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CONTEMPORARY ISSUES IN THE VISUAL ART REALM: HOW USEFUL ARE CREATIVE COMMONS LICENSES?

*Maritza Schaeffer**

All Mankind is of one author, and is one
volume; when one man dies, one chapter is
not torn out of the book, but translated into a
better language; and every chapter must be so
translated . . .

-John Donne

INTRODUCTION

In producing creations, whether photographs, oil paintings or lithograph prints, visual artists undoubtedly find inspiration from numerous sources, including the work of other artists.¹ Whether the goal of the finished work of art is social commentary, or whether it is merely to present an aesthetically pleasing image, there are inherent issues of Copyright law that face the artist during

* Brooklyn Law School, Class of 2009; B.A., Skidmore College, 2003. The author would like to thank her friends and family for their love and support throughout law school, and the staff of the *Journal of Law and Policy* for their editorial help.

¹ “Artists are, among other things, mischievous, and we should try to remember that we wish them to be. In songs, films, paintings, and much poetry, allusions and even direct quotations . . . are subsumed within the voice of the artist who claims them. Citations come afterward, if at all. There are no quotation marks around the elements in a Robert Rauschenberg collage or around Quentin Tarantino’s swipes from lesser-known movies.” Rebecca Tushnet, *Naming Rights: Attribution and Law*, 2007 UTAH L. REV. 789, 797 (2007) (citing Jonathan Lethem, Letter, HARPER’S MAG., Apr. 2007, at 5).

and after the creation process.² Such questions range from the type of protection afforded to the artist through the law, to whether the law impedes creativity, to whether sharing works of art with the public for their own adaptations and uses is inhibited or unnecessarily restricted. Thus, one significant criticism of the current state of Intellectual Property law is that it constrains access to information and creations that would otherwise enhance the cultural value of society.³ Additionally, it can be argued that copyright law must be reexamined and rethought in the context of recent advances in digital technology that can enable high quality, low cost mass reproduction and modification of visual art works. As a reaction, and attempted solution, to perceived flaws in the legal tenets of the Copyright system, the non-profit organization Creative Commons has established various forms of licenses for works that would otherwise fall under protection of the Copyright statute.⁴ These licenses attempt to strike a balance between those who desire an expansion of proprietary rights by adhering to strict copyright protectionist notions, and those who advocate for an extensive public domain.⁵ The licenses take a “some rights reserved” approach and enable authors, scientists, artists and educators to determine the extent to which others may have access to, and build upon, their work.⁶ The Creative Commons

² See generally 17 U.S.C. § 101 *et seq.* (1976) (demarcating the scope and content of federal copyright law in the United States).

³ See generally About Creative Commons, <http://creativecommons.org/about/> (last visited Sept. 30, 2008) (stating that the mission of Creative Commons is “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules” wherein creative control means that “every last use of a work is regulated and . . . ‘all rights reserved’ (and then some) is the norm”).

⁴ *Id.*

⁵ Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 *FORDHAM L. REV.* 375, 376 (2005). See also About Creative Commons, <http://creativecommons.org/about/> (last visited Sept. 30, 2008) (“[T]he debate over creative control tends to the extremes” with “all rights reserved” at one end and “anarchy” and “exploitation” at the other).

⁶ See About Creative Commons, <http://creativecommons.org/about/> (last visited Sept. 30, 2008).

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community, through its goal of promoting social change, thrives on cooperation and interaction in order to build a collectively-shared commons of licensed work.⁷

Creative Commons licenses purport to apply to any type of work that would be protected by copyright law.⁸ This Note, however, assesses whether it would be feasible and beneficial to apply such licenses to tangible works of *visual art* given their unique physical embodiment, and assesses the protections already afforded to artists by the current Copyright structure. Part I provides a brief overview of the 1976 Copyright statute⁹ and how it is being applied to today's artists, and addresses some current controversial issues in copyright law including appropriation artists¹⁰ and the fair use affirmative defense. Part II explains the various types of Creative Commons licenses, the extent to which they allow or prohibit certain uses, and examines the strong social policy ramifications they embody. Finally, Part III analyzes the actual application of Creative Commons licenses to works of visual art: the process, who benefits from such licenses, and why an artist might diverge from the standard protections afforded by copyright law in order to specify the explicit terms under which others may use his work. This note will demonstrate that the licenses apply best to a class of artists who are not primarily concerned with remuneration, but would rather attain popularity or spread a message through the dissemination of their work over the internet. Ultimately, this Note concludes that while certain artists, such as artists who work in a digital form or those who strive for non-pecuniary needs like recognition by a broader audience, might likely benefit from the Creative Commons licenses and would therefore have an incentive to apply them to their art, there is not an overall pressing need for them as a supplement to Copyright law in the visual art realm.

⁷ *Id.*

⁸ However, it is recommended that Creative Commons licenses not be applied to software code. *See* Creative Commons, Frequently Asked Questions, <http://wiki.creativecommons.org/FAQ> (last visited Sept. 30, 2008).

⁹ 17 U.S.C. § 101 *et seq.* (1976).

¹⁰ *See infra* notes 64–82 and accompanying text.

I. COPYRIGHT PROTECTION OF VISUAL ARTS

A. *How Artists are Protected Under Copyright Law and VARA*

While it is well established that the constitutional protection of copyright extends to the visual arts,¹¹ the current state of copyright law in the United States as applied to the arts has become a controversial subject with debates over such major issues as fair use,¹² and whether existing traditional copyright laws hamper creativity.¹³ This is further complicated by ambiguities within the statute itself regarding what is and is not copyrightable.¹⁴

The foundation for copyright law originates in the Constitution, in Article I, Section 8, which states: "Congress shall have the power to promote the progress of science and the useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries."¹⁵ Copyrightable materials are presently protected for the life of the author plus

¹¹ See, e.g., *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903) (holding that "pictorial images" are protected by copyright law, even when used in a commercial context).

¹² For example, in April 2006 the New York Institute for the Humanities at New York University hosted a panel, "Comedies of Fair Use, A Search for Comity in the Intellectual Property Wars," with notable figures in the art world as well as lawyers and historians expressing varying views. See *Comedies of Fair Use*, available at <http://newsgrist.typepad.com/comediesoffairuse/> (last visited Sept. 30, 2008); see also *Panel III: Fair Use: Its Application, Limitations and Future*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1017 (Summer 2007).

¹³ See, e.g., KEMBREW MCLEOD, *FREEDOM OF EXPRESSION@: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY* (1st ed., University of Minnesota Press 2007) (2005); Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 *COLUM. J.L. & ARTS* 219 (Winter 2007).

¹⁴ The statute "does not define originality and creativity or what constitutes a copyright or reproduction, it does not say whether short lived but tangible works are protected, and it does not state what protection is afforded functional works that are arguably also artistic." JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS* 177 (2d ed. 1987).

¹⁵ U.S. CONST. art. I, § 8, cl. 8.

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seventy years.¹⁶ Current copyright law, which protects works created on or after January 1, 1978, enables the artist to have the sole ability to reproduce and prepare derivatives of the work of art, and to distribute, sell and publicly display the work.¹⁷ The artist is granted a temporary monopoly over the work, which is the sole property of the artist. At the same time, the artist is encouraged to put the work in a fixed form—a “tangible medium of expression”¹⁸—so that it may enter the stream of commerce. In addition, the artist has the ability to assign, transfer or convey any of the rights associated with copyright ownership.¹⁹ Finally, when a work of art is sold, the artist still maintains the rights in the piece unless the purchaser has obtained a written agreement that explicitly states that the copyright ownership interests have been transferred.²⁰ In effect, Copyright law has the potential to create an economic incentive for visual artists.²¹

¹⁶ 17 U.S.C. § 302 (1998).

¹⁷ 17 U.S.C. § 106 (1976). Some theorize that, in effect, the rights affiliated with a creator of visual art are comparable to property rights. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS, THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 4–5 (2001).

¹⁸ 17 U.S.C. § 102(a) states that “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). In addition, “pictorial, graphic and sculptural works” are considered “works of authorship.” *Id.*

¹⁹ 17 U.S.C. § 201(d) (2007).

²⁰ 17 U.S.C. § 201(d). This is contrary to the common law rule that existed prior to the enactment of the Copyright Act in 1976, in which courts would often find that, unless the artist had a written agreement stating otherwise, the rights automatically transferred to the purchaser once the work of art was sold. *See, e.g.,* *Pushman v. N.Y. Graphic Soc’y, Inc.*, 39 N.E.2d 249, 250 (N.Y. 1942); *see also* LEONARD D. DUBOFF & CHRISTY O. KING, *ART LAW IN A NUTSHELL* 162–63 (St. Paul: West Publishing 3d ed. 2000) (1994).

²¹ *See generally infra* notes 22–29 and accompanying text.

i. The Artist's Economic Incentive for Creativity

There is arguably a strong economic basis for copyright law as an incentive for encouraging creativity.²² Creating a work of art involves the expenditure of money, time, and effort, which economists call the “cost of expression,”²³ and which is considered to be a fixed cost.²⁴ Therefore, copyright protection provides the incentive to create based on an efficiency justification by allowing artists to “recoup their outlays on the time and effort of creating the work.”²⁵ Yet, when it comes to the visual arts there is a weaker argument for copyright protection due to the compensatory nature of art, as “the main source of income [for most artists] comes from the sale of the work itself and not from the sale of copies.”²⁶ Nevertheless, without copyright protection, “unauthorized copying or free riding on unique art works will reduce the income an artist receives . . . [and] without this source of income there will be less incentive *ex ante* to create unique works.”²⁷ In addition, unauthorized copying of a work of art can reduce the income visual artists might receive from creating derivative works from the original piece.²⁸ Thus, copyright law furthers the creation of new works by ensuring protection against unauthorized copying, especially considering “the speed and low cost of copying as well as the difficulty of employing private measures to prevent

²² See, e.g., William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 5 (Fall 2000).

²³ *Id.*

²⁴ WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 37 (2003).

²⁵ RUTH TOWSE, *CREATIVITY, INCENTIVE AND REWARD: AN ECONOMIC ANALYSIS OF COPYRIGHT AND CULTURE IN THE INFORMATION AGE* 10–11 (Edward Elgar ed., Edward Elgar Publishing Inc. 2001).

²⁶ Landes, *supra* note 22, at 5. Note, however, that “[t]he opposite is true of most copyrightable works, such as books, movies, software, [and] musical works.” LANDES & POSNER, *supra* note 24, at 254.

²⁷ Landes, *supra* note 22, at 5.

²⁸ *Id.* The derivative works a visual artist could prepare from the original include “posters, note cards, puzzles, coffee mugs, mouse pads, [and] t-shirts.” *Id.*

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copying” of works of art,²⁹ and is therefore a valuable right and protection for the visual artist.

ii. Artist’s Rights Under VARA

In addition to the property-based rights that are granted to an artist who has created a work of visual art and the ensuing economic incentive, the artist gains additional protection and federal rights under the Visual Artists Rights Act (“VARA”).³⁰ The act protects only works that are considered “visual arts,”³¹ such as

²⁹ *Id.* at 6.

³⁰ 17 U.S.C. § 106A(a) (1990). The Act states in the relevant parts:

[T]he author of a work of visual art—

(1) shall have the right—

(A) to claim authorship of that work, and

(B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) . . . shall have the right—

(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and

(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.

Id.

³¹ 17 U.S.C. § 101. According to the statutory definition:

A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only,

paintings, drawings and sculptures, and thus has an intentionally narrow and limited application.³² The act is specifically intended to protect the moral rights and integrity of visual artists³³ by allowing the author of a work of art to prevent any intentional mutilation, distortion or other modification that would harm the artist's reputation, and to prevent against destruction of works of visual art

existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

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

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

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

(B) any work made for hire; or

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

Id.

³² See OSLA Art & Law Home Page, <http://www.artslaw.org/VARA.HTM> (last visited Sept. 30, 2008). "The work of many artists who create works of graphic design, works for trade or commercial purposes or for reproduction or which are simply not considered 'fine' art, will not be given any protection by this federal law." *Id.* See also, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (stating that in the Visual Artists Rights Act of 1990, "[t]he express right of attribution is carefully limited and focused: it attaches only to specified 'works of visual art,' is personal to the artist, and endures only for 'the life of the author'" (citations omitted)).

Thus, VARA does not protect "work[s] made for hire," defined under the copyright statute as:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (2007).

³³ 17 U.S.C. § 106A; see also *Quality King Distrib., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 149 n.21 (1998).

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that are of a “recognized stature.”³⁴ In addition, the act also provides for the “*right of attribution*,”³⁵ which enables the author to be recognized by name as the creator of the work, provides the author with the ability to stop the work from being attributed to someone else, and allows the author to prevent someone else from attaching the author’s name to his or her work.³⁶ These rights are considered “moral rights,” and “[t]he theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation.”³⁷ However, there are certain circumstances under which a work may be infringed despite these protections afforded to the visual artist, such as those instances meriting the defense of fair use.³⁸

*B. An Affirmative Defense to Copyright Infringement
Allegation: The Fair Use Doctrine*

The Fair Use Doctrine,³⁹ found in section 107 of the Copyright

³⁴ 17 U.S.C. §§ 106A(a)(3)(A)–(B) (2007).

³⁵ The rights associated with integrity and attribution directly correspond to the rights “protected by Article 6 *bis* of the Berne Convention.” Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 133 (1st Cir. 2006) (citing Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995)) (emphasis added). The Berne Convention is “an international copyright treaty providing that works created by citizens of one signatory nation will be fully protected in other signatory nations, without the need for local formalities. The treaty was drafted in Berne in 1886 and revised in Berlin in 1908.” *Id.* at 133 n.3 (citations omitted).

³⁶ Carter, 71 F.3d at 81. This right is reminiscent of the sentiment eloquently expressed in William Shakespeare’s Othello: “Who steals my purse steals trash; ‘tis something, nothing;/ ‘Twas mine, ‘tis his, and has been a slave to thousands;/ But he that filches from me my good name/ Robs me of that which not enriches him,/ And makes me poor indeed.” WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3. See also, discussion of attribution in Creative Commons licenses, *infra* pp. 23, 25–26.

³⁷ Carter, 71 F.3d at 83.

³⁸ See discussion *infra* notes 39–63 and accompanying text.

³⁹ Until the Copyright Act was enacted in 1976, fair use was a judge-made doctrine, dating back to Justice Story, in *Folsom v. Marsh*, 9 F.Cas. 342 (C.C.D. Mass. 1841) (No. 4,901), who offered this working definition: “look to the nature and objects of the selections made, the quantity and value of the materials

Act, allows one to use and reproduce copyrighted work “for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research,” without the risk of infringement.⁴⁰ In assessing whether the use is appropriate, a court will look to four factors: (1) the purpose and character of the use, and whether it is commercial or for nonprofit educational purposes; (2) the nature of the work; (3) the amount and significance of the section used in relation to the copyrighted work as a whole; and (4) the extent to which the use affects the potential market or value of the copyrighted work.⁴¹

i. Application of the Four Fair Use Factors

The Supreme Court has noted that with regard to the first statutory factor, one must consider “whether the new work merely ‘supersede[s] the objects’ of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”⁴² The act of *transforming* the original work triggers a proper fair use defense.⁴³ While the commercial use of the work should be weighed, “[t]he language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character.”⁴⁴ Therefore, whether the work is of a commercial nature is not dispositive.⁴⁵

used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.* at 348.

⁴⁰ 17 U.S.C. § 107 (2007).

⁴¹ 17 U.S.C. §§ 107 (1)–(4).

⁴² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citing *Folsom v. Marsh*, 9 F.Cas 342 (No. 4,901) (CCD Mass. 1841)).

⁴³ *See id.*

⁴⁴ *Id.* at 584.

⁴⁵ The Supreme Court states that if “commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities are generally conducted for profit in this country.” *Campbell*, 510 U.S. at 584 (internal citations omitted).

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When assessing the second factor, the nature of the copyrighted work, there are two distinctions that come into play: “whether the work is expressive or creative” or merely factual, and “whether the work is published or unpublished.”⁴⁶ The likelihood that a fair use defense will be recognized corresponds to the extent to which the work is factual or informational, rather than creative.⁴⁷ Furthermore, “the scope of fair use involving unpublished works is considerably narrower.”⁴⁸

When examining the third fair use factor, the proportion of the original used in the new work “in relation to the copyrighted work as a whole,”⁴⁹ the court will look to “the persuasiveness of a [copier’s] justification for the particular copying done”⁵⁰ and how this relates to the character and purpose of the use.⁵¹ Another consideration is whether a significant portion of the work was copied verbatim.⁵² While the *quantity* of the work used is important, courts must also consider the *quality* and importance of the materials used.⁵³

Finally, when considering the fourth fair use factor, the market for the copyrighted work, courts must look to the extent to which the alleged infringer has diminished the value of the original work.⁵⁴ A court will examine “whether unrestricted and widespread conduct of [the alleged infringement] would result in a

⁴⁶ *Blanch v. Koons*, 467 F.3d 244, 256 (2d Cir. 2006).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Campbell*, 510 U.S. at 586 (citing 17 U.S.C. § 107(3)).

⁵⁰ *Id.*

⁵¹ *Id.* at 586–87.

⁵² *Id.* at 587. The importance of this assessment stems from the fact that “it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superceding use, fulfilling the demand for the original.” *Id.* at 587–88. However, the artist, when using the fair use defense, must keep in mind that “no copier may defend the act of plagiarism by pointing out how much of the copy he has not pirated.” *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

⁵³ *Campbell*, 510 U.S. at 587.

⁵⁴ *Id.* at 590.

substantially adverse impact on the potential market for the original”⁵⁵ and “take[s] account not only of harm to the original but also of harm to the market for derivative works.”⁵⁶ While the notion of fair use is certainly a limitation on the rights of the copyright holder, it can provide a strong affirmative defense for artists who have used copyrighted material to further their own creative works and make cultural contributions, if they are able to meet the burden of demonstrating fair use.⁵⁷

In addressing the fair use defense, the Supreme Court has observed that “[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright’s very purpose, ‘[t]o [p]romote the [p]rogress of [s]cience and useful [a]rts.’”⁵⁸ In a 2007 panel held at Fordham University, Professor Sonia Katyal⁵⁹ succinctly described fair use as

the best personification . . . of the various public and private considerations that animate the utilitarian balance within copyright law. It is also an area that, despite its statutory construction, is meant to be inherently malleable and flexible in order to adapt to the changing obligations and considerations regarding new technologies.⁶⁰

In addition, the fair use doctrine “permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See, e.g., discussion on the lawsuit against Jeff Koons, *Blanch v. Koons*, wherein he successfully proffered a fair use defense, *infra* at pp. 14–17.

⁵⁸ *Campbell*, 510 U.S. at 575 (quoting U.S. CONST., art. I, § 8, cl. 8). The Supreme Court in *Acuff-Rose*, a case involving a lawsuit over a song, ultimately concluded that the rap group 2 Live Crew was not guilty of copyright infringement, despite creating a parody of the Roy Orbison song “Oh, Pretty Woman,” due to the fair use defense.

⁵⁹ Professor Katyal is a professor at Fordham Law School and an intellectual property scholar. See Fordham University School of Law Faculty Information, <http://law.fordham.edu/ihtml/reg-2bioPP.ihtml?id=544&bid=766> (last visited Sept. 30, 2008).

⁶⁰ *Panel III: Fair Use: Its Application, Limitations and Future*, *supra* note 12, at 1018.

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designed to foster.”⁶¹ The vagueness of the statute can also often work in the favor of artistic expression.⁶² This emphasizes the oft-repeated notion that the primary purpose and function of copyright law is to promote creativity and not to merely influence property rights.⁶³

ii. Appropriation Art and Fair Use

The interplay between copyright law and the visual arts can be found in the art form known as “appropriation art,” whereby an artist borrows elements of something previously existing—anything from a photograph published in an art magazine to a postcard found in a gift shop⁶⁴—in order to create a new piece of art.⁶⁵ Photographer Sherrie Levine is an example of a well-known and established appropriation artist.⁶⁶ Levine’s process of creating her works of art involves taking pictures of famous photographer’s

⁶¹ *Campbell*, 510 U.S. at 577 (citing *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

⁶² *Id.*

⁶³ *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (noting that copyright laws are “intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”); *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (“The Copyright Act was intended to promote creativity, thereby benefiting the artist and the public alike.”); *Arden v. Columbia Pictures, Inc.*, 908 F. Supp. 1248, 1258 (S.D.N.Y. 1995).

⁶⁴ For example, a lawsuit was brought against the artist Andy Warhol after he enlarged and silk-screened an image found in an issue of *Modern Photography* magazine, taken by the artist Patricia Caulfield, to create a series called *Flowers*. MCLEOD, *supra* note 13, at 137. Following a “long, costly court case,” Warhol agreed to give Caulfield a percentage of future profits from prints of the image, as well as several paintings. Warholstars Website, <http://www.warholstars.org/chron/1966.html> (last visited Sept. 30, 2008).

⁶⁵ *See, e.g., Landes, supra* note 22, at 1 (“Appropriation art borrows images from popular culture, advertising, the mass media, other artists and elsewhere, and incorporates them into new works of art . . . commonly described as getting the hand out of art and putting the brain in.”).

⁶⁶ *See, e.g., TONY GODFREY, CONCEPTUAL ART* 334 (1998).

photographs and presenting them as her own.⁶⁷ These works of art are not shunned as plagiarized images lacking authenticity, but rather are accepted in the art world as new works of art, despite their intentional and blatant appropriation.⁶⁸ Levine purposefully undermines and subverts the assumption of originality and novelty in art through her photographs, and “in framing [the famous images of others that she photographs] and presenting them as singular works of art, she returns them to the privileged arena of fine art where such mid-twentieth-century photographers as Edward Weston and Walker Evans intended them to be seen.”⁶⁹ Like other famous appropriation artists,⁷⁰ Levine was accused of copyright infringement for her work by the lawyers representing the estate of the artist Edward Weston and subsequently stopped using his works.⁷¹

Andy Warhol is a more popular example of an appropriation artist.⁷² An essential element to Warhol’s art is the heavy appropriation of images from popular culture, and his process often involved taking images from magazines and then making them his own.⁷³ While he was widely respected and influential in the art

⁶⁷ LAURA WEINTRAUB, *ART ON THE EDGE AND OVER: SEARCHING FOR ART’S MEANING IN CONTEMPORARY SOCIETY 1970S-1990S* 249 (1996).

⁶⁸ *Id.*

⁶⁹ *Id.* at 250–51.

⁷⁰ For example, renowned artists such as Robert Rauschenberg, Andy Warhol, Damien Hirst and Jeff Koons have been accused of copyright infringement. See MCLEOD, *supra* note 13, at 137–42; see also Wikipedia entry for “Appropriation (art),” http://en.wikipedia.org/wiki/Appropriation_art (last visited Sept. 30, 2008).

⁷¹ Weintraub, *supra* note 67, at 250–51. Levine’s *Untitled (After Edward Weston)* is a photograph taken of a poster of a photograph by Edward Weston of his son’s torso called *Neil, Nude*. Ironically, the pose of his son in the photograph was intended to replicate the sculpture of the classical Greek sculptor Praxiteles. *Id.* When the Weston estate threatened to sue, Levine stopped using his works. E. Kenly Ames, *Beyond Rogers v. Koons: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1484–85 (1993).

⁷² Andy Warhol is a widely known and influential 20th century Pop Artist, as well as filmmaker and author, who was largely influenced by popular culture and consumerism. See The Warhol Foundation, www.warholfoundation.org (then follow “Andy Warhol: Bio” hyperlink) (last visited Sept. 30, 2008).

⁷³ MCLEOD, *supra* note 13, at 137.

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world, the artists from whom he appropriated did not always appreciate the manner in which he used their work.⁷⁴ For example, after Warhol borrowed an image of a photograph taken by Patricia Caulfield to create a series of silkscreen pieces, she stated, “the reason there’s a legal issue here is because there’s a moral one. What’s irritating is to have someone like an image enough to use it, but then to denigrate the original intent.”⁷⁵ However, a biographer of Warhol argued that Caulfield was not actually concerned about infringement of her photographs, but rather that “she had been prompted to sue him when she heard Andy was ‘rich.’”⁷⁶

A similar sentiment was expressed following the artist Robert Rauschenberg’s⁷⁷ appropriation of a widely-seen photograph taken by Martin Beebe of a man diving into a swimming pool, when it was used in collage form in a piece titled *Pull*.⁷⁸ In response to an angry letter from Beebe, however, Rauschenberg stated:

I have received many letters from people expressing their happiness and pride in seeing their images incorporated and transformed in my work Having used collage in my work since 1949, I have never felt that I was infringing on anyone’s rights as I have consistently transformed these images sympathetically . . . to give the work the possibility of being reconsidered and viewed in a totally new context.⁷⁹

⁷⁴ See, e.g., discussion *supra* at note 64, on legal action taken by Caulfield after her work was appropriated by Warhol.

⁷⁵ MCLEOD, *supra* note 13, at 138 (citing G. Morris, *When Artists Use Photographs*, ARTNEWS, January 1981, at 105).

⁷⁶ Meyers, *supra* note 13, at 266 (quoting VICTOR BOCKRIS, *THE LIFE AND DEATH OF ANDY WARHOL* 197 (1989)).

⁷⁷ Rauschenberg is a painter and graphic artist, who, in the 1950s, devised and began using a process involving solvent to transfer other people’s images from newspapers and magazines directly onto his canvasses. Like Warhol, his themes often involved influences from modern history and popular culture. See Robert Rauschenberg—Encyclopedia Britannica Online, <http://www.britannica.com/eb/article-9062788/Robert-Rauschenberg> (last visited Sept. 30, 2008).

⁷⁸ MCLEOD, *supra* note 13, at 138–39.

⁷⁹ *Id.* at 139 (citing G. Morris, *When Artists Use Photographs*, ARTNEWS,

In response to the lawsuit filed by Beebe, which was ultimately settled out of court, Rauschenberg's lawyer argued that the use of the image was allowed because the artist was making fair use of the photograph in his creation of an original work of art.⁸⁰

Strangely enough, considering the prevalence of artists appropriating throughout the history of art, lawsuits concerning appropriation art are a relatively recent phenomenon. Professor Kembrew McLeod noted that he has "found no documentation before the 1960s of any American or European artists who were threatened or prosecuted for intellectual-property 'theft' when they appropriated art from the commercial world, even in the most brazen way."⁸¹ The 1960s saw the rise of the Pop Art genre, whose art borrowed heavily from the commercialized pop-culture world around them, making pop artists "the first copyright criminals."⁸²

In a noteworthy decision in 2006, the Court of Appeals for the Second Circuit examined the copyright law ramifications with regard to appropriation art and fair use in *Blanch v. Koons*.⁸³ Fashion photographer Andrea Blanch⁸⁴ sued the well-established⁸⁵

January 1981, at 102, 106). Rauschenberg's sentiment, that there are positive and cultural-enhancing aspects to the transformation of other's works of art, lends itself well to the application of Creative Commons licenses for appropriation artists.

⁸⁰ *Id.* at 139.

⁸¹ *Id.* at 129; see also Meyers, *supra* note 13, at 225.

⁸² McLEOD, *supra* note 13, at 137.

⁸³ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

⁸⁴ At the time of the lawsuit, Blanch had been in the fashion and portrait photography business for over 20 years, publishing her work in notable magazines and periodicals, as well as authoring a book. *Id.* at 247.

⁸⁵ Judge Owen of the United States District Court for the Southern District of New York had described Mr. Koons as:

a controversial artist whose work has been exhibited at museums in the United States and Europe. He is regarded by some as a 'modern Michelangelo', while others view his work as 'truly offensive.' A New York Times art critic observed that 'Koons is pushing the relationship between art and money so far that everyone involved comes out looking slightly absurd.' His works apparently sell at substantial prices, in the area of \$100,000, with some works selling for over \$200,000.

Campbell v. Koons, No. 91 Civ. 6055(RO), 1993 WL 97381, at *1 (S.D.N.Y. 1993).

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artist Jeff Koons⁸⁶ for copyright infringement upon viewing one of Koons' paintings in the Guggenheim Museum.⁸⁷ Blanch believed that the painting unlawfully contained part of her copyrighted photograph, "Silk Sandals."⁸⁸ The Court of Appeals for the Second Circuit affirmed the holding of the district court, which held that Koons' use of the plaintiff's photographs fell under the fair use doctrine.⁸⁹ The painting at issue, *Niagara*,⁹⁰ was part of a series commissioned by Deutsche Bank and the Guggenheim Museum called Easyfun-Ethereal,⁹¹ in which Koons "culled images from advertisements or his own photographs, scanned them into a computer, and digitally superimposed the scanned images against the backgrounds of pastoral landscapes"⁹² before making templates of the images to be applied on canvasses.

Critics of Koons, including Yve-Alain Bois, a professor of modern art at Harvard University, disparage his work as being too commercial to be considered fine art with a symbolic meaning: "his work is totally trivial and a pure product of the market. He's considered to be an heir to Duchamp, but I think it's a trivialization of all that. I think he's kind of a commercial artist." Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B2.

⁸⁶ Koons is no stranger to the courtroom, and has in the courtroom on several occasions for copyright infringement claims. *See, e.g.*, *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992), *cert. denied*, 506 U.S. 934 (1992); *Campbell*, 1993 WL 97381; *United Feature Syndicate, Inc. v. Koons*, 817 F. Supp. 370 (S.D.N.Y. 1993).

⁸⁷ *Blanch*, 467 F.3d at 246.

⁸⁸ *Id.* at 246, 249.

⁸⁹ *Id.* at 249, 259.

⁹⁰ The painting depicts four pairs of women's feet and lower legs dangling prominently over images of confections--a large chocolate fudge brownie topped with ice cream, a tray of donuts, and a tray of apple Danish pastries--with a grassy field and Niagara Falls in the background [F]our pairs of legs occupy the entire horizontal expanse of the painting.

Id. at 247.

An image of the work can be found on the Guggenheim Museum's website, http://www.guggenheimcollection.org/site/artist_work_md_P65.html (last visited Sept. 30, 2008).

⁹¹ *Blanch*, 467 F.3d at 247.

⁹² *Id.*

In determining that Koons' appropriation of Blanch's image was fair use, the Court of Appeals took into account the four statutory elements⁹³ and found that Koons' incorporation of the photograph was not copyright infringement.⁹⁴ With regard to the transformative element,⁹⁵ the court pointed to several factors in support of the conclusion that there was fair use, such as the different purposes in the images, and the different objectives of the artists.⁹⁶ In addition, the court articulated a test that can be used to assess the "transformative" nature: "whether it merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."⁹⁷ Because the court found the use was clearly transformative, the commercial exploitation⁹⁸ of the copied work was deemed a less significant factor.⁹⁹ The court also discussed how the transformative nature of the work makes the second statutory factor, the nature of the work, of "limited usefulness."¹⁰⁰ Additionally, the court reasoned that the

⁹³ See *supra* pp. 8–11.

⁹⁴ *Blanch*, 467 F.3d at 259.

⁹⁵ The court makes it clear that:

Koons does not argue that his use was transformative solely because Blanch's work is a photograph and his a painting, or because Blanch's photograph is in a fashion magazine and his painting is displayed in museums. He would have been ill advised to do otherwise. We have declined to find a transformative use when the defendant has done no more than find a new way to exploit the creative virtues of the original work.

Id. at 252.

⁹⁶ *Id.* at 253.

⁹⁷ *Id.* The court goes on to describe the way that the test "almost perfectly describes Koons's adaptation" due to the manipulation of the colors, size, background, medium, and "their entirely different purpose and meaning." *Id.*

⁹⁸ Commercial exploitation can be found "when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material." *Id.*

⁹⁹ *Id.* at 254.

¹⁰⁰ *Blanch v. Koons*, 467 F.3d at 257. The Court supported this assertion by stating that "the second fair-use factor has limited weight in our analysis because Koons used Blanch's work in a transformative manner to comment on her image's social and aesthetic meaning rather than to exploit its creative virtues."

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amount and substantiality of Koons' copying—the third statutory element—was reasonable, considering his artistic purpose of social commentary.¹⁰¹ Finally, with respect to the fourth statutory factor, the effect on the market for the original work, the court held that Koons' painting “had no deleterious effect on the potential market for or value of” Blanch's photograph.¹⁰² While the court in *Blanch v. Koons* ultimately found that there was a proper fair use defense for the use of the appropriated images, there still remain ambiguities and uncertainties that have the potential to stifle the creativity of artists.¹⁰³

C. Stifling Creativity: Ways that Copyright Law Can Harm Artists

Closely associated with lawsuits targeted at artists¹⁰⁴ is the notion that, while enacted and intended to further creativity and protect artists, copyright law can potentially have the opposite effect and actually hinder creativity.¹⁰⁵ Specifically, an artist who fears that his creation might result in a copyright infringement lawsuit might be less inclined to create the work for fear of being

Id. (referencing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612–13 (2d Cir. 2006)).

¹⁰¹ *Blanch*, 467 F.3d at 257–58.

¹⁰² *Id.* at 258 (citing 17 U.S.C. § 107(4)). This reasoning is based on the fact that:

Blanch acknowledges that she has not published or licensed ‘Silk Sandals’ subsequent to its appearance in *Allure*, that she has never licensed any of her photographs for use in works of graphic or other visual art, that Koons's use of her photograph did not cause any harm to her career or upset any plans she had for ‘Silk Sandals’ or any other photograph, and that the value of ‘Silk Sandals’ did not decrease as the result of Koons's alleged infringement.

Id.

¹⁰³ See *infra* notes 105–18 and accompanying text.

¹⁰⁴ See *supra* pp. 373–79.

¹⁰⁵ See, e.g., KEMBREW MCLEOD, FREEDOM OF EXPRESSION@: OVERZEALOUS COPYRIGHT BOZOS AND OTHER ENEMIES OF CREATIVITY (2005); Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219 (Winter 2007).

subject to massive legal fees.¹⁰⁶ Further, it has been suggested that instead of protecting the rights of initial and subsequent artists, the fair use standard fails to obtain this objective.¹⁰⁷

In addition, artists who intend to make statements on contemporary society through utilizing popular culture items or products that evoke certain connotations can potentially face legal battles with large corporations.¹⁰⁸ For example, in *Mattel, Inc. v. Walking Mountain Productions*,¹⁰⁹ artist Tom Forsythe was sued by the Mattel toy manufacturing company after he created a series of seventy-eight photographs called *Food Chain Barbie*, in which he portrayed Barbie dolls “in various absurd and often sexualized positions” juxtaposed with different types of kitchen appliances such as a fondue pot, casserole dish and a blender.¹¹⁰ Although the case against Forsythe was ultimately found to be unreasonable and frivolous¹¹¹ and the Court of Appeals for the Ninth Circuit

¹⁰⁶ “Intellectual Property law remains the murkiest and least understood aspect of American life and commerce. The rules seem to change every few years, yet remain a step behind the latest cultural or technological advances. Ignorance of the laws and fear of stepping over gray lines intimidate many artists, musicians, authors, and publishers.” VAIDHYANATHAN, *supra* note 17, at 2–3.

¹⁰⁷ “The fact that even a well-known artist with a strong fair use claim [such as Rauschenberg’s against Beebe], and more financial resources than the average appropriating artist, capitulated to the copyright owner of the appropriated work serves to further chill the expression of subsequent artists who wish to appropriate.” Meyers, *supra* note 13, at 228.

¹⁰⁸ See, e.g., *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 796. See also Tom Forsythe, *Food Chain Barbie and the Fight for Free Speech*, National Coalition Against Censorship, Aug. 10, 2004, available at http://www.ncac.org/art/20040810~USA~Tom_Forsythe_Food_Chain_Barbie.cfm (last visited Sept. 30, 2008).

¹¹¹ *Mattel*, 353 F.3d at 816. The Ninth Circuit, supported by the Latham Act, 15 U.S.C. § 1117(a), which allows a court to award attorney’s fees in exceptional cases, found that “analysis of Mattel’s trademark and trade dress infringement claims indicates that Mattel’s claims may have been groundless or unreasonable. Forsythe’s use constituted nominative fair use and was protected by policy interests in free expression.” *Id.* The Court vacated the conclusions of

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concluded that the work was fair use and not copyright infringement,¹¹² the artist accrued nearly \$2 million dollars in legal costs defending his position.¹¹³ While Forsythe was ultimately able to secure pro bono representation through the ACLU and a private law firm, it took him five months to find legal representation and most lawyers suggested that he just give up.¹¹⁴ Forsythe has commented that, from the artist's perspective, when defending a copyright infringement or other intellectual property lawsuit:

[T]he legal system is little more than a boxing ring for the rich with the common people not even invited to experience the proceedings on pay per view. We may be free to express ourselves, but if that expression involves offending a rapacious corporation, they're equally free to sue; and unless we have the wherewithal to fight off high powered attorneys, that's where our free speech ends.¹¹⁵

It is clear that fear of legal retaliation and the high costs of litigation could discourage artists from creating pieces of commentary or criticism of the surrounding commercial culture, stifling creativity and leading to self-censorship.

An additional problem that might hinder creativity is that the fair use case law does not present reliable precedent to encourage artists to lawfully appropriate even when their work would likely fall under the fair use doctrine.¹¹⁶ In 2005, the Brennan Center at New York University published a report that "examined the

the district court and directed the district court to award attorney's fees to Forsythe. *Id.*

¹¹² The Ninth Circuit held that the defendant artist's use of the Barbie doll was "nominative" and that he "used Mattel's Barbie figure and head in his works to conjure up associations of Mattel, while at the same time to identify his own work, which is a criticism and parody of Barbie. Where use of the trade dress or mark is grounded in the defendant's desire to refer to the plaintiff's product as a point of reference for defendant's own work, a use is nominative." *Mattel*, 353 F.3d at 810 (internal citations omitted).

¹¹³ Forsythe, *supra* note 110.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Meyers, *supra* note 13, at 233. Meyers goes on to say "the chilling effect is so severe that it is functionally censorship." *Id.*

chilling effect on artists across all media as a result of the muddled fair use doctrine.”¹¹⁷ Researchers found that while cease and desist letters are commonplace when copyright holders are attempting to restrict someone from using their work, many of them actually stated weak claims, or the material they sought to stifle would likely fall within the fair use doctrine.¹¹⁸

II. CREATIVE COMMONS LICENSES IN CONTEMPORARY SOCIETY

While there are certainly important issues facing artists with regard to their creation of visual arts, the next factor to consider is whether there is the need for a new instrument in the current legal framework, or whether copyright law—despite some vagueness and difficulty—still remains the preferable source of rights.¹¹⁹ Creative Commons licenses are intended to both depart from and provide a supplement to Copyright law to the extent that the license users can determine the terms under which they will allow their work to be used and modified by future users.¹²⁰ They are not intended to be a blatant alternative to copyright, but rather serve as an intermediate ground where license holders work cooperatively to share their work with others to the extent laid out in the terms of the licenses.¹²¹ However, while it seems that Creative Commons licenses could potentially be useful in the visual art realm, the questions of whether such applications are actually feasible and whether there is a true incentive to use them remain important considerations. Before approaching an analysis of these issues, it is important to understand the general elements of, and impetus

¹¹⁷ *Id.* (citing MARJORIE HEINS & TRICIA BECKLES, BRENNAN CTR. FOR JUSTICE, FREEDOM OF EXPRESSION POL’Y PROJECT, WILL FAIR USE SURVIVE? FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL—A PUBLIC POLICY REPORT 3 (2005), available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>).

¹¹⁸ Meyers, *supra* note 13, at 233–34.

¹¹⁹ See, e.g., *infra* notes 104–18 and accompanying text.

¹²⁰ See generally Creative Commons, <http://creativecommons.org> (last visited Sept. 30, 2008).

¹²¹ See About Creative Commons, <http://creativecommons.com/about/> (last visited Sept. 30, 2008).

behind, the Creative Commons licensing scheme.

A. *History of the Creative Commons Movement*

The Intellectual Property law spurring the Creative Commons movement has been criticized as a “restriction on access to information, an abusive cultural despot, an obstacle to the freedom of artistic appropriation, and a monopolist of semiotics . . . depict[ing] artistic and literary property as a barrier to artistic, political and social production of meaning and information.”¹²² Consequently, there is a strong divide between those who want to expand proprietary rights, and those who are concerned about the diminishing public domain.¹²³ Creative Commons arose in light of this debate between advocates and critics of enhanced proprietary rights.¹²⁴ On one side are “copyright protectionists” who believe that expansive and all-encompassing copyright protection is crucial in today’s “digital environment,” where “informational goods [are] an essential asset and at the same time increasingly difficult to exclude.”¹²⁵ The other side of the debate is comprised of “public domain advocates” who view expansive copyright as “a growing threat to academic freedom, free speech, and cultural autonomy, which will compromise efficiency and stifle innovation.”¹²⁶

The project known as Creative Commons, however, is a divergence from these conflicting views and seeks to establish artistic, commercial and social change through the use of a “proprietary regime” in furtherance of providing greater access to creative works.¹²⁷ Creative Commons, a 501(c)(3) non-profit organization that was started in 2001 by Professor Lawrence Lessig,¹²⁸ provides information on creating licenses that enable

¹²² Séverine Dusollier, *Open Source and Copyleft: Authorship Reconsidered?*, 26 COLUM. J.L. & ARTS 281 (2003) (internal citations omitted).

¹²³ Elkin-Koren, *supra* note 5.

¹²⁴ *Id.* at 376–77.

¹²⁵ *Id.* at 376.

¹²⁶ *Id.*

¹²⁷ See About Creative Commons, <http://creativecommons.org/about/> (last visited Sept. 30, 2008).

¹²⁸ Lawrence Lessig is a Stanford Law School professor, founder of the

“authors, scientists, artists, and educators [to] easily mark their creative work with the freedoms they want it to carry.”¹²⁹ The organization’s aim is to find a middle ground between “all rights reserved,” full copyright protection, and the lack of reserved rights for works in the public domain.¹³⁰ A Creative Commons license takes a “some rights reserved” approach in an effort to revive “balance, compromise and moderation,” which the proponents of Creative Commons feel is missing in the current state of copyright law.¹³¹ This aim is advanced through the use of the Creative Commons licenses which “use private rights to create public goods: creative works set free for certain uses.”¹³² The ultimate objective—promotion of community and cooperative interaction—is obtained through “voluntary and libertarian” means.¹³³ The

Stanford Center for Internet and Society, and author of several books. Lessig was the chair of the Creative Commons project until he retired in 2006. *See* Lessig.Info: Short Biography, <http://lessig.org/info/bio/> (last visited Sept. 30, 2008); *see also* Wikipedia, “Creative Commons,” http://en.wikipedia.org/wiki/Creative_Commons (last visited Sept. 30, 2008). The members of the board of directors include cyberlaw and intellectual property experts James Boyle, Michael Carroll, Molly Shaffer Van Houweling, MIT computer science professor Hal Abelson, “lawyer-turned-documentary filmmaker-turned-cyberlaw expert” Eric Saltzman, prominent documentary filmmaker Davis Guggenheim, distinguished Japanese entrepreneur Joi Ito, and public domain web publisher Eric Eldred. *See* History - Creative Commons, <http://wiki.creativecommons.org/History> (last visited Sept. 30, 2008).

¹²⁹ *See* Creative Commons, <http://creativecommons.org> (last visited Sept. 30, 2008).

¹³⁰ *See* About Creative Commons, <http://creativecommons.org/about/> (last visited Sept. 30, 2008).

¹³¹ *Id.* Creative Commons views creative control and copyright issues as existing on a pole where at one end is total control with strict regulations, and is countered at the other end by a “vision of anarchy” where there is creative freedom but no protection that leads to exploitation. *Id.*

¹³² *Id.*

¹³³ *Id.* This is comparable to the free software and open source movements that encouraged the usage of the open source licenses, which is a copyright license for computer software “that harnesses the power of distributed peer review and transparency process. The promise of open source is better quality, higher reliability, more flexibility, lower cost, and an end to predatory vendor lock-in.” *See* Open Source Initiative, <http://opensource.org/> (last visited Sept. 30, 2008).

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stated goal of the project is “to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules.”¹³⁴ Essentially, Creative Commons uses the established legal tenets of copyright law in a “subversive way” to change the meaning behind the law and to promulgate cultural change.¹³⁵

B. Creative Commons Licenses

Creative Commons licenses apply to any form of art that can be protected by copyright law,¹³⁶ and give the license holder the ability to determine the extent to which others may exercise rights initially delegated to the copyright holder through copyright law.¹³⁷ Such rights include the right to make derivatives or adaptations of the work, the right to make copies, and the right to distribute and make money from the work.¹³⁸ However, instances that would otherwise be permitted under the copyright statute, such as fair use, may not be limited or restricted through the licenses.¹³⁹ Everyone who comes into contact with a work that is protected under a Creative Commons license is authorized to use the work consistently with the terms put forth in the license.¹⁴⁰ In addition, while Creative Commons licenses are non-exclusive, they are also non-revocable; once a work has been accessed by a Creative Commons license, the license holder is unable to restrict the other person from using the work according to the license.¹⁴¹ Although the license holder may later decide to stop distributing the work

¹³⁴ See History - Creative Commons, <http://wiki.creativecommons.org/History> (last visited Sept. 30, 2008).

¹³⁵ Elkin-Koren, *supra* note 5, at 375.

¹³⁶ According to the website, this includes “books, websites, blogs, photographs, films, videos, songs and other audio & visual recordings,” but does not recommend that Creative Commons licenses be applied to software code. See Creative Commons, Frequently Asked Questions, <http://wiki.creativecommons.org/FAQ> (last visited Sept. 30, 2008).

¹³⁷ *Id.*





¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

under the Creative Commons license, the licensee cannot withdraw from circulation any copies of the work that already exist at that point, regardless of whether they are “verbatim copies, copies included in collective works and/or adaptations of [the] work.”¹⁴²

There are six main licenses that one can choose from when licensing the work under a Creative Commons license, and the choices range from heavily restrictive to a more accommodating use by others.¹⁴³ The license holder must choose a combination of conditions to apply to the license; the options are “Attribution,” “Noncommercial,” “No Derivative Works,” and “Share Alike.”¹⁴⁴ Each license has a selection of icons that correspond with the requirements and guidelines of the particular license,¹⁴⁵ much like the familiar copyright icon. The icon to represent “Attribution” is  and signifies that others are allowed to distribute, display and perform the copyrighted work and derivative works based on it, as long as credit is given to the license holder in the manner specified.¹⁴⁶ The icon to signify the “noncommercial” condition is  and means that while others are allowed to copy, distribute, display, and perform the licensed work and any derivatives based upon it, there must not be any commercial purposes for doing so.¹⁴⁷ The symbol  represents “No Derivative Works,” which means that others can only perform, copy, display, or distribute “verbatim copies” of the licensed work and not create derivatives.¹⁴⁸ Finally, the condition for “Share Alike,” indicated by , means that others are required to distribute derivative works only under a license that is identical to the one chosen by the original license holder.¹⁴⁹

¹⁴² See Creative Commons, Frequently Asked Questions, <http://wiki.creativecommons.org/FAQ> (last visited Sept. 30, 2008).

¹⁴³ Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Sept. 30, 2008).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Sept. 30, 2008).

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Regardless of the license that is ultimately chosen, there is a set of “baseline rights” that have features that are common to each:¹⁵⁰

[e]very license will help you: retain your copyright; announce that other people’s fair use, first sale, and free expression rights are not affected by the license. Every license requires licensees to get your permission to do any of the things you choose to restrict; to keep any copyright notice intact on all copies of your work; to link to your license from copies of the work; not to alter the terms of the license Every license allows licensees, provided they live up to your conditions, to copy the work; to distribute it; to display or perform it publicly; to make digital public performances of it; to shift the work into another format as a verbatim copy. Every license applies worldwide; lasts for the duration of the work’s copyright; is not revocable.¹⁵¹

Once the choice of license has been made, there are three ways the license is expressed: the commons deed, the legal code, and the digital code.¹⁵² The commons deed is a “plain language summary of the license, complete with the relevant icons.”¹⁵³ The legal code is “the fine print that you need to be sure the license will stand up in court.”¹⁵⁴ Lastly, the digital code is “a machine-readable translation of the license that helps search engines and other applications identify your work by its terms of use.”¹⁵⁵

The first, and “most accommodating” of the licenses with regard to what others can do with the license holder’s work, is called an Attribution (“by”) license, and it enables works under the license to be “remix[ed], tweak[ed] and buil[t] upon . . . even commercially,” as long as the original license holder is credited as

¹⁵⁰ See Creative Commons, Baseline Rights, http://wiki.creativecommons.org/Baseline_Rights (last visited Sept. 30, 2008).

¹⁵¹ *Id.*

¹⁵² License Your Work - Creative Commons, <http://creativecommons.org/about/license/> (last visited Sept. 30, 2008).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

the original creator.¹⁵⁶ The Attribution Share Alike (“by-sa”) license, the second option, allows others to remix, tweak, and build upon the work in a commercial way as long as the license holder is credited and the new creations are licensed under terms identical to the original license.¹⁵⁷

The Attribution No Derivatives (“by-nd”) license is the third Creative Commons license option, and it provides for the work, in whole and with no changes, to be redistributed, either commercially or non-commercially, as long as credit is given to the original license holder.¹⁵⁸ The fourth option, the Attribution Non-Commercial (“by-nc”) license, requires that while others may remix, tweak and build upon the work protected by the license in a non-commercial way, and must credit the license holder in any newly created non-commercial work, they are not obligated to license their derivative works under the same terms as the initial license.¹⁵⁹

The fifth type of Creative Commons license, the Attribution Non-Commercial Share Alike (“by-nc-sa”), lets others remix, tweak and build upon the work as long as it is not done in a commercial manner, and requires that the license holder be credited and that the new creations are licensed under terms identical to the original license.¹⁶⁰ In addition, others can download and redistribute the work, as well as “translate, make remixes and produce new stories” based on the licensed work.¹⁶¹ Because this newly created work must carry the same license as the original, the derivatives will also be non-commercial in nature.¹⁶² The last license, which is also the most restrictive of the six main Creative

¹⁵⁶ Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Sept. 30, 2008).

¹⁵⁷ *Id.* This license is comparable to open source software licenses. *Id.* See also The Open Source Definition, <http://www.opensource.org/docs/osd> (last visited Sept. 30, 2008).

¹⁵⁸ Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Sept. 30, 2008).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

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Commons licenses that allow redistribution, is called the Attribution Non-Commercial No Derivatives (“by-nc-nd”) license.¹⁶³ This license allows individuals to download the licensed work and to share it with others as long as they mention and link back to the license holder; however, the works cannot be used commercially or changed in any way.¹⁶⁴ Thus, it is often called the “free advertising” license.¹⁶⁵ While the six basic Creative Commons licenses are user-friendly and easy to understand, there has been some critical reception to their actual application and the potential aftermath.¹⁶⁶

C. Criticisms of the Licensing Scheme

While the Creative Commons licensing regime does not propose outrageous changes to copyright law, the license model has garnered critiques regarding the real-world application of the licenses.¹⁶⁷ One critic, Jeffrey L. Harrison, has commented that he is “not comfortable with allowing some of our most precious resources—the creativity of individuals—to be simply tossed into the commons to be exploited by whomever has spare time and a magic marker.”¹⁶⁸

¹⁶³ *Id.*

¹⁶⁴ See Creative Commons Licenses, <http://creativecommons.org/about/licenses/meet-the-licenses> (last visited Sept. 30, 2008).

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., *infra* notes 167–76 and accompanying text.

¹⁶⁷ For some excellent examples of criticism of the licensing model, as this Part of the Note is a broad and brief examination, see generally Séverine Dusollier, *The Master’s Tools v. The Master’s House: Creative Commons v. Copyright*, 29 COLUM. J.L. & ARTS 271 (2006); Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEO. MASON L. REV. 271 (2007); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375 (2005).

¹⁶⁸ Jeffrey L. Harrison, *Creativity or Commons: A Comment on Professor Lessig*, 55 FLA. L. REV. 795, 797 (2003). This criticism, however, seems somewhat specious given that under Creative Commons licenses it is the artist, and not “whomever has spare time,” who decides which rights to share.

Harrison argues that “the more one can internalize the profits from creativity—i.e. the more copyright protection there is—the greater amount of creativity.”¹⁶⁹ Therefore, without the possibility of profiting from the derivative works, the artist might be less inclined to create. The license would arguably not foster creativity, but would hinder the production of new works because there is a lesser likelihood of profiting from the creation.¹⁷⁰ The Creative Commons licensing scheme is dependent on artists sharing work in the public commons, and suggests that the economic model is based on gratuity.¹⁷¹ Certainly, argues Séverine Dusollier, “[t]his system seems to turn on its head the traditional economic model of copyright where the remuneration that flows from the exercise of exclusive rights is deemed to be the necessary incentive to create.”¹⁷² Furthermore, while one might argue that the Creative Commons allows the work to be presented to the public while preventing another person from distributing the work commercially, this manner of circulating the work for free under the license serves to reduce the commercial interest in the work.¹⁷³

Creative Commons has also been criticized for creating an “ideological fuzziness” by its lack of a “comprehensive vision of the information society and a clear definition of the prerequisites for open access to creative works.”¹⁷⁴ Although Creative Commons seems to succeed as a social movement in explaining its proposed rights, it arguably lacks a strong, comprehensive idea for what the “commons” actually means since it can apply to a large variety of situations.¹⁷⁵ Thus, a “fuzziness” ensues whereby the

¹⁶⁹ *Id.* at 798.

¹⁷⁰ *See id.*

¹⁷¹ Dusollier, *supra* note 122, at 281.

¹⁷² *Id.* However, there is a potential counterargument to this, in that some artists are certainly not solely after making money off their work and intend to use their art as an act of communication, and thus the economic value of free publicity through Creative Commons licenses could be of greater value.

¹⁷³ *Id.*

¹⁷⁴ Elkin-Koren, *supra* note 5, at 377.

¹⁷⁵ *Id.* at 389. Elkin-Koren describes the commons as “a legal regime, in which ‘multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another.’” *Id.* (citing Michael A.

theoretical underpinnings of the movement are clear, but the actual application of the licenses in practice is uncertain.¹⁷⁶

III. CREATIVE COMMONS LICENSES APPLIED TO VISUAL ARTISTS

A. *Ways that Creative Commons Can Work in the Art World*

When assessing whether the Creative Commons licenses are a viable supplement to the protection provided for visual artists under current federal Copyright laws, there are several important factors to consider. First, one must question the incentive an artist has to give up his or her rights and protections in a work of art in order to add to the commons. Given the function of Creative Commons licenses, an important factor is the form of the work and how it would facilitate sharing. In order for the license to be a viable option for works of art, the work itself would need to be in a form that is freely shareable. While the definition of “visual art” under the copyright statute¹⁷⁷ encompasses many media, it is difficult to imagine a way to allow tangible objects—the work of art itself in its physical form—to be in a format that would allow for easy sharing and modification. The Creative Commons website, however, asserts that the licenses do apply to “offline” work (i.e., the physical format rather than digital).¹⁷⁸ To do so, the artist must choose the desired license, then mark the work either:

- (a) with a statement such as “This work is licensed under the Creative Commons [insert description] License. To view a copy of this license, visit [insert url]; or, (b) send a letter to Creative Commons, 171 2nd Street, Suite 300, San Francisco, California, 94105, USA” or insert the applicable license buttons with the same statement and URL link.¹⁷⁹

When the license is applied to an offline work, it would not include

Heller, *The Tragedy of the Anti-Commons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623–24 (1998).

¹⁷⁶ *Id.*

¹⁷⁷ *See supra* note 31.

¹⁷⁸ *See* Creative Commons, Frequently Asked Questions, <http://wiki.creativecommons.org/FAQ> (last visited Sept. 30, 2008).

¹⁷⁹ *Id.*

the metadata¹⁸⁰ that enables the work to be identified under Creative Commons-customized search engines.¹⁸¹

Clearly, a digital format of the artwork is best for allowing easy sharing among others. According to Fred Benenson,¹⁸² Creative Commons Culture Program Associate, the work of art needs to be in a digital format because digital objects have a visual representation as well as the “robust metadata” that allows for sharing through the internet.¹⁸³ Because of the infinitely reproducible nature of a digital work, the artist arguably needs his own set of rights provided by and decided by himself, rather than the standard rights provided by copyright law, in order to protect the work from being utilized in a way with which he does not agree.¹⁸⁴ However, unlike a single canvas labored over by an artist, it is potentially difficult to find value in a work of digital form due to the ease with which it can be copied. Thus, Creative Commons would be attractive to an artist who is not interested in capitalizing on the individual copy, but instead would rather make a social

¹⁸⁰ Metadata is defined as “data about data,” and is intended to “facilitate the understanding, characteristics, and management usage of data.” Metadata definition on Wikipedia, <http://en.wikipedia.org/wiki/Metadata> (last visited Sept. 30, 2008). See also Creative Commons, <http://wiki.creativecommons.org/UsingMarkup> (last visited Sept. 30, 2008).

¹⁸¹ At Creative Commons Search, <http://search.creativecommons.org/>, the user has access to various search engines (Google, Yahoo, flickr, blip.tv, Owl Music Search, and SpinXpress) where he can enter a search query to find Creative Commons licensed works he can “modify, adapt, or build upon.” *Id.* However, an artist can always photograph the tangible work of art and upload a digital photograph onto the internet and thus make it searchable.

¹⁸² Fred Benenson is the Creative Commons Culture Program Associate and former Free Culture intern at Creative Commons. People - Creative Commons, <http://creativecommons.org/about/people/#98> (last visited Sept. 30, 2008). I met with Mr. Benenson, a very valuable source of information about the licenses, to discuss with him the rationale for applying Creative Commons licenses to works of visual art and the ways in which it would be possible. Interview with Fred Benenson, Creative Commons Culture Program Assoc., Creative Commons, in N.Y., N.Y. (Nov. 5, 2007).

¹⁸³ Interview with Fred Benenson, Creative Commons Culture Program Assoc., Creative Commons, in N.Y., N.Y. (Nov. 5, 2007).

¹⁸⁴ *Id.*

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contribution.¹⁸⁵ Essentially, the Creative Commons-licensed artist who works in an easily-copied medium such as digital photography may make a compromise, trading the diminished incentive for selling copies of the work in exchange for the contribution into the shared commons.¹⁸⁶ Furthermore, the value of the free publicity through Creative Commons attribution licenses may potentially be greater in many cases than collecting royalties.

i. How Creative Commons Can Work in the Visual Art Realm

Digital photography, in the form of either a digital photograph as the work of art itself, or a digital image of a painting or other visual art form that can be scanned and uploaded for easy sharing,¹⁸⁷ is the ideal format for a Creative Commons-licensed work of art. Placing a digital version of the work on a website is a straightforward way to allow others to know the uses permitted by the license holder. For example, through the widely-used photograph uploading website Flickr,¹⁸⁸ an artist can upload a photograph and easily allow others to know exactly what kind of uses are allowed by providing a link to the Creative Commons website listing the appropriate icons and a brief description of the rights.¹⁸⁹

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ There are numerous websites available online for photo sharing, including Picasa, Shutterfly, Snapfish and Flickr. *See* Wikipedia definition of Photo Sharing, http://en.wikipedia.org/wiki/Photo_sharing (last visited Sept. 30, 2008).

¹⁸⁸ Flickr is a popular photograph sharing and management website and online community which is owned by Yahoo.com. Flickr Home Page, www.flickr.com (last visited Sept. 30, 2008).

¹⁸⁹ For example, a Flickr-user can search for a photograph of the “Brooklyn Bridge” and find an interesting image of the bridge, listed as “Some Rights Reserved.” Under the Brooklyn Bridge, Brooklyn, N.Y., http://flickr.com/photos/an_untrained_eye/2552820626/. Upon clicking on that language, the user will be directed to a link on the Creative Commons website which instructs that the photograph is under an “Attribution-Noncommercial 2.0 Generic” license. Thus, the user is able to use the image under the following conditions: she is allowed to share the photograph as long as she attributes the work to the original

Another uncomplicated way to facilitate sharing of Creative Commons-licensed works of art is through a Creative Commons art show.¹⁹⁰ Such an event took place at New York University in 2006,¹⁹¹ at which all of the works of art on exhibit were—in addition to being for sale—licensed under Creative Commons licenses “in order to display the benefits of having creative works that give rights to both the artists and to the art-appreciating public.”¹⁹² To differentiate this type of event from a typical student art show, however, the attendees would need to be on notice that the work was licensed in this particular way. To confront the issue of notifying the viewers of the particular rights affiliated with each piece, the images were also uploaded onto a website with a link to the chosen Creative Commons license.¹⁹³ When a work of art is in a digital format, it can be easily shared and transferred, downloaded, modified and used according to the original creator’s guidelines,¹⁹⁴ and thus becomes an easy way to facilitate the use of Creative Commons licenses for work by visual artists. As a result, the internet becomes a vital instrument in conveying both the art itself, and the Creative Commons license terms.

Flickr user/photographer, but she cannot use it for commercial purposes and cannot transform or make derivatives of the work. Creative Commons Attribution-Noncommercial 2.0 Generic, <http://creativecommons.org/licenses/by-nc/2.0/deed.en> (last visited Sept. 30, 2008).

¹⁹⁰ See, e.g., description of the “Open Art” show put on by Florida Free Culture in 2007, Fla. Free Culture, <http://uf.freeculture.org/2007/02/16/open-art-in-the-reitz-union-gallery/> (last visited Sept. 30, 2008) (describing the art show wherein all the artwork on display was licensed under a Creative Commons license and available for downloading and sharing online). The website also notes that “[t]his ‘open art’ will help to remove barriers to culture and creativity and help artists find a wider audience.” Florida Free Culture, <http://uf.freeculture.org/2007/10/16/openart08> (last visited Sept. 30, 2008).

¹⁹¹ See Creative Commons Art Show, <http://www.freeculturenyu.org/ccartshow/> (last visited Sept. 30, 2008).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See *supra* notes 136–66 and accompanying text for discussion on the ways licensees may license their work via Creative Commons.

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ii. Policy Rationale for Creative Commons Licenses for Artists

Under the Creative Commons approach, intended to foster “balance, compromise and moderation” of competing property and dissemination interests,¹⁹⁵ there are several reasons why an artist might decide to license his work to subsequent users under blanket terms of the chosen license, rather than simply uploading the works onto a website with disclaimers and guidelines for what use is restricted and allowed.¹⁹⁶ First, standardization plays a vital role in the efficiency of Creative Commons,¹⁹⁷ while at the same time allowing for license compatibility and avoiding license proliferation.¹⁹⁸ Second, a boilerplate disclaimer on limitations runs the risk of being legally unsound, while Creative Commons are intended to be enforceable by law.¹⁹⁹ Finally, choosing a Creative Commons license serves as a branding point for the non-profit Creative Commons organization founded with the intention of protecting and enhancing artists’ interests²⁰⁰ by “creat[ing] a

¹⁹⁵ About Creative Commons, <http://creativecommons.org/about/> (last visited Sept. 30, 2008).

¹⁹⁶ *Supra* note 182.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* See also definition of License Proliferation, http://en.wikipedia.org/wiki/License_proliferation (last visited Oct. 10, 2008).

¹⁹⁹ *Supra* note 182. Furthermore, the Creative Commons states the following with regard to the legality of the licenses:

the Creative Commons Legal Code has been drafted with the intention that it will be enforceable in court. That said, we can not account for every last nuance in the world’s various copyright laws and/or the circumstances within which our licenses are applied and Creative Commons-licensed content is used. Please note, however, that our licenses contain “severability” clauses — meaning that, if a certain provision is found to be unenforceable in a certain place, that provision and only that provision drops out of the license, leaving the rest of the agreement intact.

Creative Commons Frequently Asked Questions, http://wiki.creativecommons.org/Frequently_Asked_Questions#Are_Creative_Commons_licenses_enforceable_in_a_court_of_law.3F (last visited Sept. 30, 2008).

²⁰⁰ See generally Creative Commons, <http://creativecommons.org> (last visited Sept. 30, 2008).

platform for a wide range of ideologies that share an interest in enhancing access to works.”²⁰¹

iii. Type of Artist to Use a Creative Commons License

Creative Commons licenses raise a vital question regarding the type of artist who would want to further the branding purposes behind the organization and essentially compromise some of his or her copyright-protected rights in order to further the social movement. One of the main benefits of sharing the work is the idea that the artist’s name and/or message becomes more widespread and gains popularity through being shared over the internet.²⁰² Thus, artists who choose such a license likely prefer to build a name for themselves through the “Attribution” component of the license over receiving royalties and remuneration.²⁰³ While proponents of the Creative Commons movement might argue that the Copyright regime is intended to leverage commercial rights,²⁰⁴ work licensed under Creative Commons is intended to be closer to social capital, where the original artist’s attribution for the work becomes valuable on its own as a form of free publicity because it allows for dissemination and exposure of the artist’s work or name in a way that would be hard to quantify.²⁰⁵ However, while compromising on royalty fees in exchange for exposure and popularity on blogs or websites might be considered invaluable to some artists, issues do arise with respect to the “commercial” limitations of the Creative Commons licenses.²⁰⁶ Commerciality is

²⁰¹ Elkin-Koren, *supra* note 5, at 377.

²⁰² For example, internet users gain access to the work when it contains the searchable metadata and can be found using a tool such as the Creative Commons search engine, <http://search.creativecommons.org/>. *Supra* note 182.

²⁰³ When a work is licensed with the “Attribution” component, subsequent users must reference the original creator in any subsequently created works based on the original. *See* License Your Work - Creative Commons, <http://creativecommons.org/about/license/> (last visited Sept. 30, 2008).

²⁰⁴ *Supra* note 182.

²⁰⁵ *Id.*

²⁰⁶ For example, Creative Commons was named as the defendant in a lawsuit wherein the plaintiff alleged, among other things, that Creative Commons did not “adequately educate and warn him . . . of the meaning of

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difficult to define in some instances, and can perhaps lead to a slippery slope if not properly delineated.²⁰⁷

Any appropriation artist would likely benefit if the borrowed work was licensed under a Creative Commons license, for there would be no fear of legal repercussions from using the image in her own work.²⁰⁸ Artwork created by appropriation artists utilizes and borrows images that are pre-existing in society, from sources such as the media or other artists, in order to create a new work of art.²⁰⁹ Furthermore, while all appropriation artists might not share the same mentality, it seems likely that any artist who feels entitled to freely borrow and access another's work would be inclined to allow other artists the same kind of access to her work. Regardless of a possible fair use defense for using another's work,²¹⁰ it would be hypocritical for an artist to intentionally utilize elements of another's art but then place limits on her own art being used under similar contexts.²¹¹ Thus, Creative Commons seem a natural fit for

commercial use and the ramifications and effects of entering into a license allowing such use." Lessig Blog, http://lessig.org/blog/2007/09/on_the_texas_suit_against_virg.html (Sept. 22, 2007, 16:41 PST) (citing Count V of the complaint). The lawyer for the plaintiffs alleged that Creative Commons failed to satisfactorily explain the definition of "commercial use," that the term "was too vague to inform users of the license and that it was incumbent on Creative Commons to raise the issue of the rights of the people who appear in the picture." Noam Cohen, *Use My Photo? Not Without Permission*, N.Y. TIMES, Oct. 1, 2007, at C3. The suit, however, was dropped shortly thereafter. Grant Gross, *Photo-Sharing Lawsuit Against Creative Commons Dropped*, IDG News Serv., Nov. 29, 2007, available at <http://www.itworld.com/071129/creativecommons.com>.

²⁰⁷ For example, one might need to draw the line between allowing a not-for-profit organization distributing a licensed work and the organization selling the work for a profit.

²⁰⁸ See, e.g., discussion *supra* at Part I.B and C.

²⁰⁹ See *supra* notes 65–82 and accompanying text.

²¹⁰ See discussion *supra* notes 83–103 and accompanying text.

²¹¹ The artist Richmond Burton expresses this attitude:

Whenever people's response is how dare you! I consider that a high compliment. First of all, taking from other artists is not illegal in the art world, as it is in the music industry, and second, it is a direct acknowledgement of how we work in painting. Everything you do is based on what came before what is happening concurrently I feel

appropriation arts.

Therefore, an important concern in applying a Creative Commons license to appropriation art is determining which license would be most fitting.²¹² The appropriation artist would be able to determine the extent to which he or she desires attribution in the subsequently-prepared work, whether or not it should be used for a commercial purpose, and whether to restrict the creation of derivatives of the licensed work.²¹³ The “share alike” function of the licenses might be a particularly interesting option for an appropriation artist. Share alike, which sets the condition that any derivative works that are created based on the licensed work must be licensed under terms identical to the original, could potentially serve to further the impetus behind appropriation art and encourage others to create and develop new works. Additionally, because remuneration may certain artists, it would seemingly be contradictory for appropriation artists to limit the commercial purpose of the subsequent creations based on their Creative Commons-licensed work by applying the “Non-Commercial” option.

B. The Warhol Foundation: A Balance Between Lessig's Ideology and Disney's Monopoly

A distinction between commercial and non-commercial uses is appropriate. According to Joel Wachs, the president of The Andy Warhol Foundation,²¹⁴ there is a possibility for an artist to be both

very free to take and change whatever I want, and that includes borrowing from my contemporaries. If some people are upset because my work has similarities to what they're doing, that's their problem. And if they take from me, that's great! I don't respect these artificial boundaries that artists and people around artists erect

Landes, *supra* note 22, at 1 (citing Richard Rubenstein, *Abstraction in a Changing Environment*, 82 ART IN AM. 102, 103 (Oct. 1994)).

²¹² See *supra* notes 143–66 for a description of the various Creative Commons license options.

²¹³ *Id.*

²¹⁴ See <http://www.warholfoundation.org/> for more information on The

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“Lessig when it comes to artists and scholars,”²¹⁵ and “Disney when it comes to commercial use”²¹⁶ of their art. While other artists are allowed to “use and reference Warhol work without charge and without challenge,”²¹⁷ and scholars may utilize “Warhol imagery for just a nominal fee to cover the costs of administering the rights,”²¹⁸ the foundation is “vigorous in enforcing [its] rights when it comes to people wanting to use Warhol’s art for commercial purposes.”²¹⁹ These values allow artists to appropriate from Warhol’s work and potentially profit without having to obtain approval for the usage of the work, as the foundation likens such an approval process to censorship.²²⁰

The goals of the organization are met by examining each request for use on a case-by-case basis, and by noting the distinction between art and commerce in the desired use of the work.²²¹ Each request requires a two-step process in which the Foundation looks first to who is acquiring the image, and whether it is for-profit or not-for-profit uses.²²² Second, if someone will

Andy Warhol Foundation. The objective of the Foundation is:

to foster innovative artistic expression and the creative process by encouraging and supporting cultural organizations that in turn, directly or indirectly, support artists and their work. The Foundation values the contribution these organizations make to artists and audiences and to society as a whole by supporting, exhibiting and interpreting a broad spectrum of contemporary artistic practice.

Id. (last visited Sept. 30, 2008).

²¹⁵ See *supra* note 128 for information on Professor Lessig.

²¹⁶ Lawrence Lessig, *When Theft Serves Art*, WIRED MAGAZINE, Jan. 2006, <http://www.wired.com/wired/archive/14.01/posts.html?pg=5> (last visited Sept. 30, 2008).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ I met with Mr. Michael Hermann, the Licensing Director at the Foundation, in order to fully understand the mechanisms the Foundation uses in licensing Warhol’s works to scholars, artists, and those who would like to use the images for commercial purposes. Interview with Michael Hermann, Licensing Dir., The Andy Warhol Found., in N.Y., N.Y. (Nov. 7, 2007).

²²² *Id.*

profit, the important question is how the profit will be obtained.²²³ A *practical balance* is therefore used to try to find a clean line between commercial and noncommercial uses when taking the request into consideration.²²⁴

Furthermore, because Warhol himself was an appropriation artist, the foundation seeks to encourage other artists' appropriation and usage of Warhol images by providing access and availability.²²⁵ Thus, the organization is able to avoid invoking the ownership of Warhol intellectual property as a form of censorship, and instead seeks to ensure that the images are available and accessible to artists and scholars.²²⁶ At the same time, the Foundation is aware that there is a value to Warhol's art and therefore will allow commercial use in a practical and case-by-case basis in order to ensure the best value for the art.²²⁷ Additionally, the Foundation facilitates scholarly uses by establishing low publishing rates so that requests by scholars are easy to process, unless they are of a commercial nature.²²⁸ This process is thus able to balance the interests of both sides—the artist and the user—when assessing subsequent uses of Warhol's work. It embodies some of the important components of Creative Commons by allowing artists and scholars relatively free access to Warhol's work, while still maintaining the artist's sense of control and restrictions.

²²³ For example, complications may arise as to whether the use is commercial when a not-for-profit organization, such as a museum, partners with a for-profit company in order to provide a service such as a benefit gala. *Id.*

²²⁴ *Id.* (emphasis added).

²²⁵ *Id.* It is important to note that while the Warhol Foundation might provide access to artists to use the Warhol images, the actual images themselves might invoke trademark ownership, such as Coca-Cola or Campbell's Soup. *Id.*

²²⁶ Interview with Michael Hermann, Licensing Dir., The Andy Warhol Found., in N.Y., N.Y. (Nov. 7, 2007).

²²⁷ *Id.*

²²⁸ *Id.*

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C. Rights Licensing Organizations

As the Warhol example shows, despite the rationales for utilizing Creative Commons licenses, there are alternatives to those licenses that potentially better serve the economic interests of individual artists in the visual art realm.²²⁹ An alternative, and more restrictive approach for artists whose works are in high demand is to use the services of a rights licensing organization in order to outsource the requests for reproduction or uses of their works.²³⁰ Requests for reproduction of art come from a wide variety of industries including traditional print media, electronic media producers, advertising agencies, film and television producers, as well as manufacturers of merchandise such as posters and greeting cards.²³¹ The rights licensing organization Artists Rights Society (“ARS”)²³² works on behalf of artist members to “streamline the process for reviewing and approving or rejecting requests for reproduction.”²³³ ARS provides artists with the necessary information,²³⁴ and the artist chooses whether or not to license the work for reproduction.²³⁵ ARS also enables the artist to suggest terms and conditions and may, for example, “require the client to submit color proofs and/or mock-ups for final review and

²²⁹ This is likely true for those artists who, for example, are not solely interested in art for art’s sake and seek the economic benefit as well as the impulse to communicate a message through their art.

²³⁰ See, e.g., Artists Rights Society (“ARS”), <http://www.arsny.com/general.html> (last visited Sept. 30, 2008). It is important to note that while this approach might better serve the interests of the artist on an individual, there are inevitable transaction costs for the person desiring to use the art which Creative Commons obviously seeks to avoid.

²³¹ *Id.*

²³² The ARS is “the preeminent copyright, licensing, and monitoring organization for the visual arts in the United States.” ARS, About Artists Rights Society, <http://www.arsny.com/about.html> (last visited Sept. 30, 2008).

²³³ ARS, Services Provided, <http://www.arsny.com/services.html> (last visited Sept. 30, 2008).

²³⁴ Examples of this kind of information include the type of product their work will potentially be used in, the number of copies to be prepared, the territories where it will be distributed, and the proposed fee rights. *Id.*

²³⁵ *Id.*

approval prior to publication. If the proof fails to meet the required criteria, members may demand another proof or withhold permission entirely.”²³⁶ If the work of art is licensed for reproduction in the manner approved by the artist, ARS provides terms and conditions to the user.²³⁷ The rights granted “are normally on a non-exclusive basis for a given period, number of copies, and specific territories of distribution.”²³⁸

However, rights that are provided by a licensing organization are no longer applicable to works licensed under Creative Commons, as the artist has already determined the terms of the license whenever the work is used.²³⁹ By applying a Creative Commons license, for example, the artist essentially gives up the right to request a proof and require final approval of the reproduction or modification of his or her work.²⁴⁰ If a work of art is licensed under any of the six main licenses,²⁴¹ the future user of the work will be able to bypass a licensing organization altogether, undeniably reducing transaction costs associated with licensing the work, and will just have to abide by the guidelines specified by the artist under the license terms.

Organizations such as the ARS serve an important role for certain artists by allowing them to be involved in the process of

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ ARS, Terms and Conditions of Use, <http://www.arsny.com/terms.html> (last visited Sept. 30, 2008). Furthermore, “[t]he grant of rights are contingent upon the inclusion of correct copyright credits, and the payment of any applicable fees.” *Id.*

²³⁹ “Creative Commons licenses attach to the work and authorize everyone who comes in contact with the work to use it consistent with the license.” Creative Commons, Frequently Asked Questions, <http://wiki.creativecommons.org/FAQ> (last visited Sept. 30, 2008).

²⁴⁰ Because the licenses are non-revocable, an artist essentially gives up the right to “stop someone, who has obtained [the] work under a Creative Commons license, from using the work according to that license. [The artist] can stop distributing [the] work under a Creative Commons license at any time [he might] wish; but this will not withdraw any copies of [the] work that already exist under a Creative Commons license from circulation” *Id.*

²⁴¹ See *supra* notes 143–66 and accompanying text.

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choosing which uses should be licensed.²⁴² It is an easy way to enable artists whose works are in demand to license their work, and, unlike Creative Commons, there is no provision for automatic use.²⁴³ Rather, the process involves repeated interactions between the artist and the potential licensee to seek approval and come to terms approved and desired by both parties.²⁴⁴ Although this does not reduce transaction costs for the potential future user of the work in the way Creative Commons licenses would, it is likely an important feature from the perspective of the artist who is not interested in relinquishing all control over his work. Creative Commons licenses, on the other hand, are unable to assure artists that the reproductions of their licensed work will be of a quality of which they approve.²⁴⁵ Therefore, the approach of utilizing a rights licensing organization is more viable for an artist whose work is in demand, and who is not motivated to create for the sole purpose of spreading a message and/or contributing his work to a shared commons.

CONCLUSION

Despite the two examples in which the licenses would likely work well for today's artists—works in a digital media and works created by appropriation artists—overall there is not a general need for the licenses in the visual art realm from the perspective of the artist. Creative Commons licenses tip the balance in favor of the user, rather than the artist, since it is the user who benefits from the work being licensed freely under the specified terms. Unless artists intend to benefit from spreading a message or gaining popularity specifically through use of the internet, or uses Creative Commons as a branding point, there is not an obvious benefit or incentive to use the licenses for their works of art. On the other hand, artists rights licensing organizations or the reasonable approach taken by The Andy Warhol Foundation, do not displace copyright

²⁴² Telephone Interview with Adrienne R. Fields, Assoc. Counsel, Artists Rights Soc'y, in N.Y., N.Y. (Nov. 9, 2007).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See supra* note 240.

holders/artists, but rather let them be involved in the licensing process. Allowing the use of the artwork to be determined on a case-by-case basis is a vital action that enables artists to prevent their work from being used in a manner with which they disapprove and would seek to prevent. Creative Commons, as a social movement, is a valuable contribution in response to what can be an oppressive copyright system. Its tenets and beliefs are well reasoned and might be suitable for a variety of licensed forms. However, Creative Commons licenses are not well suited to non-digital works of visual art.