A Few Observations on Copyright and Art
By Alfred Steiner

I was recently talking with an acquaintance, who happens to be a copyright scholar, about a cease and desist letter that an artist had received from a publisher. The publisher objected to the artist's display and sale of works that collaged cutouts from a comic book with new material painted by the artist. I worried that if you took the copyright owner's claims seriously, any collage[1] incorporating copyrighted material would be prima facie copyright infringement, even a collage made of pictures cut from a copy of the *New York Times*. My acquaintance did not even blink at this observation, but seemed to believe it was a perfectly reasonable result.[2] My jaw slackened. How could it be that whenever people include a single shred of an authorized copy in a unique collage they subject themselves to claims for copyright infringement that could result in $150,000 in statutory damages[3] and millions of dollars in plaintiff's attorney's fees,[4] not to mention their own legal defense costs? Claims that, even if not meritorious, may be difficult or impossible to dispose of without a full trial?

Despite the possibility of such nightmare scenarios, most attorneys I talk with seem to believe that copyright works just as it should in the context of the Art World.[5] I happen to disagree. In several important ways, copyright fails to function properly when art[6] is involved, both in terms of basic fairness and intended economic incentives. I hope the following observations will bring those failures to light and suggest how courts and lawyers could tweak their analyses, within the established framework of copyright, to reach more reasonable results.

Fair Use

Art Is *Different: The 10-Foot* Balloon Dog[7] *in the Room*

Despite the fact that courts faced with the question have yet to acknowledge it, art *is* different. When a copyright owner alleges that artwork infringes, the question that courts must answer is whether the artist has violated the copyright owner's exclusive rights by creating a unique[8] work. The court need not consider whether the artist can create unlimited copies of the work, as it must in other copyright cases. Nevertheless, courts treat cases involving four copies[9] the same as cases involving millions of copies,[10] mechanically applying the four statutory fair use factors without even nodding to this crucial distinction. But it defies credulity to say that Jeff Koons's use of Art Rogers's photograph *Puppies* to make four sculptures is the same, in terms of commerciality and market substitution,[11] as Luther Campbell's use of Roy Orbison's *Oh, Pretty Woman* to make millions of phonorecords.[12] Copyright is designed to deal with mass production.[13] It works well in the context of music, movies, books, and software, where works routinely sell millions of copies. But at least as applied now, copyright breaks down in its approach to art, which is not generally mass produced.

To address this issue, a reasonable general rule might be:

> *Anyone should be able to use preexisting material to make anything, so long as he or she makes only one copy and is not engaging in blatant piracy.*

Or, to translate that into copyright-speak:

> *Reproducing and preparing derivative works based upon a copyrighted work for the purpose of creating, distributing, publicly displaying, or publicly performing a unique work constitutes fair use unless it would be reasonable to expect that someone would buy the unique work (or pay to see it displayed or performed) instead of buying an authorized copy of the corresponding copyrighted work or an authorized derivative work based upon such work (or paying to see it displayed or performed), assuming there is a well-established market for such derivative works (e.g., a movie adaptation of a novel).*[14]

If courts were to embrace a safe harbor for unique works,[15] it would allow artists (and anyone else) to use existing copyrighted works to produce unique works without risk of financial ruin[16] and without substantially affecting any plausible markets for copyrighted works.[17]

This proposal will not please everyone, of course. Copyright owners and their lawyers may dismiss my proposal as overbroad. Artists, on the other hand, may believe that my proposal does not go far enough in protecting artistic freedom. But my purpose in making the proposal is to offer a solution that resolves much, not all, of the conflict between copyright and art. Like the Supreme Court, I do not believe it is possible to create a bright-line rule for all situations.[18]

Artists Appropriated by Other Artists Should Be Content with Attribution

One special case worth drawing attention to is where artists appropriate the work of other artists to create unique works. Take Jonathan Monk, for example, who has made shiny stainless steel sculptures of Mylar balloon rabbits in various stages of deflation.[19] These sculptures are based on Koons's famous[20] stainless steel sculpture of a Mylar balloon rabbit.[21]

Putting aside the fact that Koons's earlier sculpture may well have been based on a copyrighted original, and assuming for the sake of argument that Koons owns the copyright in his *Rabbit* sculpture,[22] how should we think about Monk's appropriation of Koons's work from a copyright perspective? Because Monk's work sells for far less than Koons's work, are these sculptures merely pirated knockoffs, whose deflation is just a sign of their inferior quality? The answer I would like to suggest is that Koons has no reason to be aggrieved with Monk, but in fact benefits from Monk's work. This is because people who would consider buying a Monk *Deflated Sculpture* will almost certainly realize (or be told) that they are created after Koons's "original." And if they buy the sculpture, it is not because they want a Koons sculpture but, at least in part, because they understand the art-historical progression suggested by the Monk sculpture. This art-historical progression is precisely the reason that Koons benefits from Monk's work. Influence on later artists is one of the most important objective measures of an artist's historical importance. Thus, the more later artists "cite" an earlier artist in their work, the more historically relevant the earlier artist becomes. So, in this example, Koons loses no sales and his reputation is further cemented into the pantheon of art history.

Accordingly, the unique work fair use safe harbor should apply to the scenario where artists appropriate material from other artists, at least where attribution is clear.[23]

The "Transformative" Test Is Bad Jurisprudence

In *Campbell v. Acuff-Rose Music*, the Supreme Court embraced Judge Pierre Leval's "transformative" test[24] for fair use, holding that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[25] The word has since become a mantra in fair use discourse. But basing the fair use determination on the extent to which an earlier work has been "transformed"[26] is, at best, a poor

choice of words and, at worst, bad jurisprudence. This is because the copyright owner's exclusive rights include the right to "transform" the work.[27] The fact that the Supreme Court failed to mention this conflict with the text of the Copyright Act[28] in *Campbell* and that lower courts have not expressed frustration in being forced to apply such a problematic test is frankly embarrassing. Courts should at least explain why "transformative" use does not conflict with the copyright owner's exclusive right to transform its works.

Given that the goal of copyright law is "[t]o promote the Progress of . . . useful Arts,"[29] a more sensible approach would be to interpret the four fair use factors in light of the underlying incentives of authors to create works, i.e., to take an economic approach.[30]

Licensing

Licensing Is Often Impractical or Impossible

Artists often work intuitively and experimentally, quickly selecting and dispensing with a variety of images and source materials in the course of making something. If artists working in this manner had to seek permission every time they used copyrighted material, their output would grind to a halt. And it can often be difficult and time consuming to figure out who owns the copyright in a given work, and even where that is possible, it may not be easy to reach them. Moreover, the process of obtaining a license can take weeks, months, or even longer, and the copyright owner may simply refuse a license or demand an exorbitant fee, especially if the copyright owner finds the proposed use critical or distasteful.[31] Of course, one might argue that in practice, artists can freely create in their studios, safe from the prying eyes of copyright owners, and that copyright issues only need to be addressed when the work is to be shown or sold. But artists working in that manner would have a cloud on everything they produce that contains copyrighted material, and an artist might end up with no work to show or sell if copyright owners cannot be identified or reached, seek an exorbitant license fee, or refuse to grant a license.

The bottom line is that the negligible effect on authors' incentives to produce new work posed by unique works incorporating earlier copyrighted material is almost always far outweighed by the high transaction costs associated with obtaining licenses.[32] But even where licenses are readily available, the feedback problem described below still weighs against obtaining one.

Feedback: Artists Have a Moral Obligation Not to Obtain Licenses

A few years ago, a friend of mine was hired by an art magazine to photograph Jeff Koons and his studio. Knowing my interest in art and the law, my friend invited me to assist him on the shoot. At an opportune moment, I congratulated Koons on his recent fair use victory.[33] Koons quickly responded with something like, "We license everything now." Although it did not occur to me immediately, Koons's response arguably sounded the death knell for fair use in artwork.

Seeking a license where none is needed is problematic because "the existence (vel non) of licensing markets plays a key role in determining the breadth of rights, [so] these . . . decisions eventually feed back into doctrine, as the licensing itself becomes proof that the entitlement covers the use."[34] In other words, when artists license work for use in unique works, they create evidence supporting the existence of a market for unique works as derivative works. If such a market were deemed to exist, then artists would fair poorly under the fourth fair use factor (market substitution), which must consider the market for derivative works.[35] And losing on this

factor, which is "undoubtedly the single most important element of fair use,"[36] would make a finding of fair use nearly impossible.

Perhaps counterintuitively then, artists have a moral obligation to other artists *not to* obtain licenses for purposes of producing unique works.

Remedies

Copyright Remedies Are Draconian as Applied to Allegedly Infringing Artworks

What remedies apply when a unique artwork is held to have infringed an earlier work? Consider the following example: An artist cuts out part of an advertisement from a magazine and collages it with several other elements, selling the completed work for $200. The advertisement's creator sues the artist, alleging that the artist has infringed its copyright by preparing a derivative work based upon the advertisement. The court is not convinced by the artist's fair use defense and finds infringement.

In this case, the court could enjoin the artist from displaying the work publicly, order the artist to turn over the work to the plaintiff for destruction, impose statutory damages of $150,000, and order the defendant to pay the plaintiff's attorney's fees,[37] which could be in the millions of dollars.[38] With one possible exception,[39] the monetary portion of this remedy would be greater than or equal to that available to a recording artist if a retail music chain were to sell millions of unauthorized copies of a CD single, despite the vast divergence of culpability in the two cases. In addition, the impounding or destruction of artwork represents a distinctly different issue, in cultural and free speech terms, than the destruction of pirated CDs. Nevertheless, courts have made[40] and upheld[41] such orders.

A solution to this problem is not difficult to formulate: Courts should make clear that, when a unique work is held to infringe an earlier work, they will not award attorney's fees, excessive statutory damages, or the impounding or destruction of the work unless the "artist" is simply using "art" as a guise to perpetrate piracy. Without such a statement, artists will continue to labor under the Damoclean X-Acto blade of potential financial ruin whenever they so much as slice anything out of a magazine.

The Price of Art Is Tied to the Artist's Reputation, Not the Work Appropriated

Generally speaking, art has no intrinsic economic value.[42] Instead, the value of art is driven almost exclusively by the reputation or "brand" of the artist.[43] Therefore, artists' references to art history[44] and popular culture are typically incidental to the price an artist can command for a work. And because profits attributable to the reputation of an artist may be retained by the artist when copyright infringement damages are calculated,[45] actual damages should rarely be more than trivial. So even if you believe that copyright infringement cases involving unique works should be treated no differently than other infringement cases,[46] it is difficult to justify the remedies of statutory damages and attorney's fees in such cases.

Because little is at stake economically in such cases, courts should adopt a unique work fair use safe harbor as described above. Adopting this safe harbor would minimize the potential for self-censorship associated with the risk of financial ruin without substantial adverse impact on the market for copyrighted works.

Photography

Proliferation of Photography Means Most Images Are Arguably Copyrighted

Before the advent of the printing press and, later, photography, painters and draftsmen were the only people who created images. This is in stark contrast to the current situation, where billions of people walk around every day with the means of capturing images using their camera-equipped smartphones, and hundreds of millions, if not billions, daily post these images to a medium that is perhaps now accessible by the majority of humanity.[47] Given this ever-accelerating pace of image creation, the vast bulk of all existing images are arguably subject to copyright.[48] Moreover, the sliver of images that are not subject to copyright are in the public domain because they are old.[49] The relative antiquity of these public domain images means that their relevance to today's culture is attenuated. While you might copy a Martin Schongauer engraving instead of a cel from *The Simpsons* to represent the grotesque in a painting, the two works have indisputably different cultural import. So unless you believe that artists should not engage contemporary culture, making the vast majority of relevant images essentially off-limits[50] is highly problematic.[51]

Courts Accord Too Much Copyright Protection to Photographs

Anyone who embraces the idea of copyright must admit that at least some photographs are copyrightable. Cindy Sherman's elaborately staged self-portraits, for example, involve more creative decisions than many paintings. But are all photographs protected by copyright? Despite widespread opinion to the contrary, the answer is, or at least should be, a resounding "no." For example, if I accidentally trigger the shutter of my iPhone when I pull it from my pocket, resulting in an unplanned photograph, is the resulting image protected by copyright? I would be the originator of the image, but is that the only sense of authorship required for copyright protection? If so, presumably the idiosyncratic shape and color of a coffee stain on my sleeve from my morning commute would also have to be accorded copyright protection.

You can extend this logic along the spectrum of intentionality, moving a bit further from the entirely accidental to an iPhone photo hastily composed and taken on the fully automatic setting, and further still toward complete intentionality, to an intricately lit and carefully composed abstract setup, photographed with a purpose-driven, tilt-shift lens, 2.1 aperture for limited depth of field, slow shutter speed to account for low light, and a low ISO to minimize noise. The point is, the fewer creative decisions photographers make, the thinner the copyright in the resulting photographs should be. And if those decisions are sufficiently few, a simple application of the merger doctrine should mean that there is no copyright at all.

But even if a photograph is taken quite intentionally, "where the content of the photograph has an independent reality, and the photographer seeks only to achieve and does in fact achieve an accurate representation of that independent reality, there is a good chance that the photograph has no copyright protection at all."[52] And to the extent that copyright protection applies, it should apply only to the original expressive elements introduced by the photographer, not the independent reality represented by the image's subject matter. This point is of exceptional importance today when appropriating photographs is one of the dominant modes of artistic production.[53]

Consider, for example, Judge Batts's recent holding that Patrick Cariou's photographs of Rastafarians in Jamaican landscapes "are highly original and creative artistic works [that] fall . . . within the core of the copyright's protective purposes."[54] Despite counsel for Richard Prince's contention to the contrary, there is little question that Judge Batts was correct to hold that Cariou's photographs contain sufficient original expression to qualify for copyright protection.

Yet Judge Batts went astray when she held that the second fair use factor weighed in favor of Cariou because his photographs were further to the expressive side of the fanciful-factual spectrum. Taking photos of people near where they live doing things they normally do in relatively unremarkable, centered compositions is without question more factual than expressive. Certainly, Cariou may have made many choices in terms of composition, lighting, aperture size, shutter speed, etc., but those choices are more akin to the limited tools that biographers might use to convey their subject matter accurately, not the elements fantasy novelists imagine without reference to the real world.

Do Ignorance and Penury Mitigate the Problem?

If copyright remedies are so tough on artists, why do artists still use so much copyrighted material in their work? A legal realist might argue that the empirical observation of continued artistic appropriation means that the remedies associated with copyright infringement are set appropriately (or perhaps even too low). But that argument assumes that artists understand the possibility of ruinous financial liability associated with using copyrighted material and that they perceive a reasonable risk of enforcement. But in my experience, even many lawyers outside of the intellectual property area, let alone artists, do not understand how copyright remedies apply. Artists are often surprisingly well-schooled on the issue of copyright *liability*, but they do not tend to understand the intricacies of copyright *remedies*. And even if they did understand the outsized remedies available to copyright owners, the vast majority of artists are essentially judgment-proof, which means that copyright owners are unlikely to bother with them, and that, even if they do, they are unlikely to be able to enforce any judgment. In my experience, artists do seem to understand this point, at least intuitively. They believe that until their reputation ascends sufficiently, it is unlikely that any copyright owner will interfere with their work. And once they are art superstars, they can afford to hire Boies, Schiller & Flexner[55] to defend them and to pay any likely damages. But this creates a problem for more modestly successful artists in the middle—the ones lucky enough to lead middle-class lives, buy homes, and save for other large expenses, like children's education and retirement. Those savings could quickly vanish if these artists were forced to defend a copyright infringement lawsuit.

So unfortunately we cannot dismiss the problems described in this article simply because many artists fail to understand copyright infringement remedies and lack substantial assets. If we care about fostering a robust dialog involving artists and contemporary culture, we must address the problems.

Conclusion

In 2010, the Danish artists' group SUPERFLEX set up a factory in a Dutch museum that produced exact replicas of a work by artist Sol LeWitt,[56] which were then distributed free of charge to museum visitors.[57] Among other things, this performance was an illustration of the Art World's own sui generis form of intellectual property—a form of intellectual property more trademark-like in character, based on each artists' reputation.

Presumably, the estate of Sol LeWitt had no problem with the performance given the added institutional sheen it would lend to his already brilliant reputation,[58] despite the fact that in virtually any copyright-driven industry, distributing free copies of a work would be unacceptable. But in this case, the estate of Sol LeWitt, along with other denizens of the Art World, understood that what was being reproduced and distributed were not Sol LeWitt sculptures, but *simulacra* of Sol LeWitt sculptures. SUPERFLEX seems to have been very

careful *not* to say "these are Sol LeWitt works," although they were indistinguishable from Sol LeWitt works aside from lacking a certificate of authenticity from the artist or his estate.

The point is, in the Art World, it is not the object itself that is important, but the reputation of the artist attached to it. For that reason, copyright is largely unnecessary with respect to intra-Art World activity, that is, activity occurring within a world populated primarily by unique works.[59]

This informal reputation-based system of pseudo-intellectual property within the Art World also means that the value of artworks that borrow elements from mass media is driven not by the appropriated elements, but by the reputation of the artist.[60] And because the cultural benefit of allowing artists to create freely far outweighs the negligible harm to copyright owners caused by unique works that do not serve as market substitutes for copyrighted originals, copyright should rarely be necessary for those outside the Art World to enforce rights with respect to activity in the Art World.

But what about when mass media borrows from artists? Does my analysis imply that because artists may borrow freely from mass media, mass media may freely borrow from them? The answer is clearly "no." Again, there is a big difference between cutting advertisements from a magazine to make a unique collage and mass producing an advertisement based on a unique work.[61] Copyright should recognize that difference.

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Endnotes

1. On the importance of collage to 20th century artistic practice, see David Banash, *From Advertising to the Avant-Garde: Rethinking the Invention of Collage*, POSTMODERN CULTURE, Jan. 2004. For a historical survey of artists' use of existing material to create new works, see Brief of Amicus Curiae the Andy Warhol Foundation for the Visual Arts, Inc. in Support of Defendants-Appellants and Urging Reversal 6–23, Cariou v. Prince, No. 11-1197-cv (2d Cir. Nov. 2, 2011).

2. For a similar result, see the frequently criticized *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988).

3. *See* 17 U.S.C. § 504(c)(2).

4. *See id.* § 505.

5. By the "Art World" I mean the global system of artists, curators, dealers, critics, galleries, auction houses, museums, and other players and institutions that traffic in one-of-a-kind objects and small editions.

6. By "art" or "artwork" I mean one-of-a-kind objects and small editions that are created by natural persons and potentially copyrightable subject matter (for purposes of this article, there is no need to consider uncopyrightable subject matter). In many cases, I may be referring primarily to objects made by people who show their work in galleries and museums, but I do not intend to exclude less celebrated creators, e.g., children, students, and everyone else. This definition leaves out plenty of things that are now considered art, e.g., videos distributed through the Internet. Because the arguments I make in this article often rely on the uniqueness of the works involved, I have restricted my definition of art accordingly. How copyright should apply to mass-produced or mass-distributed artworks is beyond the scope of this article.

7. It seems appropriate to substitute something big and blue for the elephant in the cliché, especially something as inflated with meaning as a sculpture by oft-adjudicated infringer Jeff Koons. *See* Jeff Koons, *Balloon Dog (Blue)*, 1994–2000, high chromium stainless steel with transparent color coating, 121 x 143 x 45 in. (five unique versions (Blue, Magenta, Yellow, Orange, Red)). You might be surprised to learn that Koons, through his attorney Peter Vogl of Jones Day, sent a cease and desist letter to a retail store in San Francisco that sold bookends shaped like balloon dogs, alleging copyright and trademark infringement. But Koons quickly ran off with his tail

between his legs after being swatted with a declaratory judgment action by the store's pro bono attorney, Jedediah Wakefield of Fenwick and West. *See* Cat Weaver, *Is a Cease and Desist about Irony, Hypocrisy or Legal Strategy?*, HYPERALLERGIC (Mar. 10, 2011), http://hyperallergic.com/20398/cease-and-desist-strategy/.

8. That is, "existing in a single, physical instance," not "atypical or unusual." In most cases, my use of "unique" applies to small editions as well. I will not try to define what "small" means—artists can easily adjust the size of their editions in proportion to their appetite for risk.

9. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).

10. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

11. These are the first and fourth statutory fair use factors. *See* 17 U.S.C. § 107(1), (4).

12. Although the Supreme Court has not had the opportunity to consider this difference, there is support for the distinction in *Campbell*, where the Court notes that weighing commerciality against a finding of fair use "will vary with the context," distinguishing "[t]he use . . . of a copyrighted work to advertise a product," from a parody "performed a single time." *Campbell*, 510 U.S. at 585. The Court also acknowledges that "the new work's minimal distribution in the market" may mean "there is little or no risk of market substitution." *Id.* at 581 n.14.

13. *See* Joy Garnett, Cariou vs. Prince*: The Copyright Bungle*, ARTNET.COM (Mar. 31, 2011), http://www.artnet.com/magazineus/news/garnett/cariou-v-prince-the-copyright-bungle-3-31-11.asp.

14. This "well-established market" qualification is necessary to address the feedback problem discussed *infra* text accompanying notes 33–36.

15. Such a safe harbor would be subject to potential exceptions. For example, consider if someone set up a studio in China using anonymous artists to mass produce paintings of Looney Tunes characters (all of which were slightly different, and therefore "unique") for sale to Looney Tunes fans in the United States at low prices. Such paintings could interfere with the well-established market for Looney Tunes posters.

16. *See infra* text accompanying notes 37–41.

17. For an excellent description of why a "unique work" fair use exception would best promote the goals of copyright from an economic standpoint, see William M. Landes, *Copyright, Borrowed Images and Appropriation Art: An Economic Approach* 15 (John M. Olin Law & Econ. Working Paper No. 113, 2000), *available at* http://papers.ssrn.com/paper.taf?abstract_id=253332 ("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.").

18. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). Although I think the Supreme Court's statement here goes too far in that it is certainly conceivable that bright-line rules will emerge that simplify the task by resolving certain classes of cases, for example, when consumers copy complete television programs for time shifting purposes. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

19. *See, e.g.*, Jonathan Monk, *Deflated Sculpture No. I*, 2009, stainless steel on white maple pedestal, *available at* http://caseykaplangallery.com/cat/exhibitions/the-inflated-deflated/.

20. A less conceptually compelling version of Koons's sculpture has floated down Broadway on Thanksgiving morning—less compelling because *Rabbit* is a heavy, steel sculpture *of* a balloon, while the Macy's float retranslates the concept back to its unremarkable balloon reality.

21. Jeff Koons, *Rabbit*, 1986, stainless steel, 41 x 19 x 12 in. (edition of three plus Artist's Proof).

22. And we know that Koons has not been shy about asserting such rights in the past, despite his own checkered history with copyright infringement. *See* Weaver, *supra* note 7. Of course, that case did not involve Koons asserting rights against an artist, but against the retailer of a mass-produced item.

23. Without attribution, there is a potential for a substantial adverse impact on the earlier artist's market for unique works, which may overlap with the market for the later artist's unique works. And because artists' primary markets are for unique works, such use by a later artist would fall out of the proposed unique work safe harbor if it interfered with the earlier artist's well-established market for unique works.

24. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

25. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

26. *See, e.g.*, Castle Rock Entm't v. Carol Publ'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998).

27. *See* 17 U.S.C. §§ 101, 106(2).

28. 17 U.S.C. §§ 101 *et seq.*

29. U.S. CONST. art. I, § 8, cl. 8.

30. *See generally* William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18

J. Leg. Stud. 325 (1989).

31. This is why the Supreme Court should have gone further in *Campbell* to hold that a copyright owner's refusal to license a work weighs *in favor* of fair use. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 585 n.18 (1994) ("Thus, being denied permission to use a work does not weigh against a finding of fair use.").

32. But see, for example, *Cariou v. Prince*, 784 F. Supp. 2d 337 (S.D.N.Y. 2011), where, given the volume of the defendant's appropriation and his knowledge of the plaintiff's identity, the transaction costs associated with obtaining a license may not have outweighed the economic harm done to the plaintiff.

33. Blanch v. Koons, 467 F.3d 244, 253–54 (2d Cir. 2006).

34. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 882 (2007).

35. *Campbell*, 510 U.S. at 571.

36. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985).

37. *See* 17 U.S.C. §§ 501–13. Statutory damages and attorney's fees are subject to the plaintiff registering its copyright with the U.S. Copyright Office within the statutorily prescribed time frame. *See id.* § 412.

38. For an example of million-dollar attorney's fees, see *Mattel, Inc. v. Walking Mountain Prods.*, No. CV-00-08543 (C.D. Cal. Aug. 22, 2001), *aff'd*, 353 F.3d 792 (9th Cir. 2003), *on remand*, 2004 U.S. Dist. Lexis 12469 (C.D. Cal. June 21, 2004) (granting defendant's motion for more than $1.8 million in attorney's fees and expenses). Despite the fact that the defendant ultimately prevailed in this case, the signal it sends to artists is nevertheless more red than green, showing that sophisticated copyright holders are willing to spend millions of dollars subjecting artists to years of financial uncertainty (in this case, nearly five) even where the fair use claim is strong.

39. The recording artist might elect actual damages plus the defendant's profits if the artist believes that they are likely to be greater than statutory damages.

40. *See* Cariou v. Prince, 784 F. Supp. 2d 337, 355 (S.D.N.Y. 2011).

41. *See* Rogers v. Koons, 960 F.2d 301, 313 (2d Cir. 1992).

42. *See* DAVE HICKEY, *Frivolity and Unction*, *in* AIR GUITAR: ESSAYS ON ART & DEMOCRACY (1997). *But see* Damien Hirst, *For the Love of God*, 2007, platinum, diamonds, and human teeth (production costs for this diamond-encrusted, life-size, platinum cast of a human skull are rumored to have been £14 million).

43. *See generally* DON THOMSON, THE $12 MILLION STUFFED SHARK: THE CURIOUS ECONOMICS OF CONTEMPORARY ART (2008).

44. *See* Marcel Duchamp, *L.H.O.O.Q.*, 1919, pencil on reproduction of Leonardo da Vinci's *Mona Lisa*, 11.8 x 9.1 in. (a printed reproduction of the *Mona Lisa* with a mustache and beard drawn on in pencil and "L.H.O.O.Q." written at the bottom, which sold for $94,379 in 2003; "L.H.O.O.Q.," when pronounced in French, sounds like "Elle a chaud au cul," which may be translated as "She has a hot ass").

45. *See Rogers*, 960 F.2d at 313 ("To the extent that Koons is able to prove that the profits at issue derive solely from his own position in the art world, he should be allowed to retain them.").

46. *See supra* text accompanying notes 7–18.

47. *Internet Users in the World*, INTERNET WORLD STATS (June 30, 2012), http://www.internetworldstats.com/stats.htm.

48. The only reason that this proposition is not certain is that many images being created now may not be sufficiently original to qualify for copyright protection. *See infra* text accompanying notes 52–54.

49. The duration of copyright in the United States generally extends for 70 years after the death of the author (which did not occur universally in 1967, despite Roland Barthes and his essay *The Death of the Author* of the same year). *See* 17 U.S.C. § 302(a). There are unpublished works created in 1894 and works published in 1925 that are still subject to copyright protection.

50. That is, because licenses are impractical to obtain (*see supra* text accompanying notes 31–32) (and artists have a moral obligation to other artists not to obtain them in the first place (*see supra* text accompanying notes 33–36)) and the risk associated with using copyrighted material is so disproportionately high (*see supra* text accompanying notes 37–41).

51. Although you could argue that artists should always come up with their own, completely new material for communicating their messages, the efficiencies of communication lost by making copyrighted works difficult or impossible to use are not justified by the trivial harm done to copyright holders by allowing artists relatively free use of copyrighted material for creating unique works.

52. Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 327, 374 (2012). Hughes goes even further to say that, "as digitization makes photography more and more ubiquitous, we have probably already crossed a threshold beyond which most of the world's

photographic images are not truly protected by copyright." *Id.*

53. *See, e.g.*, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011); Fairey v. Associated Press, No. 1:2009cv01123 (S.D.N.Y. Feb. 9, 2009).

54. *Cariou*, 784 F. Supp. 2d at 352 (internal quotation marks omitted).

55. Counsel for Prince on the appeal pending before the Second Circuit in the *Cariou* case.

56. Sol LeWitt, Untitled (Wall Structure), 1972.

57. SUPERFLEX, *Free Sol LeWitt*, 2010.

58. Even if the estate of LeWitt had objected, any copyright infringement claim would have faced a steep hurdle given the minimalist nature of LeWitt's work.

59. *See supra* note 8 and text accompanying notes 10–23.

60. *See supra* text accompanying notes 42–46.

61. Interestingly, advertisers seem to be very sophisticated in borrowing from artists where established intellectual property doctrines provide no recourse to artists. Compare Jennifer Allora & Guillermo Calzadilla, *Under Discussion*, 2005, single channel video projection with sound, 6:14 min, with Levi's commercial from 2011 (in which a man captains an inverted table with an attached outboard engine over water in a manner virtually identical to that in Allora and Calzadilla's video projection). Compare Christo & Jeanne-Claude, *The Gates*, 2005, with AT&T commercial from 2010 (in which various buildings, structures, and monuments are dramatically draped with orange fabric seemingly identical to that used in *The Gates*). *See AT&T Rips Off "The Gates" by Christo and Jeanne-Claude?*, HUFF POST N.Y. (May 26, 2010), http://www.huffingtonpost.com/2010/05/26/att-rips-off-the-gates-by_n_590075.html.