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# HISTORY, CULTURE, AND THE COPYRIGHT ACT

JUNE T. TAIT†

## INTRODUCTION

The Sonny Bono Copyright Term Extension Act has continually expanded the term of protection for copyright. Not only does this extension threaten to disturb the constitutional balance intended by the founders to promote the “useful Arts,” but it also increases the economic incentives for the creation of art while ignoring the corresponding cultural incentives. As a result, the continued expansion of the Copyright Act may result in an oppressive overprotection of art. Therefore, this comment suggests that future legislators and scholars should consider cultural incentives when legislating or discussing the extension of the Copyright Act.

From patent to trademark to copyright, intellectual property law grants differing levels of property rights. These property rights are intended to provide the creator with an adequate incentive to create since, for a limited time, no other person or organization will be allowed to profit from the invention or artistic work. However, with the latest enactment of the Copyright Act, legal scholars have noted that Congress may be approaching the line of unconstitutionality.<sup>1</sup> In extending the term of licenses granted under the Copyright Act, Congress cited several objectives, one of which was to provide artists and writers with a greater monetary incentive, in the form of property rights, to produce new works. Other incentives, such as politics and religion, while often mentioned from a general standpoint, are not typically examined in legal scholarship. The extension of the copyright term weights heavily the economic incentive for the creation of works while ignoring the cultural incentives present throughout art history. Since much scholarship focuses on the economic motives for copyright protection, this comment will explore the various cultural incentives for

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1. See, for example, Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 Cal L Rev 2187, 2236–39 (2000) (arguing that an inquiry into legislative processes should be made when examining the constitutional balances set by statutes).

the creation of visual art, which legislators and scholars seem to have ignored.

This comment will use a historical analysis to examine the creation of art works and determine whether these cultural incentives have been abrogated by the extension of the copyright term. First, this comment will provide a foundational analysis of the Copyright Act. This discussion will include a survey of the history and economic analysis of the Act as well as the current constitutional challenges to the Act. Second, the comment will survey different cultural incentives to create art coupled with examples drawn primarily from the visual arts. This analysis will include a brief discussion of the economic theories associated with the creation of art. Finally, the comment will assess the Sonny Bono Copyright Term Extension Act and its effect on the future production of art.

## I. THE BACKGROUND AND CONSTITUTIONALITY OF THE COPYRIGHT ACT

The Copyright Term Extension Act (“CTEA”) currently faces constitutional challenges because its expanded term grants lengthy periods of monopoly rights to creators of art and music.<sup>2</sup> Such lengthy periods of copyright protection are the result of the legislature weighing economic incentives heavily in its consideration of both the necessity of the Copyright Act and the length of copyright term extensions.

This section of the comment has three goals. First, it will summarize the historical development of the Copyright Act. Second, it will analyze the legislative history surrounding the CTEA. Finally, this section will examine the current constitutional challenges to the CTEA and survey the arguments made by parties on both sides of the debate.

Copyright provides the right to restrict the publication and reproduction of a work. Under the Constitution, Congress has the power to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>3</sup> The 1909 Copyright Act granted a twenty-eight-year term of protection with a renewal term of an additional twenty-eight years.<sup>4</sup> The 1976 Copyright Act extended the duration of protection to the lifetime of the author plus fifty years.<sup>5</sup> The CTEA, which went into effect in 1998, extended this protection to the lifetime of the author plus seventy years.<sup>6</sup> Critics have suggested that this newest

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2. See, for example, Richard A. Posner, *Antitrust in the New Economy*, 68 *Antitrust L J* 925 (2001).

3. US Const, Art I, § 8, cl 8.

4. William Hart & Jenifer deWolf Paine, *Copyrights, Trademarks, and Moral Rights*, in Roy S. Kaufman, ed, *Art Law Handbook* 3, 29 (Aspen 2000) (discussing the history of copyright law in the United States).

5. *Id.*

6. 17 USC § 302(a) (2000).

legislative extension seems close to a line drawn by the Constitution.<sup>7</sup> The continued expansion of the copyright protection term tests the constitutional balance between releasing information to the public domain and providing artists with an appropriate incentive to create new works.<sup>8</sup> The CTEA extension does this by giving artists an increased economic incentive to produce work. Alone, this economic incentive might not test the constitutional balance. However, when combined with the overlooked cultural incentives discussed in this comment, the extension threatens the constitutional balance.

Economic incentives are typically used to rationalize the necessity for copyright protection. Essentially, if artists and writers do not receive some form of copyright protection for their works, scholars argue that they will lack the necessary incentive to produce their work.<sup>9</sup> Copyright protection provides a necessary economic reward since artists and writers can control (and therefore receive payment for) the publication and reproduction of their works.<sup>10</sup> However, it is unclear whether extending the term of copyright protection twenty years creates a substantial additional incentive for artistic creation.<sup>11</sup> In debating the CTEA, the House acknowledged both the economic rationale for copyright protection and the cultural impetus.<sup>12</sup> Massachusetts Congressman Barney Frank stated: "The cultural reasons are probably more familiar to people, so we stress sometimes in this debate the economic reasons, not because we think the cultural reasons are less important, but [because] the economic reasons are not always fully understood."<sup>13</sup> In the Senate, Orrin Hatch acknowledged that the existing term of life-plus-50 years was arbitrary.<sup>14</sup> Hatch pointed to the European Union's move towards giving a minimum copyright protection of life-plus-70 years as the motivational factor for the United States to extend its copyright.<sup>15</sup> Hatch

7. Note, *The Sonny Bono Copyright Term Extension Act*, 30 U Memphis L Rev 363, 399–402 (2000). See also *Merges*, 88 Cal L Rev at 2236–37 (cited in note 1) (noting that industry groups, such as Walt Disney Company, lobbied heavily for the term extension).

8. Note, 30 U Memphis L Rev at 400 (discussing constitutional problems with the CTEA).

9. *Id.* at 390 (presenting a brief overview of the incentive for creativity).

10. *Id.* (explaining how extending the term of monopoly rights will provide greater economic incentive for creativity).

11. See *Merges*, 88 Cal L Rev at 2236–37 (cited in note 1) ("From an incentive point of view, the Act is virtually worthless; viewed from a present-value perspective, the additional incentive to create a copyrightable work is negligible for an extension of copyright from life-plus-fifty years to life-plus-seventy years.").

12. 144 Cong Rec H1458 (March 25, 1998).

13. *Id.*

14. 141 Cong Rec S3391 (March 2, 1995) ("[M]any have observed that the term itself, particularly the decision to give significance to 50 years, has achieved dominance perhaps more through imitation and acceptance than through an analytical belief that the life-plus-50 year term represents the ideal period of protection needed to appropriately reward and inspire creative activity.").

15. *Id.* ("After the European law goes into effect, American authors will be theoretically protected for an additional 20 years, but will in reality be unprotected for that entire period of time.").

urged the Senate to extend copyright protection because artists expect their works to remain protected for the benefit of their heirs.<sup>16</sup>

The CTEA does not simply provide greater incentives by extending the term of protection for new works. The CTEA also works retroactively by extending the copyright terms of existing works. As a result, the end effect of the CTEA is to ensure that no copyright on existing works will expire until 2018. Yet, it is difficult to argue that an additional incentive to pursue the arts is created by awarding prolonged monopoly rights to works already in existence.<sup>17</sup> As a result, members of the publishing, music and film industries have banded together and mounted legal challenges to the constitutionality of the CTEA.<sup>18</sup>

In *Eldred v Reno*, the plaintiffs alleged that the CTEA violates the First Amendment.<sup>19</sup> They also alleged that the CTEA's extension of copyright protection for existing works was beyond the scope of Congress' power under Article I, § 8 and violated the public interest doctrine.<sup>20</sup> In a short opinion, the district court summarily disposed of each of the plaintiff's contentions and granted the Attorney General's motion for judgment on the pleadings.<sup>21</sup>

On appeal, the DC Court of Appeals, in a per curiam opinion, affirmed.<sup>22</sup> In the opinion, Judge Ginsburg relied chiefly on *Schnapper v Foley*,<sup>23</sup> holding that the language of the copyright clause in Article I, § 8 does not limit Congressional power.<sup>24</sup> Judge Ginsburg rejected amicus briefs that argued the extension of the copyright term was unconstitutional because it did not promote the science and arts as mandated by the copyright clause.<sup>25</sup> In the dissent, Judge Sentelle responded: "I accept that extending copyright terms for future works may well increase creative efforts at the margin. Once a work is published, however, extending the copyright term does absolutely nothing to induce future creative activity by the author."<sup>26</sup> Sentelle further noted that a rehearing should have been granted in order to reconcile any conflict with *Schnapper*.<sup>27</sup> The Supreme Court, which granted certiorari on February 25, 2002, may agree.<sup>28</sup>

Artists and composers insist that stronger copyright protection is crucial for

16. Id at S3392 (giving, as an example, a series of works recently released to the popular domain despite their continued popularity).

17. But see Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U Pitt L Rev 719, 736-37 (1998).

18. See *Eldred v Reno*, 74 F Supp 2d 1, 1 (D DC 1999); aff'd, *Eldred v Ashcroft*, 255 F3d 849 (DC Cir 2001); cert granted, 122 S Ct 1062 (2002).

19. *Eldred v Reno*, 74 F Supp 2d at 2.

20. Id.

21. Id at 4.

22. *Eldred v Ashcroft*, 255 F3d 849, 852 (DC Cir 2001).

23. Id at 850 (citing *Schnapper v Foley*, 667 F2d 102, 112 (DC Cir 1981)).

24. Id. (finding Congress could allow assignment of copyrights to the government).

25. Id at 851.

26. Id at 854.

27. Id at 855.

28. *Eldred v Ashcroft*, 122 S Ct 1062 (2002).

the continued production of the arts. On the other hand, it is unclear whether, given a world without copyright or with weaker copyright protection, artistic innovation would cease. By examining the history of art, one can see the cultural, as well as economic, incentives for the continued production of art.

## II. VISUAL ARTS AND CULTURAL INCENTIVES

Throughout art history, the existence of cultural incentives for the creation of art is present. This section of the comment will examine the religious, political and scientific incentives for the creation of art. Then, this section will touch on the aesthetic movement, which is premised on the idea that art should be for art's sake, and its relation to the idea that incentives are necessary for the production of art.

### A. RELIGION

Religion can be a powerful incentive for the creators of art. Evidence of the role of religion in art can be seen everywhere from the archeological finds of the Neolithic era to modern-day art work. For example, archeologists have found a group of Neolithic sculptured skulls from Jericho dated circa 7000 B.C.<sup>29</sup> Known as "the Jericho heads," these are actual human skulls covered with tinted plaster.<sup>30</sup> The features of the face are carefully molded, and each individual skull possesses unique physical characteristics.<sup>31</sup> Historians believe that the tinted plaster was intended to memorialize the flesh that would have decomposed over time.<sup>32</sup> The continued existence of the flesh, or tinted plaster, ensures that life will continue, even after death.<sup>33</sup> Art Historian Anthony Janson postulates that "[t]he Jericho heads suggest that some peoples of the Neolithic era believed in a spirit or soul, located in the head, that could survive the death of the body."<sup>34</sup> As a result, the Jericho heads acted as traps to capture the spirit of the deceased.<sup>35</sup> This early example of portraiture, therefore, was motivated by religious necessity and suggests the prominent role of religion as an impetus for the creation of artwork.

Nowhere does the presence of religion play a more obvious role in artistic creation than in the Gothic cathedrals of Europe. Chartres Cathedral, rebuilt in 1220,<sup>36</sup> represents the mature Gothic style.<sup>37</sup> From the west facade, the viewer's

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29. H.W. Janson, *History of Art* 53 (Prentice Hall, 5th ed 1995).

30. Id.

31. For example, pieces of seashell, embedded in the plaster flesh, represent the eyes of the Jericho heads. Id.

32. Id.

33. Id.

34. Id at 54.

35. Id.

36. Id at 335.

gaze is drawn to the rose window over the three portals of the cathedral.<sup>38</sup> As visitors enter Chartres, they move from the hustle and bustle of everyday life, to a cavernous space, seemingly devoid of light.<sup>39</sup> As viewers progress into the church, glimmers of light from the stained glass along the nave and choir area introduce an ethereal presence.<sup>40</sup> The religious experience the viewer has while standing in the interior of the cathedral is not an accident, but rather by design. Architects of the Gothic period sought to create a spiritual center for worshippers that inspired religious emotion.<sup>41</sup> Therefore, the desire to spread Christianity played an important role in spurring the construction of some of Europe's most renowned architectural landmarks.

In the Middle Ages, images in paintings and architecture revolved around religion, but in the Early Renaissance a fusion of classical and religious iconography emerged.<sup>42</sup> While some images during the European Renaissance portrayed wholly religious subject matter,<sup>43</sup> the representation of classical images also emphasized religious iconography. During the Middle Ages, representations of classic mythical characters were slowly combined with Christian teaching in order to cement the acceptance of the pagan visuals by the public.<sup>44</sup> Botticelli's *Birth of Venus*, circa 1480, is a prime example of this amalgamation. Here, Botticelli has painted Venus, nude, rising from the sea or possibly floating above a seashell. On the right, Spring welcomes Venus while two wind gods hover above on the left. Although the painting depicts a blatantly pagan nude female rising from the sea, the image of Venus was, in the minds of the Neo-Platonists of the time, synonymous with the Virgin Mary.<sup>45</sup> The wind gods in the painting resemble angels typical in the religious art of the Middle Ages while Spring, to the right of Venus, represents St. John the Baptist.<sup>46</sup> Therefore, the birth of Venus echoes the birth of Christ,<sup>47</sup> and Botticelli's painting possesses a "quasi-religious meaning."<sup>48</sup> As a result, Botticelli's *Birth of Venus* reflects the move from a strict interpretation of the classical myths as Christian allegories to a

37. Id at 337.

38. Id.

39. Id.

40. "The sensation of ethereal light, which dissolves the physical solidity of the church and, hence, the distinction between the temporal and the divine realms, creates the intensely mystical experience that lies at the heart of Gothic spirituality." Id at 339. Abbot Suger, who commissioned another French Gothic cathedral, St. Denis, wrote, "The 'miraculous' light that floods the choir through the 'most sacred' windows becomes the Light Divine, a mystic revelation of the spirit of God." Id at 332.

41. See id. at 331 (discussing another Gothic cathedral, the Abbey Church of St-Denis).

42. See id. at 469.

43. See, for example, Albrecht Durer's *Adam and Eve*, 1504 (Id at 531); Raphael's *Madonna del Granduca*, c 1505 (Id at 496); Michelangelo's *The Last Judgment*, 1534-41 (Id at 491).

44. Id at 470 (discussing Neo-Platonist thought).

45. Id.

46. Id.

47. Id.

48. Id.

Neo-Platonist philosophical thought that embraced the fusion of Christian theology and classical myths.<sup>49</sup> Therefore, in the Middle Ages, the need to appeal to the masses spurred the combination of classical and Christian iconography in the creation of art.

Despite the obvious role religion plays in prompting the creation of art in history, the role of religion is not obvious, at first glance, in modern art.<sup>50</sup> Modern art movements such as Dadaism sought to reject traditional bases and meanings of art.<sup>51</sup> However, the controversial portrayal of religion in contemporary art demonstrates religion's continuing influence on the art world. Andres Serrano's *Piss Christ*, for example, unleashed a firestorm of controversy when it was unveiled in the late 1980's. Funded by a grant from the National Endowment for the Arts, *Piss Christ* was a photograph of a crucifix resting in a jar of urine.<sup>52</sup> The religious right used Serrano's art to prompt a public outcry over the funding of sacrilegious art.<sup>53</sup> As a result, policy-makers nationwide debated the intersection of public funding, art, religion, and the First Amendment. However, few recognized the religious undertones in his artwork. Serrano was raised Catholic and art critics describe his work as more reverential than critical of the Catholic Church.<sup>54</sup> As critic Eleanor Heartney commented: "Serrano makes work that is permeated with Christian themes of redemption and transcendence."<sup>55</sup> Portrayed as a heretic by the popular media, Serrano's home is actually populated with religious symbols.<sup>56</sup>

More recently, Chris Ofili's *The Holy Virgin Mary* prompted a similar response when displayed at the Brooklyn Institute of Arts and Sciences. *The Holy Virgin Mary* portrays a black Madonna painted in oils with a right breast of elephant dung.<sup>57</sup> Before the show was opened to the public, New York City Mayor

49. Id.

50. Linda-Marie Delloff, *The Ministry of Culture*, Sojourners Magazine (Mar/Apr 2001), available at <<http://www.sojo.net/magazine/index.cfm/action/sojourners/issue/sojo0103/article/010320.html>> (visited Apr 20, 2002) ("Throughout history some of the greatest art has been religious art. But the idea that the same could be true today, or that religion can help people understand and appreciate culture in general, is not widespread.")

51. Janson, *History of Art* at 784 (cited in note 29) ("Dada has often been called nihilistic, and its declared purpose was indeed to make clear to the public at large that all established values, moral or aesthetic, had been rendered meaningless by the catastrophe of the Great War.")

52. Susan Scafidi, *Intellectual Property and Cultural Products*, 81 BU L Rev 793, 825 (2001) (examining intellectual property regimes in the context of culture).

53. Eleanor Heartney, *Postmodern Heretics*, 85 Art in America 32, 33 (Feb 1997) (commenting that U.S. politicians interpreted *Piss Christ* as a denunciation of Christianity).

54. Id (discussing the role of religion in the work of various modern artists including Serrano).

55. Id at 34.

56. Id. (describing how Serrano's interest in religion has led to his collection of crucifixes and other Christian imagery that he displays in his apartment).

57. Elizabeth C. Baker, *Sacred or Profane?*, 87 Art in America 39 (Nov 1999).



Rudolph Giuliani threatened to withdraw funding for the museum.<sup>58</sup> Although protestors portrayed the work as an attack on religion, the artist, Ofili, is a practicing Catholic whose work is well respected in British art circles.<sup>59</sup> The work itself, while shocking in composition, was lauded by critics who found a religious element in the work.<sup>60</sup> Although some critics found the use of bodily fluids associated with religious iconography sacrilegious, others felt these materials provided a crucial medium in which Ofili could properly convey his message. In her analysis of *The Holy Virgin Mary*, Heartney commented: "For over a thousand years, then, bodily fluids have had a place in Catholic art as symbols of the link between the realms of God and man ..."<sup>61</sup> Thus, despite its controversial nature, Ofili's work can be viewed as a reflection of the interplay between religion and art. Not only does Ofili's work question the role of religion in modern society, it draws on historical references to shock its audience into questioning the status quo. Modern artists, such as Ofili and Serrano, use religion to spark debate about their art and gain notoriety in the art world.

Although artists often use religion for self-promotion, there still remains a fundamental clash between art and religion. Scholar Simon Laeuchli describes how, during the Reformation, mobs smashed the stained-glass windows of Gothic cathedrals in opposition to the use of religious images in worship.<sup>62</sup> This trend toward iconoclasm stems from biblical texts.<sup>63</sup> In addition to iconoclasm, art poses other threats to religion and faith. According to Laeuchli, art is associated with the forbidden and the sexual, thereby clashing with religions that maintain control over the sexual lives of members.<sup>64</sup> Furthermore, art threatens religion because to some it appears to be a new religion.<sup>65</sup> Therefore, the relationship between art and religion is not clearly defined nor easily dissectible.

Thus, despite the uneasy theological relationship between art and religion, the desire to spark debate about or to promote religion has often been a driving force in the creation of the visual arts. With the continued emphasis on economic incentives for creating art through the extension of the CTEA, these religious incentives are ignored.

58. See *Brooklyn Inst of Arts and Sciences v City of NY*, 64 F Supp 2d 184 (E D NY 1999) (granting museum's motion for preliminary injunction against the city).

59. Baker, 87 *Art in America* at 39 (cited in note 57).

60. Id. ("[H]is dignified, iconlike painting seems fundamentally spiritual in conception.").

61. Eleanor Heartney, *A Catholic Controversy?*, 87 *Art in America* 39, 41 (Dec 1999).

62. Samuel Laeuchli, *Religion and Art in Conflict* 58 (Fortress Press, 1980).

63. See id. at 59–61 for a listing of the textual basis for the rejection or destruction of religious images. For example, the Second Commandment states, "You shall not make for yourself any carved image, or any likeness of *anything* that *is* in heaven above or that *is* in the earth beneath, or that *is* in the water under the earth." The Holy Bible, Exodus 20:2, New King James Version (1984).

64. Laeuchli, *Religion and Art in Conflict* at 67 (cited in note 62).

65. Id. at 81 (commenting that both art and religion make promises that cannot be kept).

## B. POLITICS: PROPAGANDA AND CRITICISM

Politics is another cultural incentive that is not evaluated when legislators discuss the CTEA. However, politics has played an important role in shaping artistic movements and giving artists additional incentives to create. This section will examine the power of art in political persuasion, both as propaganda and as criticism. This section will first examine the use of art to lend legitimacy to the newly formed United States Government. Next, this section will discuss examples drawn from the realist movement in Spain and the Social Realism movement in the United States. Governmental programs, such as the Depression-era Farm Service Administration photography and the World War II wartime propaganda posters demonstrate the use of art as persuasive political devices in the twentieth century. Finally, this section will touch briefly on the role of politics in contemporary art.

One example of the use of art as a political tool is the emphasis on Neoclassicism in the United States. The Neoclassical movement, which lasted from about 1750 to 1850, emphasized a revival of classical antiquity.<sup>66</sup> In the United States, Neoclassical artists used symbols drawn from classical arts in order to cement America's position as a new country. The Virginia Legislature commissioned Jean-Antoine Houdon's sculpture of *George Washington* in 1785. Here, Washington is portrayed, wearing his general's uniform, but his sword, unneeded in peacetime is suspended from thirteen rods that represent the thirteen colonies.<sup>67</sup> Washington's figure is carefully positioned contrapposto,<sup>68</sup> similar to the classical Greek statue of the Apollo Belvedere.<sup>69</sup> The positioning and clothing of Washington echoes classical Greek statues, therefore promising both peace and power as associated with the birthplace of democracy.<sup>70</sup>

Even absent the government's monetary support, art was used as a vehicle for political criticism and social reform. Spanish artist Francisco Goya's *The Third of May, 1808* (1814–15) portrays the execution of a group of Madrid citizens.<sup>71</sup> At the time of the execution, Napoleon's army occupied Spain and Goya, along with other Spaniards, hoped the French would institute liberal reforms. However, the French troops' horrific treatment of the Spaniards generated resentment and bitterness. Goya's *The Third of May* reflects these emotions. The French soldiers are faceless, orderly "automatons," while the Spaniards are por-

66. Janson, *History of Art* at 646 (cited in note 29).

67. Id at 655.

68. Ian Chilvers, et al, eds, *The Oxford Dictionary of Art* 117 (Oxford, 1988) (describing contrapposto as the term "applied to poses in which one part of a figure twists or turns away from another part").

69. Janson, *History of Art* at 655 (cited in note 29) (commenting that viewers unconsciously associate the iconography and style of the sculpture with the classical Greek statues).

70. Id ("Far more than any other portrait, Houdon's statue, and the busts associated with it, determined how the nation visualized the Father of His Country.")

71. Id at 660.

trayed as martyrs.<sup>72</sup> The lighting in the background and the positioning of the figures emphasizes the nearly religious intensity of their cause.<sup>73</sup>

In the United States, the Social Realism movement, which took place between World War I and World War II, exemplifies the use of the visual arts as an instrument for propaganda and social change. Social Realists, such as Ben Shahn, used their art to show compassion for the working class and the poor.<sup>74</sup> In contrast with other art movements, Social Realism held essential the combination of art with a “personal moral consciousness ... [that] demanded, at every level, a political commitment.”<sup>75</sup>

Shahn’s best-known work consists of a series of twenty-three paintings portraying the trial of Nicola Sacco and Bartolomeo Vanzetti. Sacco and Vanzetti’s trial and subsequent execution has long been recognized as a result of the radicalism and xenophobia characteristic of the Red Scare in the 1920s.<sup>76</sup> Accused of murder and robbery, the two men were sentenced to death despite obvious animosity from the judge and flagrant violations of procedural due process.<sup>77</sup> In response to public outcry, the Lowell Commission was formed to investigate the trial.<sup>78</sup> Shahn’s *The Passion of Sacco and Vanzetti*, circa 1930, shows Sacco and Vanzetti in open coffins. The members of the Lowell Commission stand in “mock piety” over the coffins while the judge that presided over the trial is visible in the background.<sup>79</sup> Shahn’s view of Sacco and Vanzetti as simple martyrs is apparent in his portrait, *Bartolomeo Vanzetti and Nicola Sacco*, 1943.<sup>80</sup> Shahn painted these portraits to deliver a political message and motivate the public to respond to Sacco and Vanzetti’s treatment. This collection of paintings by Shahn demonstrates how art can be used as political commentary.

The Farm Security Administration (“FSA”) demonstrates how political propaganda can impact public thought and governmental decision-making. The FSA was created in 1935 by the United States government to document the Depression’s impact.<sup>81</sup> It employed photographers to document rural life and the positive changes created by New Deal legislation. Dorothea Lange’s *Migrant*

72. Id.

73. Id.

74. Paul Von Blum, *The Critical Vision: A History of Social & Political Art in the U.S.* 56 (South End 1982) (emphasizing that Social Realists were not interested in merely “dispassionate reportage”).

75. Id at 57.

76. Id at 56 (noting that Sacco and Vanzetti were labor organizers).

77. Id at 57.

78. Id at 58. The Lowell Commission was headed by Harvard University President A. Laurence Lowell.

79. Id.

80. Id at 57–58 (“Their sad expressions reveal the quiet dignity with which they approached their martyrdom; they are seen as gentle and simple men whose suffering was the result of their sincere attempts to improve the lot of their fellow workers and immigrants.”).

81. Id at 44.

*Mother, California*, 1936,<sup>82</sup> is probably the most famous example of how photographers used their position to influence governmental decisions. Lange's proofs show that she followed her subjects, choosing the right moment to capture, on film, an image that evokes human compassion.<sup>83</sup> The careful positioning of the figures in her photograph illustrates Lange's skill at using her subjects to convey a political message. In her final print, Lange shows the mother, her face weathered by a difficult life, resting her chin on her hand and gazing into the distance. Her children, perhaps hungry and tired, or simply bashful, hide their faces from the camera. The triangular grouping of the figures is reminiscent of the careful positioning of figures in Renaissance portrayals of the Virgin Mary.<sup>84</sup> As in the Renaissance portraits of the Virgin Mary, the viewer's gaze is drawn towards the central figure in the *Migrant Mother*. This tactic invokes in the viewer the desire to help migrant workers escape their plight of poverty. As a result of the publication of *Migrant Mother*, the government was persuaded to provide food and open migrant relief camps.<sup>85</sup> While the FSA's work was intended by the government to boost morale during the Depression, the end result was a blend of propaganda and social criticism that garnered support for expanded New Deal legislation.

Artwork as a vehicle for social criticism is not confined to historical events. Post-modern artists attack the status quo in both art and society. One such artist, Barbara Kruger, creates feminist statements and attacks large, impersonal power centers such as the military or the government. Her works are often displayed on billboards and have direct, easy to understand statements that play on society's fears. In *You Are a Captive Audience*, 1983, Kruger appropriates a magazine photo and blows it up to emphasize an image that appears to be a tooth extraction. The crude, horrific image, coupled with the words "You are a Captive Audience" printed on the poster, emphasizes the viewer's inability to escape.

Art functioning as criticism or propaganda in the political arena is a proven method of effecting social change. Political messages in the form of art have helped build a great nation from meager beginnings, signaled anger over unfair treatment, changed society's view about a persecuted group, garnered support for government programs and wars, and questioned the status quo. As seen in the above examples, the artist can accomplish many goals through the creation of art that are unrelated to economic incentives. However, the role of art in politics is simply another cultural incentive legislators typically ignore when they revisit the structure of the CTEA.

82. *Migrant Mother* depicts a woman and her two children at a migrant worker's camp in Nipomo, California.

83. Id at 45.

84. See Leonardo Da Vinci's *The Virgin of the Rocks*, in Janson, *History of Art* at 480 (cited in note 29). See also Raphael's *Madonna del Granduca*, in Janson, *History of Art* at 496.

85. Id at 876.

### C. SCIENCE AND TECHNOLOGY

Science is another source of cultural incentives for the creation of art. This section will assess how the pursuit of scientific knowledge and the desire to bring nature to the average man spurred artistic innovation. Leonardo Da Vinci, perhaps the most popularly recognized Renaissance artist, was also an accomplished scientist. Da Vinci believed that it was important for the artist to understand “not only the rules of perspective, but all the laws of nature, and the eye was to him the perfect instrument for gaining such knowledge.”<sup>86</sup> Therefore, according to Da Vinci, the artist must understand first-hand the workings of the body before he could properly portray it. Da Vinci’s *Foetus* (sic) *in the Womb*, circa 1513, is a carefully detailed sketch of a cotyledonous placenta.<sup>87</sup> Although scientifically inaccurate,<sup>88</sup> Da Vinci’s drawings set the standard for scientific illustration.<sup>89</sup>

Andreas Vesalius’ *Fabrica*, published in 1543, epitomizes the Renaissance tradition of realistic, believable images of the body.<sup>90</sup> The illustrations were so accurate that Vesalius had to remind his readers that the illustrations in his book should not be substitutes for seeing the real thing.<sup>91</sup> In the fifteenth century, these medical images had a significant effect on art “because medical illustration inevitably evokes affective questions of gender, pleasure, and pain, and commonly employs pictorial conventions very close to those of contemporaneous fine art.”<sup>92</sup>

Paying similar attention to detail, John James Audubon was a naturalist who drew life-like paintings of birds.<sup>93</sup> His images were published in a book entitled, *The Birds of America*.<sup>94</sup> Because he drew the birds in their natural surroundings, rather than from stuffed models, the images were acclaimed for their accuracy.<sup>95</sup> Biographer John Chancellor noted that Audubon’s technique varied according to his interests: “When he was interested in a certain bird, he portrayed it in microscopic detail, to the displeasure of the ‘artists’; when he was interested in a

86. See id at 483. See also id. at 621 (quoting Da Vinci’s undated manuscripts as stating: “[P]ainting is a science, the true-born child of nature”).

87. Martin Kemp, *Medicine in View: Art and Visual Representation*, in Irvine Loudon, ed, *Western Medicine: An Illustrated History* 1, 4 (Oxford 1997).

88. Id. (Da Vinci’s *Foetus* (sic) *in the Womb* is inaccurate because it was derived from a dissection of a cow’s uterus).

89. Janson, *History of Art* at 483 (cited in note 29).

90. Kemp, *Medicine in View* at 4 (cited in note 87).

91. Id at 3.

92. James Elkins, *Art History and Images that are Not Art*, 77 *The Art Bulletin* 553, 553 (Dec 1995) (Commenting that “Vesalius’s figures have affinities with Italian landscape and figural compositions”).

93. For the story of John James Audubon and his life, see John Chancellor, *Audubon* (Viking 1978).

94. Id at 9 (describing his work as a “monument to ornithology”).

95. Id at 8 (presenting general overview of Audubon’s life).

certain split-second pose of a bird, he would tend to portray it impressionistically, thus displeasing the 'scientists.'"<sup>96</sup> Audubon's *Birds of America* is still used by amateur bird watchers and ornithologists.

The pursuit of scientific knowledge about both birds and humans all demonstrate that science can be considered yet another cultural incentive for the creation of art. However, the CTEA drafters have failed to take these important incentives for the creation of art into account.

#### D. AESTHETICISM

Even absent economic incentives and the more apparent cultural incentives such as religion, politics, and science, philosophical movements such as aestheticism prompt independent rationales for the creation of art. The Aesthetic movement in art, premised on the term, *l'art pour l'art* (art for art's sake), contended that art is self-sufficient and does not need a moral, political, or religious purpose. James McNeill Whistler, a proponent of the aesthetic movement, outlines his theories in his treatise, *The Gentle Art of Making Enemies*, stating: "Art should be independent of all clap-trap—should stand alone, and appeal to the artistic sense of eye or ear, without confounding this with emotions entirely foreign to it, as devotion, pity, love, patriotism, and the like."<sup>97</sup> Whistler's philosophy is exemplified in his painting, *Nocturne in Black and Gold: The Falling Rocket*, circa 1874.<sup>98</sup> When unveiled, Whistler's paintings were so scandalous that noted art critic John Ruskin wrote, "I have seen and heard, much of cockney impudence before now; but never expected to hear a coxcomb ask two hundred guineas for flinging a pot of paint in the public's face."<sup>99</sup> Whistler's response was to bring an action for libel in the case of *Whistler v Ruskin* before the Court of the Exchequer on November 15, 1878.<sup>100</sup> Although Whistler won the trial, he was awarded only one farthing<sup>101</sup> in comparison to the £1000 requested.<sup>102</sup>

In contrast to Whistler's philosophy on art, Leo Tolstoy's writings outlined

96. Id at 32 (comparing Audubon's technique to his predecessors).

97. James McNeil Whistler, *The Gentle Art of Making Enemies: As Pleasingly Exemplified in Many Instances, Wherein the Serious Ones of This Earth, Carefully Exasperated, Have Been Prettily Spurred on to Unseemliness and Indiscretion, While Overcome by an Undue Sense of Right* 127–28 (Lovell 1890).

98. Id. *Nocturne in Black and Gold* was one painting in a series of Nocturne river paintings consisting of mere impressions of barges and lights on the River Thames. The titles of Whistler's paintings emphasized his interest in creating lyrical musical compositions that could be heard over tangible entities.

99. Id at 3.

100. While no cite is available for this case, the proceedings are well documented in Whistler, *The Gentle Art of Making Enemies* at 2–3 (cited in note 97). See also Laurie Adams, *Art on Trial* 1–34 (Walker 1976).

101. Farthings were one of Britain's smallest monetary unit, with 960 farthings to the pound sterling. See *The Story of the Farthing: A Brief History*, available at <<http://www.24carat.co.uk/farthingstory.html>> (last visited November 26, 2002).

102. Adams, *Art on Trial* at 19 (cited in note 100).

three objectives that a perfect work of art will achieve:

A perfect work of art will be one in which the content is important and significant to all men, and therefore it will be *moral*. The expression will be quite clear, intelligible to all, and therefore *beautiful*; the author's relation to his work will be altogether sincere, and heartfelt, and therefore *true*.<sup>103</sup>

Tolstoy discusses in detail his philosophical analysis of the relationship between art, religion, and science in his essay, *What is Art?*<sup>104</sup> Often, his ideas are in direct opposition to those expressed by Whistler. While Whistler believed that art possessed an inherent value, Tolstoy believed that art is necessarily intertwined and motivated by the cultural incentives discussed elsewhere in this comment.

Like Whistler, art critic Harold Rosenberg's discussion of the relationship between art and culture emphasizes the free will of the artist instead of the external cultural impetus for the creation of art. He writes:

Free work, whether in the studio, the workshop, the laboratory or the industrial plant, is work done because the worker wants to do it, when he wants to do it, how he wants to do it. It is done not in obedience to external need but as a necessity of the worker's personality, it is work for the sake of the worker, his means of appropriating nature and the heritage of other men's ideas and skill—thus his means of developing himself.<sup>105</sup>

The ideals of the aesthetic movement probably are not a significant motivator for the creation of art in contemporary society. However, the philosophy behind the aesthetic movement continuously echoes in the writings of contemporary artists. Dadaists, for example, believe that art can be found in everyday objects. As a result, the impact of aestheticism on art is evident. The idea that artists are motivated by a desire to create for creation's sake is wholly separate from the economic reward rationale promulgated by Congress. By failing to recognize the role of philosophical movements in the creation of art, Congress has overcompensated artists economically.

As seen in this comment, religion, politics, science, and philosophy all play crucial roles in prompting the development of the visual arts. However, Congress has failed to recognize the role these cultural incentives have in the creation of art. Instead, Congress has, in all likelihood, expanded the copyright term of protection beyond the point economically required, thereby threatening the careful constitutional balance intended by the founders. With the Supreme Court's impending review of the CTEA, the question of the right combination of economic and cultural incentives has never been more pressing. An aware-

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103. Leo Tolstoy, *On Art*, in Aylmer Maude, ed, *Tolstoy on Art* 75, 84 (Oxford 1924).

104. Leo Tolstoy, *What is Art?* in *Tolstoy on Art* 121 (volume cited in note 103).

105. Harold Rosenberg, *Discovering the Present: Three Decades in Art, Culture, and Politics* 67 (Chicago 1973).

ness of these cultural incentives, in addition to the economic incentive, is crucial to maintaining the necessary constitutional balance and the optimal level of art.

### III. COPYRIGHT LAW: ECONOMIC VS. CULTURAL INCENTIVES

As discussed in Section II, many incentives, in addition to the economic incentives usually discussed by the court and legal scholars, exist for the creation of visual arts. However, in modern society, it seems more realistic to view monetary compensation as essential to the development of the arts. In addition, there is some relationship between market controls and the creation of art, which art historians have not ignored. As historian Josef Herman states, "Modern society is scientific and is technologically orientated. It favours (sic) utilitarian ideologies."<sup>106</sup> Herman expands by stating:

Art today exists not because society needs it or depends on it but because by some freak of nature artists still exist; and they have their own way of deciding their function. . . . the artist . . . believes that in one way or another his labours (sic) add to the rest of Man's intellectual efforts to come to know himself, change himself, civilise (sic) himself.<sup>107</sup>

Studies by historians examining the interrelationship between economics and the arts have reached contradictory conclusions. According to the "Lopez Thesis," society invests more in culture and the arts during periods of economic depression than during times of prosperity.<sup>108</sup> Lopez based his theory on the finding that while the Italian economy was at its most prosperous during the thirteenth century (rather than the Renaissance), there were no major artistic achievements during this time.<sup>109</sup> However, other studies of different eras have shown contrary results.<sup>110</sup> Ultimately, Michael North concludes: "Capital accumulation was necessary for the stimulation of craft artistic production and private and institutional collecting; however, economic prosperity did not and does not now create art automatically."<sup>111</sup>

The line between art and culture is necessarily blurred. The rise of the avant-garde movement coincided with the beginnings of a bohemian society. Es-

106. Josef Herman, *The Modern Artist in Modern Society*, in Michael Greenhalgh & Vincent Megaw, eds, *Art in Society: Studies in Style, Culture and Aesthetics* 121, 121 (St. Martin's 1978).

107. Id.

108. Robert S. Lopez, *Hard Times and Investment in Culture*, in *The Renaissance: Six Essays* 29 (Harper 1962). See also Michael North, *Introduction*, in Michael North, ed, *Economic History and the Arts* 1 (Bohlaus Verlag 1996) ("[H]ard times, i.e. periods of depression, are more likely to stimulate investment in culture than periods of economic growth.").

109. North, *Economic History and the Arts* at 1 (article cited in note 108).

110. See, for example, John H. Munro, *Economic Depression and the Arts in the Fifteenth-Century Low Countries*, 19 *Renaissance and Reformation* 235 (1983) (examining the economic development of Flanders and Brabant in the fifteenth century).

111. North, *Economic History and the Arts* at 6 (article cited in note 108).



teemed art historian Clement Greenberg writes, “[T]he avant-garde’s emigration from bourgeois society to bohemia meant also an emigration from the markets of capitalism, upon which artists and writers had been thrown by the falling away of aristocratic patronage.”<sup>112</sup> However, Greenberg notes that this ideal was not sustainable without comparable aristocratic patronage for “the avant-garde remained attached to bourgeois society precisely because it needed its money.”<sup>113</sup>

In the world of “high art,” the need to produce works based on political incentive is less powerful than monetary incentives.<sup>114</sup>

The blunt reality is that the market, manipulated by powerful economic interests and supported by established art historians and critics, determines what art will sell. And the market significantly influences public appreciation and acceptance of artistic form and content. It is natural that art that criticizes capitalism and its social institutions suffers in popularity and marketability.

The protest or radical artist often must choose between an artistic career or a political career or merely succumb to the demands of the marketplace.<sup>115</sup>

According to critic Roger Fry, the artist is only partly motivated by a response to the market price. Artists, he postulates, are also driven by an “aesthetic impulse.”<sup>116</sup> Fry declines to further analyze this impulse, but states, “[w]hatever its origin or psychological constituents may be, it is this aesthetic impulse which gives to works of art their original significance.”<sup>117</sup> Ultimately, as a matter of supply and demand, the artists that possess this aesthetic impulse and possess the capability to convey it in art “could sustain the vital imaginative life of a people.”<sup>118</sup> However, “the products these artists generated did not respond to any biological need, or meet any instinctive demands [so] their price in the market did not correspond to their social value.”<sup>119</sup> According to Fry, “artists tended to be economically conventional people and therefore market signals to them were highly relevant.”<sup>120</sup> This impulse seems not unlike those expressed

112. Clement Greenberg, *Avant-Garde and Kitsch*, in James B. Hall & Barry Ulanov, eds, *Modern Culture and the Arts* 175, 177 (McGraw-Hill 1967) (commenting that this implied “starving in a garret”).

113. Id. See also Blum, *The Critical Vision* at 2 (cited in note 74) (rejecting “art for art’s sake” as a “bourgeois notion”).

114. Blum, *The Critical Vision* at 2 (cited in note 74) (“such art is generally available only to the affluent, for whom ‘culture’ is often little more than another commodity sold via the consumption orientation of modern capitalism.”).

115. Id. at 5 (presenting two examples of artists forced to choose between art and politics).

116. Craufurd D. Goodwin, *An Interpretation: Roger Fry and the Market for Art*, in *Art and the Market: Roger Fry on Commerce in Art* 1, 16 (Michigan 1999).

117. Id.

118. Id. at 18.

119. Id.

120. Id.

by Whistler when he discussed principles of Aestheticism or Dada movement rhetoric.

Recent analysis of the interrelationship between art and economics has also emphasized the need for monetary compensation as an incentive for the creation of art. For example, economist Tyler Cowen argues that the commercialism of art provides the impetus for the survival of art production.<sup>121</sup> Under Cowen's analysis, fifteenth century Florence provided a market for art and the subsequent economic success of some works led to increased demand for more products.<sup>122</sup> Technological advancements such as the woodcut and copperplate engraving increased the availability of art to the masses.<sup>123</sup> Likewise, current advances in technology and new media, such as video art, have changed the role of artists and the production of art.<sup>124</sup> However, for Cowen the relatively unchanging, salutary force of the market economy is behind all of the historic changes, economic, technological, and social, during the last five centuries.

Critics of Cowen's approach, particularly David Krantz, have attacked his pro-capitalism stance and his failure to consider the precise cultural incentives discussed in this comment.<sup>125</sup> Furthermore, they criticize Cowen for failing "to concede that art and the marketplace share the humble status of being mere parts of a larger social context."<sup>126</sup> In fact, Krantz's critique hints that there are other moral and cultural incentives for the use of art rather than the marketplace.<sup>127</sup>

The preceding analysis demonstrates that there is some relationship between market controls and the creation of art. Economists and historians dispute the exact nature of this relationship, however. It seems clear, from this analysis, that providing substantial economic rewards changes the type of art that artists create. Copyright, therefore, favors marketable forms of art at the expense of art created in response to other cultural stimuli, such as religion, politics, or science.

121. Tyler Cowen, *In Praise of Commercial Culture* 88 (Harvard 1998).

122. *Id.* at 88–90.

123. *Id.* at 100.

124. *Id.* at 127–28 (commenting that reproduction technology, among other things, has changed the relationship between artists and patrons).

125. David L. Krantz, *Art in the Marketplace*, 87 *Art in America* 51, 51 (April 1999) ("Clearly, the artists Cowen chooses to consider are capitalism's successes, those who have competed effectively in the marketplace or have been retrospectively judged worth of recognition."). Krantz also writes:

Clearly artists, like other occupational groups, recognize the importance of the marketplace in promoting their products and providing a livelihood, prestige and collective power . . . the compelling issue . . . is the injurious costs, to the arts as well as society, exacted by the marketplace in the form of perverting artistic content, value, use and distribution.

*Id.*

126. *Id.*

127. *Id.* ("[T]here is a moral dimension to the arts, an imperative to go beyond the demands of the immediate (as expressed in the marketplace) and to project what is possible.").

#### IV. CULTURAL INCENTIVES AND THE CTEA

Congress' continued focus on economic incentives and disregard of cultural incentives for the creation of art has threatened to upset the constitutional mandate to promote the progress of the arts by awarding property rights for a limited time. With the addition of the CTEA, we can examine how the balance between the incentive for the creation of art and the dissemination of information to the public has been displaced. Certainly, in the absence of copyright law, the non-economic incentives alone are probably not enough to promote the optimum level of art creation. Copyright creates a property regime and this property regime is crucial for the function of a market economy. The inability to award artists property rights in their creations would result in a complete market failure. However, the Copyright Act, with its increasingly extended terms of protection, undermines the effectiveness of other cultural incentives in the pursuit of capitalism. States J.H. Reichman in his evaluation of the CTEA: "The incentive theory of copyright protection thus tends to underestimate the extent to which all states, to varying degrees, have deliberately subordinated efficiency to other cultural policy goals in the market for traditional literary and artistic works."<sup>128</sup> Reichman predicts that Congress will strengthen its interest in other property rights models such as moral rights<sup>129</sup> and reevaluate the effectiveness of the exclusive rights model.<sup>130</sup>

On the other hand, this comments shows how, in addition to the economic interests vested in the exclusive rights model of property, significant cultural incentives exist. As a result, the continuing extension of the term of protection under the Copyright Act weighs the economic incentives too heavily and fails to give cultural incentives for the creation of art adequate consideration, thereby overcompensating artists. While theorists such as Cowen emphasize the triumph of capitalism in producing successful art and artists, examples throughout history show how other factors such as religion, politics, science, and philosophical movements necessarily prompt artistic creation.

#### CONCLUSION

Ultimately, this comment attempts to survey some of the cultural incentives for the creation of art, such as religion, politics, science and aesthetic philosophy, that are ignored in a typical economic analysis of the Copyright Act. While

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128. J.H. Reichman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 *Cardozo Arts & Ent L J* 625, 644 (1996) (arguing that cultural policy goals must be taken into account in any expansion of rewards to artists).

129. *Id.* (Moral rights prevent those who commissioned the artistic work from using the artwork in a manner disrespectful to the artist.)

130. *Id.* (The exclusive rights model promulgated under the Constitution grants monopoly ownership to authors and artists.)

monetary compensation is necessary for an artist to survive, other incentives play a role in encouraging the production of art. The CTEA, in overlooking these cultural incentives, has likely overextended the term of protection. By acknowledging these cultural incentives, the legislature might find that they have the ability to supplement economic incentives and serve to compensate artists much like extended terms of protection.

The Founders intended that Congress grant exclusive rights to artists in order to promote the progress of the arts. However, these exclusive rights were intended to be for a limited time. The need to release the art and related information to the public domain was viewed as equally important. Focusing on the economic incentives for the creation of art at the expense of the cultural incentives weighs the incentives for creation of art too heavily and prevents the public from having access to the work. Should Congress recognize the importance of the cultural incentives, they would not need to rely so heavily on the economic incentives and risk upsetting the balance between limited rights and release of the information to the public domain. Therefore, in considering the constitutionality of the CTEA, the Supreme Court will certainly need to assess whether Congress weighed the economic incentives too heavily in this constitutional balance when it decided to extend the term of copyright protection.<sup>131</sup>

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131. One example of the dangers in the current copyright policy is illustrated by a popular Calvin and Hobbes cartoon. As Calvin looks out onto the unspoiled snowy landscape of winter, he turns to Hobbes and states, "This is my latest snow sculpture!" Hobbes protests that Calvin has yet to do anything. However, states Calvin, that is the point. "Art is dead! There's nothing left to say. Style is exhausted and content is pointless. Art has no purpose. All that is left is commodity marketing." Bill Watterson, *The Calvin and Hobbes Tenth Anniversary Book* 167 (Andrews McMeel 1995). This rather dark statement seems to predict the future of an art world in which artists receive expanded exclusive property rights.

