstances, fair use can produce beneficial incentive effects and reduce access cost as well.

The final category of fair use involves some harm to the copyright holder that is more than offset by lower access costs and possible benefits to third parties. Here courts treat productive uses more favorably than reproductive uses of a borrowed work.<sup>31</sup> The former, such as a parody, trans-

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<sup>27</sup> Another incentive consideration is the potential harm that may result from an unauthorized adaptation that tarnishes the artist's reputation and reduces his future earnings. But so might a critical review reduce future earnings. Why is the latter allowed, even if it reproduces some of the artist's work, but not an unauthorized derivative work? On average, artists should benefit from reviews because they provide information on the underlying works. To be sure, the demand for works that are trashed by reviewers will decline but that should be more than offset by the increase in demand for works that are praised. Moreover, the value of the information provided by reviews is enhanced when the reviewer does not have to acquire the right from the artist to review his works. Consistent with the economic approach, reviews that borrow some original expression are a non-infringing or fair use of the original work.

<sup>28</sup> For a sampling of more than 100 Warhol items, see The Warhol Store on the Website of The Andy Warhol Museum at <http://www.clpgh.org/warhol>.

<sup>29</sup> See 17 U.S.C.A. § 107 (2000).

<sup>30</sup> The high transaction cost rationale should be narrowly construed. Otherwise, it would reduce the incentive to develop innovative market mechanisms that reduce transaction costs. These include performing rights societies like ASCAP and BMI, the Copyright Clearance Center for journals, and two arts organizations (Visual Artists and Galleries Association and The Artists Rights Society) that license reproduction rights to the works of many artists.

<sup>31</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

forms the original work into a new work and is unlikely to substitute for the original work or reduce anticipated licensing revenues in any substantial way. Moreover, the cost of creating the transformative work falls since transaction and licensing costs are avoided. A reproductive use, on the other hand, is more likely to substitute for the original work and, therefore, have significant negative effects on the incentives to create that work in the first place.

Parody may also be protected as a fair use. Parody can involve high transaction costs because of the difficulty of negotiating with someone you want to poke fun at. It provides information or critical comment like a review. Finally, parody can be a transformative or productive use of the original work. Still, calling something a parody is not a blanket license to copy the parodied work. Parody is limited in two ways. One is that the parody can only take what is necessary to conjure up the original work. It cannot take so much of the original work that it effectively substitutes for that work. The other is that the parody must target the work it parodies.<sup>32</sup> Here the economic rationale is that a voluntary transaction is less likely when the parody attacks a particular work than when it uses the work to comment on or criticize society at large.

Before I move on to the cases, let me mention a major economic puzzle about copyright—its long duration. Today, a copyright lasts for the life of the author plus 70 years. But from an incentive standpoint, the present value of \$1,000 in say 95 years is trivial given any reasonable discount rate. On the other hand, life plus 70 years can create substantial access costs (including the cost of tracking down the copyright owner and licensing the work) because a smaller amount of public domain material is available at any point in time. Thus, a shorter copyright term would reduce access costs without significantly reducing the incentives to create new works. There are several plausible but not convincing arguments for a long copyright term. These include the possibility that the returns from copyrighted works occur mainly in the last few years; that a near perpetual term avoids the tragedy of the commons; and that the value of an author's earlier works will be enhanced by his later efforts. The first argument appears factually wrong based on some scattered data showing that copyrights were rarely renewed when renewal was a condition of extending protection from 28 to 75 years.<sup>33</sup> The second overlooks the fact that copyrighted expression is not exhaustible so the tragedy of the commons does not apply. Unlike natural resources that can be used up by over exploitation, previous editions of Shakespeare's works do not preclude publishers from bringing out new editions. Finally, the third argument might account for a copyright term that extends 20 or so years after the author's death but not the current time of life plus 70 years.<sup>34</sup>

### III. APPLYING THE THEORY TO THE CASES

#### A. *Cases Outside Appropriation Art*

Consider first the cases outside appropriation art. They have in common with appropriation art the production of new works based upon images from prior works.

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<sup>32</sup> See *id.*; see also Posner, *When Is Parody Fair Use?*, *supra* note 5.

<sup>33</sup> See H.R. REP. NO. 94-1476, at 133-36 (1976) reprinted in GORMAN & GINSBURG, *supra* note 18, at 343 (noting that about 85 percent of all copyrighted works are not renewed).

<sup>34</sup> Consider the following illustration. Imagine that a copyrighted work yields \$1 royalties each year after the author's death and assume a discount rate of 10 percent. The present value of an annual \$1 royalty equals \$9.99 under a 70-year term, and \$9.31 under a 28-year term. Hence over 93 percent of the value of the copyright is received in the first twenty-eight years. In this example, therefore, the added incentive effects of extending copyright beyond 28 years would be minimal.

### 1. Copying a Copy of a Public Domain Work

In *Alfred Bell & Co. v. Catalda Fine Arts*, the defendant reproduced and sold copies of the plaintiff's mezzotint engravings of 18th and 19th century paintings in the public domain.<sup>35</sup> The plaintiff's engravings were realistic reproductions requiring great skill and judgment. The defendant had argued that since the engravings were merely copies of works in the public domain, they failed the originality requirement. In short, the defendant claimed that he was doing nothing more than he was entitled to do--copying a public domain image albeit by copying from a copy. The defendant lost the case, as he should have. Originality lay in the art of copying, which required significant expenditures of time, effort and skill. Free riding by the defendant would undermine the plaintiff's incentives to produce high-quality copies of public domain works. Moreover, copyright protection does not prevent the defendant from hiring engravers and making copies of the same paintings or from licensing the right to make copies from the plaintiff. Copyright merely protects the plaintiff's investment in copying from the public domain without cutting off the defendant's access to the original paintings.

Will the price of copies be higher following the *Alfred Bell* decision? One's initial reaction might be "yes." After all, if the defendant had won the case, this would lower his cost of copying and the added competition with the plaintiff would translate into lower prices. But this result assumes that the plaintiff's copies would still exist. In the future, however, the absence of copyright protection would discourage firms from hiring skilled craftsmen to copy public domain works. And as the supply of high quality copies dried up, the price of future copies will tend to increase.<sup>36</sup>

### 2. Copying a Digital Copy of a Public Domain Work

Now imagine a copyist so skilled that he produces near perfect reproductions of the original work. In *Bridgeman Art Library v. Corel Corp.*, the plaintiff Bridgeman produced and marketed color transparencies and digital images of well-known public domain works of art in museum collections.<sup>37</sup> Bridgeman claimed that defendant Corel sold compact disks containing images that it had copied from Bridgeman's transparencies. The court likened Bridgeman's transparencies to copies produced by a photocopy machine. And since photocopying obviously fails the originality requirement, so would Bridgeman's transparencies. But this misconstrues the purpose of the originality requirement. Photocopying should fail the originality requirement because the element of free riding is missing. If creating high-quality transparencies were as easy as photocopying, copying from Bridgeman's copies would cost Corel about the same as photographing the underlying works. Free riding would be minimal. Copyright protection should be rejected since it would create unnecessary administrative costs without offsetting incentive benefits. Creating high-quality transparencies of art works, however, is a time consuming process that requires considerable skill on the part of the photographer or copyist. Just as in *Alfred Bell*, it is significantly cheaper to copy from Bridgeman than to create the transparencies from the underlying works. Moreover, copyright protection will not deny Corel access to these works. Rather, Corel will have to pay museums to gain access to them or license the reproductions from Bridgeman. Finally, note that the *Bridgeman* court's decision that originality requires a "distinguishable variation" between the original and copy (that cannot be satisfied by a simple change

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<sup>35</sup> 191 F.2d 99 (2d Cir. 1951).

<sup>36</sup> An additional point is worth mentioning. Copyright protection in *Alfred Bell* does not result in the plaintiff earning monopoly profits. Copyright prevents free riding but not entry by new firms. To be sure, the price of a copy will tend to be greater than the cost of making one more copy. But entry will occur until the marginal firm just covers its full cost of making copies without free riding plus a normal return on its capital.

<sup>37</sup> 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

in medium)<sup>38</sup> creates a perverse incentive to produce second-rate or poor quality copies. Such copies have less commercial and educational value but are more likely to satisfy the originality requirement.

The *Bridgeman* case brings out another consideration—the costs of administering a copyright system—that works against copyright protection for exact reproductions of public domain works. To illustrate, suppose A and B both make exact reproductions of the same painting in the public domain. Assume further that B has had access to both the original painting and A’s copy before making his own copy. If A sues B for infringement, a trier of fact would have difficulty deciding whether B had copied from the original painting or from A or from both. Since A’s and B’s copies are nearly identical, the usual legal test for copying—access plus substantial similarity—would not help one decide if B had copied from A. Alternatively, direct evidence on copying is usually unobtainable or costly to develop. These sorts of complications would multiply when several other parties, say C, D and E, also made copies of the same public domain painting. Then a slew of overlapping claims could arise that would entangle a court in costly litigation over whether B had copied from A or the original painting or someone else. Additional litigation may also arise among A, C, D and E since all have produced copies that are substantially similar to the same public domain work and hence to each other. Each copyist might claim that the other parties had unlawfully copied from its copy. To be sure, the parties have an incentive to enter into licensing arrangements or settle their disputes to avoid expensive litigation. But licensing and settling are costly.<sup>39</sup> In short, copyright protection would be economically efficient only if the added incentive benefits to create high-quality copies of works in the public domain outweighed the extra administrative and licensing costs. This suggests that the socially efficient result could well be the current law that conditions copyright on a non-trivial variation between the copy and the public domain work.

### 3. Copying both Public Domain and Copyrighted Works

Now suppose a museum or educational institution wishes to create and distribute digital images of works in its collection. Clearly, if the works are in the public domain, it may make and distribute copies. On the other hand, the museum may not know if a particular work is still under copyright and, if it is, who owns the copyright. For works created after January 1, 1978, the effective date of the 1976 Copyright Act, the museum probably has to obtain permission from the copyright holder to reproduce them unless the artist has transferred the copyright to the museum.

For works created before 1978, there is no easy answer to whether the museum can make copies. Prior to the 1976 Copyright Act (the “Act”), common law copyright protected unpublished works in perpetuity.<sup>40</sup> The Act expressly preempted common law copyright and established a single federal system that protected a work from the moment it is fixed in a tangible form.<sup>41</sup> For works that were unpublished at the time of the Act, the earliest the copyright would expire is 2002 or, if the work were later published 2027.<sup>42</sup> In theory, a 19th century painting could be still copyrighted, if it had never been published. For unique works of art, publication is not a self-defining term. The Act defines “publication” as the distribution of copies (including the first copy that embodies the copy-

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<sup>38</sup> See *id.* at 196 (quoting *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir. 1976) (en banc)).

<sup>39</sup> See generally *Gracen v. Bradford Exch.*, 698 F.2d 300 (7th Cir. 1983) and *Pickett v. Prince* 207 F. 3d 402 (7th Cir. 2000). Both Posner opinions discuss the administrative, enforcement and licensing costs arising from copyright protection for works that are substantially similar to each other because they are based on earlier copyrighted or public domain works. See also *Durhan Indus., Inc. v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980); *L. Batlin & Son*, 536 F.2d 486 (2d Cir. en banc 1976).

<sup>40</sup> See GORMAN & GINSBURG, *supra* note 18, at 72.

<sup>41</sup> 17 U.S.C.A. § 301 (2000).

<sup>42</sup> 17 U.S.C.A. § 303 (2000). See also GORMAN & GINSBURG, *supra* note 18, at 339-59 (discussing copyright duration for works created both before and after the 1976 Copyright Act and the transition from the 1909 Copyright Act to the 1976 Act).

right) to the public for sale or other transfers of ownership.<sup>43</sup> However, the law has not treated the sale of a unique work as opposed to prints as a publication.<sup>44</sup> The statute specifies that a public display is not a publication.<sup>45</sup> The distribution of reproductions might be treated as either a publication of copies or a derivative work. Publication of a derivative work, however, may not constitute publication of the original work.<sup>46</sup> To complicate matters, copyright law also developed the concept of limited publication, which does not constitute publication for the purpose of divesting one's common law copyright. Finally, if a pre-1978 work is still copyrighted, the museum may own the copyright because in some states the so-called "Pushman" presumption meant that the transfer of a unique work also transferred the copyright to the new owner.<sup>47</sup>

What does one make of these complications? At a minimum, one can say there is great uncertainty over whether licenses must be obtained to reproduce older works. A fair use claim might work given the high transaction costs of determining whether a work is still copyrighted and who owns the copyright. Still, a prudent museum director might well be reluctant to reproduce many important works in the museum's collections. The market, however, has responded to this problem—there are now two important organizations (the Visual Artists and Galleries Association and the Artists Rights Society) that facilitate licensing between persons desiring to reproduce works of art and copyright holders. Each organization publishes a list of artists they represent, keeps a slide catalogue of works of its members, and acts as agents in negotiating licenses for reproductions of art in monographs, greeting cards, postcards, merchandise, advertisement, films, and on.<sup>48</sup> In short, the desirability of requiring museums and educational institutions to obtain permission to make reproductions depends on the usual trade-off between incentives and access. If one is skeptical that reproduction rights have much impact on the incentives to create works of art, then limiting the ability of educational institutions to make and distribute copies in digital format imposes access costs without offsetting benefits.

A museum or educational institution also faces the problem of protecting the copies it lawfully makes. This is simply a variation of the question posed in the *Alfred Bell* and *Bridgeman* cases: does the copy satisfy the originality requirement? If creating copies in digital format is subject to free riding by subsequent copiers, the incentive to make copies of original works will be undermined in the absence of copyright protection. Even so, administrative and licensing costs may make copyright protection inefficient. If creating a digital image is like making a copy from a photocopy machine, copying from a copy costs about the same as copying from the original. Then, free riding is minimal and allowing unlimited copying will save costs and not undermine the incentives to create copies in digital format.

#### 4. *Altering and Reselling a Copyrighted Work*

In *Lee v. A.R.T. Co.*, the defendant A.R.T purchased note cards from the plaintiff, affixed them to tiles and resold them at retail.<sup>49</sup> Since copying was not involved, the plaintiff claimed that A.R.T. had infringed its right to prepare a derivative work. The statute defines a derivative work broadly to include "any other form in which a work may be recast, transformed or adapted."<sup>50</sup> These rights,

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<sup>43</sup> 17 U.S.C.A. § 101 (2000).

<sup>44</sup> See GORMAN & GINSBURG, *supra* note 18, at 397.

<sup>45</sup> See 17 U.S.C.A. § 101 (2000).

<sup>46</sup> See *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446 (9th Cir. 1991); GORMAN & GINSBURG, *supra* note 18, at 385-87.

<sup>47</sup> See *Forward v. Thorogood*, 985 F.2d 604 (1st Cir. 1993); *Pushman v. New York Graphic Soc'y.*, 39 N.E.2d 249 (N.Y. 1942).

<sup>48</sup> The Visual Artists and Galleries Association (VAGA) publishes a book entitled *VAGA 2000*, containing an alphabetical listing of the artists represented in the United States by VAGA and the Artists Rights Society. The book is available from VAGA at 350 Fifth Avenue, Suite 6305, New York, New York 10018.

<sup>49</sup> 125 F.3d 580 (7th Cir. 1997).

<sup>50</sup> 17 U.S.C.A. § 101 (2000) (defining various terms, including "derivative work").

however, are subject to another provision of the statute called the “first sale doctrine,” which entitles the owner of lawfully acquired copy to sell or otherwise dispose of the copy without the copyright owner’s consent.<sup>51</sup> Frank Easterbrook held that A.R.T. had not “transformed” the copy to bring it under the derivative work provision. Rather, it had merely placed the equivalent of a mat or frame on a work it purchased and then resold it.<sup>52</sup> To be sure, arguments can be mustered on both sides of the issue. But economics helps resolve this case consistent with the social purpose of copyright law. Observe that the defendant’s activity benefited the plaintiff. The more tiled cards the defendant sold, the more cards he will purchase from the plaintiff. Moreover, the plaintiff’s position would transform copyright into a broad moral right under which the author can block any minor alteration of which he disapproves. In the end, this would harm creators because contracting costs would rise as galleries, museums and collectors would seek permission from the copyright owner to mat and frame works of art to avoid copyright liability. Hence, a finding that A.R.T. had not prepared a derivative work would reduce access costs without harming and possibly even enhancing the incentives to create the cards in the first place.

Before leaving this case there is a subtle and general point that should be noted. Why would the plaintiff sue in circumstances where the defendant’s activity benefits him? One possibility is that the plaintiff’s reputation will be harmed from the sale of a product that she believes damages her reputation. But it seems implausible that mounting note cards on tiles would tarnish or disparage the plaintiff’s reputation. A more plausible explanation is price discrimination. The plaintiff would like to charge higher prices for note cards to parties who affix them to tiles and resell them than to other purchasers. Arbitrage, however, makes price discrimination infeasible. But if the law enjoins the activity of affixing tiles to cards and selling them, the plaintiff will receive additional revenues either from granting a license or from selling the tiled product itself. But the incentive argument is particularly weak. There is no indication that the plaintiff ever contemplated producing tiled note cards or licensing others to do so. And prospectively, a ruling favoring the plaintiff would make contracting over appropriate frames and mats more costly in the art market.

## B. *Cases of Appropriation Art*

Let me turn now to the cases involving appropriation art. There is a widespread belief among members of the artistic community that copyright law poses a significant danger to appropriation art. Indeed, one prominent member claimed that “If these copyright laws had been applied from 1905 to 1975, we would not have modern art as we know it.”<sup>53</sup> These concerns are greatly exaggerated. The economic approach to copyright, which I have argued is the dominant approach to copyright, does not inhibit appropriation art or other new and innovative approaches to the visual arts. On the contrary, I show below that the economic approach allows unauthorized borrowing in numerous circumstances that promote artistic innovation.

### 1. *Creating a Unique Work*

Consider first the case of an artist who incorporates a copyrighted photograph from, say, a popular magazine into a unique collage. The artist removes the actual image from the magazine, affixes it to a board and adds other objects, colors and original images. No copy of the photograph is

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<sup>51</sup> See 17 U.S.C.A. § 109(b)(1)(A) (2000). The first sale doctrine contains exceptions for renting and leasing of sound recordings (CDs, tapes) and computer programs without the copyright owner’s authorization. *See id.*

<sup>52</sup> In an earlier case, *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988), the court found that the defendant’s activity of cutting out reproductions from a book, fixing them on tiles and then reselling them had infringed the copyright holder’s derivative work right.

<sup>53</sup> See Geraldine Norman, *The Power of Borrowed Images*, ART & ANTIQUES, Mar. 1996, at 125 (quoting art dealer Jeffrey Deitch).

made and the photograph itself may constitute only a small part of the collage. This should be an easy case. Since the magazine has paid the photographer for his work and charged consumers for copies of its magazine, allowing appropriation would have no significant impact on the incentives to create new commercial photographs or publish magazines but would enable potentially large savings in access and transaction costs. Like the *Lee* case above,<sup>54</sup> the socially efficient outcome would allow the artist to use the image without the copyright holder's permission. To be sure, a particular case might turn out the other way. Since a derivative work includes "any other form in which a work may be recast, transformed, or adapted,"<sup>55</sup> a literal-minded court could find that a trivial or minor alteration is an unauthorized derivative work not protected by the first-sale doctrine. However, such a result would elevate literalism over common sense and economics. It is worth recalling Learned Hand's often repeated admonition that "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."<sup>56</sup>

## 2. *Creating Multiple Copies*

One is more sympathetic to a copyright infringement claim against an artist for incorporating a photograph into series of prints. Unlike the previous case, unauthorized copies of the borrowed image are made. For example, Henri Dauman, a French photographer, sued Andy Warhol's estate over his "Jackie" series of silkscreen prints that incorporated a copyrighted photograph of Jackie Kennedy, which appeared in *Life Magazine* in 1963.<sup>57</sup> The photographer also sued the estate for reproducing the silkscreen images on calendars, posters and other widely distributed merchandise.

It might seem unreasonable to draw a bright line between a one-time use of an image lawfully acquired and reproducing that same image in multiple copies. That distinction, however, goes to the heart of the economic rationale for copyright. Commercial photographers are in the business of licensing reproduction rights to their photographs for a variety of unanticipated uses. Without copyright protection, the price of copies would be driven down to the cost of copying leaving nothing to cover the cost of creating the work. Allowing an artist to make multiple copies without authorization poses a more substantial threat to the incentives to create new works than the unauthorized use of a lawfully acquired copy.

But that is not the end of the story. In the language of fair use, the silk-screens created by Warhol are clearly a productive or transformative, not a reproductive, use of Dauman's photograph. Warhol added substantial original expression to the original image and the silk-screens, one of which sold in 1992 at Sotheby's for over \$400,000, are not likely to cut into the market for the photograph. The case was eventually settled so we don't know how it would have come out. I suspect, however, that a court would have rejected the fair use claim for two reasons. First, Warhol made a large number of reproductions of the silk-screens on posters, calendars and other merchandise. Thus, Dauman's lost licensing revenues are likely to be substantial, particularly if this signals to other manufacturers that they need not pay to use photographic images that are incorporated in works of art. Second, transaction costs were low enough to make a negotiated license between Warhol and Dauman the likely outcome without altering Warhol's incentives to use the original photograph.

Now imagine that Warhol had been less successful in commercializing his works and had stopped reproducing the photograph after completing a limited edition series of silkscreen prints. Then, the case for fair use would be greatly strengthened. Permitting the limited use of copyrighted

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<sup>54</sup> 125 F.3d 580.

<sup>55</sup> 17 U.S.C.A. § 101 (2000).

<sup>56</sup> *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

<sup>57</sup> See Sarah King, *Warhol Estate Sued over Jackie Photo*, 85 ART IN AM. 27 (Feb. 1997).

images by Warhol and other artists would have a negligible effect on the incomes and hence incentives of photographers to create new works. In addition, fair use promotes greater access by eliminating licensing and other transaction costs.

### 3. *Appropriating from Multiple Sources*

A variation of the Warhol case involved the Russian painter George Pusenkoff who used the outline of a nude from a Helmut Newton photograph, a distinctive bright blue background from a Yves Klein's monochromatic painting, and a small yellow square from the late Russian artist Malevich.<sup>58</sup> Neither Klein nor Malevich objected to Pusenkoff's borrowing. Nor could they because the color blue and a yellow square are part of the public domain. Newton, however, objected to the use of his photograph and sought to have the painting destroyed. In Pusenkoff's defense, he created a unique work not multiple copies, borrowed only the outline of a photograph not the entire photograph, and transformed the photograph by adding public domain material and altering the medium. On the other hand, he clearly copied Newton's well-known image without paying for it. Indeed his purpose was to copy recognizable elements from other artists. His game "is to make canvases buzz with cultural associations by 'quoting' from other artists—a perfectly respectable post-modernist approach to picture-making."<sup>59</sup>

A German court held that Pusenkoff's painting was a free adaptation rather than a reworking and, therefore, did not infringe Newton's copyright.<sup>60</sup> From an economic standpoint, this is the right result. Pusenkoff's "free adaption" was a productive or transformative use that does not substitute for the original photograph. To be sure, Newton might have given up a small licensing fee but that seems outweighed by the lower access and licensing costs. Had Pusenkoff created posters and other merchandise rather than a unique work, the outcome might well be different. Then, potential lost licensing revenues become more significant. Moreover, there would be no important difference between Pusenkoff's activity and that of a commercial artist or business incorporating pre-existing copyrighted images into a product for wide distribution. The intermediate position—a limited edition series of prints—is the more difficult case to resolve. Like the Warhol example above, fair use should turn on whether the savings in access costs more than offset any small negative effects on the incentives of commercial photographers and publishers.

The Pusenkoff example raises another issue. Transaction costs are likely to be large if the law required the artist to obtain permission to appropriate from multiple sources. Other things being the same, this implies that the law should be more sympathetic to the artist whose work borrows from multiple copyrighted sources.

### 4. *Creating Sculptures from a Single Source*

My next example is appropriation of mass media images by the artist Jeff Koons who was the defendant in three similar copyright cases in the Second Circuit.<sup>61</sup> In the best-known case, *Rogers v. Koons*, the defendant purchased a note card displaying a photograph of a group of puppies with their owners, tore off the copyright notice from the card, and hired an Italian firm to make four large sculptures called "A String of Puppies" based on the photograph. Koons role was conceptual. He did not physically make the sculptures but chose the subject matter, medium, size, materials and colors.

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<sup>58</sup> See Geraldine Norman, *The Power of Borrowed Images*, ART & ANTIQUES, Mar. 1996, at 123.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* Newton was not happy with the German court's decision; he remarked: "Poor Fellow, he hasn't got an idea of his own, so he has to use other people's." *Id.* at 125. Note, however, that copyright does not protect ideas.

<sup>61</sup> See *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992); *Campbell v. Koons*, No. 91CIV.6055, 1993 WL 97381, at \*1 (S.D.N.Y. Apr. 1, 1993); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993); see also *supra* notes 3-4 and accompanying text.

Koons communicated extensively with the studio and provided them with detailed written instructions. He wrote that the sculpture “must be just like photo—features of photo must be captured.”<sup>62</sup> Indeed, altering the image to avoid a copyright lawsuit would have defeated his intended purpose of showing that meaning depends on context. Since Koons admitted copying the photograph, the only issue on appeal was if his copying was protected as a fair use.

Counting against Koons’ fair use argument, according to the court, was the commercial nature of Koons’ use; the fact that he earned a substantial sum from the sculptures (*e.g.*, three of the four sculptures sold for nearly \$400,000); that Koons faithfully copied the original image; and that the sculptures were likely to damage the market for the copyrighted photograph. Although the products are in different markets and won’t compete against each other for sales, the court believed that Koons’ use could potentially eliminate an important source of licensing revenues for photographers and result in adverse incentive effects.

Koons’ principle fair use argument was that his work should be privileged as a satirical comment or parody. By placing this particular image in a different context, Koons’ claimed he was commenting critically on a political and economic system that places too much value on mass-produced commodities and media images. Not surprisingly, the court rejected his defense. A privileged parody requires that it target the original work. No privilege is given to a parody that uses the original work as a “weapon” to comment on society at large. The economic rationale for this distinction rests on the idea of high transaction costs preventing a value maximizing exchange.<sup>63</sup> When the parody targets the plaintiff’s work, the parties are unlikely to come to terms on a price that allows the defendant to make fun, embarrass or even humiliate the plaintiff’s work. But such a use may provide substantial benefits to third parties. On the other hand, if the defendant uses the parodied work as weapon to comment on society, he should have little trouble licensing the work. Moreover, if the copyright holder refuses, he can come to terms with another copyright holder of an equally usable work.

*Rogers v. Koons* was not well received by the art community. Its members feared that the decision would cripple appropriation art, undermine artistic freedom and retard innovation. I believe this outcome is highly improbable. The more likely outcome is that not much will change other than appropriation artists paying small fees to license the images they appropriate. This is just an application of the Coase theorem—in the absence of transaction costs (and wealth effects) the outcome will be independent of the assignment of rights or liability rules.

Licensing, however, is not free of difficulties. In some instances, an artist will not be able to license his first choice or he will wind up paying more than he expected. Some copyright holders may grant licenses only if they approve of the way their images are used. This, in turn, can undermine the critical message intended by the artist. Overall, these costs are probably small. Licensing also entails transaction and contracting costs. Finally, if the appropriation artist chooses not to pay, he faces risk-bearing costs and potential litigation costs that could be significant given that a fair use defense will involve resolving the highly subjective “target versus weapon” question. When these costs are weighed against the small beneficial incentive effects to persons creating appropriated images, the most efficient legal rule would allow appropriation provided the artist creates a unique work or (as in the case of Jeff Koons) a limited number of copies. On the other hand, if the appropriation artist creates multiple copies and, particularly, if he reproduces his work on many ancillary products, there is a strong economic case for finding a copyright violation.

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<sup>62</sup> *Rogers*, 960 F.2d at 305 (quoting Jeff Koons).

<sup>63</sup> See Posner, *When Is Parody Fair Use?*, *supra* note 5.

### 5. *Borrowing from One's Earlier Work*

My final example is the case of an artist who appropriates images from his earlier works. There is a long tradition of artists returning to basic themes they had worked on earlier and even copying from their earlier works. There are some extreme examples. Gilbert Stuart is reported to have painted around 75 substantially similar portraits of George Washington.<sup>64</sup> Giorgio de Chirico made numerous copies during his life of his best known early Surrealist works.<sup>65</sup> The issue of unlawful appropriation arises only if the artist no longer owns the copyright on the earlier work. This helps explain a puzzling copyright doctrine in the case of a unique work. Ownership of the copyright is separate from ownership of the work itself.<sup>66</sup> Thus, if A transfers a unique work to B, A retains the copyright and B owns the work.<sup>67</sup> Divided ownership, however, usually raises transaction costs. For example, if C wants to reproduce A's work, he must obtain access to the work from B and a license to copy from A. Typically, that will involve greater transaction costs than C dealing with B alone, assuming B owns both the copyright and the work. But there are added costs to such an arrangement. It will be more difficult for the artist to return to earlier themes because he risks infringing the copyright on his earlier work.<sup>68</sup> Moreover, these problems will multiply if the artist borrows images or elements from several of his earlier works in which he no longer holds copyrights. Thus, the prospect that an artist will appropriate in the future from earlier works may explain, in part, why divided ownership reduces not increases transaction costs and, thereby, promotes efficiency.

Appropriating from one's earlier work also brings out a difficult evidentiary question. How would a trier of fact determine whether A has copied from himself or independently created a work substantially similar to his earlier work? Recall that Section 102(b) of the Copyright Act makes copying unlawful but not independent creation. Evidence on copying is usually circumstantial and inferred from access and substantial similarity between the two works. But access and substantial similarity won't do for works created by the same party. Obviously, A had access to his earlier work. And even if A created a new work without copying from his earlier work, one would not be surprised if the two works looked substantially similar. As Richard A. Posner, noted "If Cézanne painted two pictures of Mont St. Victoire, we should expect them to look more alike than if Matisse had painted the second, even if Cézanne painted the second painting from life rather than from the first painting."<sup>69</sup> Thus, the evidentiary value of access and substantial similarity is attenuated when the same artist created both works. This suggests that a much closer degree of similarity would be required to infer copying when the same party created the two works in question.<sup>70</sup>

## IV. CONCLUDING REMARKS

Appropriation art poses no special problems for the application of economic principles to copyright. Although there are no market impediments to licensing most copyrighted images used by appropriation artists, fair use would lower transaction and access costs. These savings should more than offset the reduced incentives to create new images in cases where the appropriation artist has already

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<sup>64</sup> See WILLIAM D. GRAMPP, *PRICING THE PRICELESS: ART, ARTISTS, AND ECONOMICS* 6 (1989).

<sup>65</sup> See KIM LEVIN, *BEYOND MODERNISM: ESSAYS ON ART FROM THE '70S AND '80S* 251-53 (1988).

<sup>66</sup> See 17 U.S.C.A. § 202 (2000).

<sup>67</sup> Of course, A may also transfer ownership of the copyright to B or anyone else, provided the transfer is in writing. See 17 U.S.C.A. § 204(a) (2000).

<sup>68</sup> In comments to me, Richard Posner noted that there are many examples in literature of authors redoing their earlier work. Both Yeats and Auden, for example, revised their earlier poems extensively, long after they were published. Had they assigned their copyrights to their publishers, their revisions would have risked infringing copyrights owned by someone else.

<sup>69</sup> *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 414 (7th Cir. 1992).

<sup>70</sup> See *Franklin Mint, Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62 (3d Cir. 1978).

paid for the image or is making only a few copies. In contrast, when the appropriation artist makes many copies, he should be treated no differently from a firm that incorporates licensed images in products such as calendars, coffee mugs and beach towels. To sanction appropriation art in the latter case would weaken incentives to create new images and add uncertainty to the already uncertain question whether or not something can be lawfully copied. Moreover, if calling a work “art” shields it from copyright liability, we can be sure that such claims would increase putting judges in the ill-suited position of having to decide what is art. And as Justice Holmes warned in his much cited phrase: “It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”<sup>71</sup>

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<sup>71</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

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