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Visual Fine Art and Copyright in the Digital Networking Age

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Abstract

The aim of copyright is to create incentives for art to be created, designed and, in many cases, shared or exhibited. The law does this by giving an artist exclusive rights to control the public display of one's work, and to control copies of one's work. The growth of new technologies has made it more difficult for an artist to not merely control the original work of art, but to receive compensation and credit. What if the artist objects to the transformational or derivative use of the original work of art because it is used without permission or invades the artist's publicity rights? Are analog rules effective in a digital world? An exploration of these questions, and the notion of whether the law should be expanded to protect innovative uses or whether new uses of art should not receive the same protection, follows.

Introduction

The growth of Internet based technology significantly challenges nearly all copyright holders' ability to control the public display and use of copyrighted material. In the post-Napster era the bulk of academic inquiry on the impact of the change from analog to digital bits of information and its dissemination through electronic means is aimed toward the music and film industry. The theme of this paper is to explore the effect of the digital revolution on visual fine art; and to discuss the competing interests between users and copyright holders in light of the new participatory culture associated with the Internet.

A Brief History of Copyright

The first modern copyright law was passed in 1710 by the British Parliament.[1] This Act, known as the Statute of Anne, granted all new published works a fixed term of fourteen years with an option to renew for another fourteen years. Works already in existence were granted a term of twenty-one years. The reason for the law was to break the monopoly powers of the Crown-chartered guild of printers and booksellers. After its passage the copyright law forbade non-copyright holders from reprinting a published work. The Act did not address the more common copyright issues of today including the sole right to copy, distribute, and exhibit.

Even before the advent of the U.S. Constitution many states considered the need to adopt copyright law. In 1783, Connecticut modeled its copyright statute on the Statute of Anne.[2] The U.S. Congress relied heavily on these experiences when it enacted its first copyright law giving authors fourteen years of exclusive control over published works. Once a copyright expired it passed into the public domain.

The authority for Congress to make copyright an exclusive federal issue stemmed from Article 1, section 8, clause 8 of the U.S. Constitution. Known as the "Progress Clause," it states:

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[1] See Lyman Ray Patterson, Copyright in Historical Perspective, Vanderbilt University Press: Vanderbilt, 1968, 151-170. *Avalon Project*, Yale University available at http://yale.edu/lawweb/avalon/eurodocs/anne_1710 html

[2] *Copyright Enactments: Laws Passed in the United States Since 1783 Related to Copyright*, Copyright Office Bulletin No. 3 (revised) 1973. The Connecticut Statute is reproduced at 1-3.

Congress has the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Perhaps a better term for this clause is the "Public Purpose Clause" because the Congressional grant of powers is for the purpose of promoting the progress of science and art, not enhancing the pockets of artists or publishers. There are two other significant aspects to this clause. The monopoly right granted is for a limited time as set by Congress. The copyright is given to inventors and authors or artists, in this case.

For the period between 1790 and 1890 Congress increased the copyright term once. Since then, increasingly, Congress has extended the tolling of the passage of works falling into the public domain. After the passage of the Sony Bono Act (Copyright Term Extension Act) in the late 1990s the term of copyright increased to life of the author (or artist) plus seventy years and ninety-five years for corporate copyright holders.[3]

The constitutionality of the Sony Bono Act was challenged in *Eldred v. Ashcroft*[4] on the grounds that extending the term of copyright was a violation of the Constitution's requirement that copyright exists for a "limited time." The U.S. Supreme Court upheld the authority of Congress to enact this change, although the Court in dicta noted it was perhaps an unwise policy decision. The net effect of lengthening past and present copyright term is to decrease the flow of material that will enter the public domain.

Before the enactment of the 1909 Copyright Act, the general view was that the term copyright meant the exclusive right to "publish" a creative work. A small change in the statute's language in 1909 altered the meaning of copyright to include prohibiting others from "copying" one's creation without permission.

In 1976, Congress deleted the requirement that authors or artists must register their copyrights with the U.S. Office of Copyrights for validity. This revision was enacted to comply with international copyright standards. The new rule is that copyright comes into existence when an original work is "fixed in a tangible medium of expression."[5] There is a benefit, however, to registering a copyright: protection in the form of statutory monetary damages in the event of unauthorized use.

The impact of these two legislative enactments did not become readily known until the advent of the newest technology, i.e. the Internet. Now nearly every original artistic work is instantaneously protected by copyright. Every Internet based use of a work of art may constitute a new copy.

Further adding to the Internet mix of copyright technology challenges, President William Clinton signed into law the Digital Millennium Copyright Act (DCMA) of 1998.[6] In short, this statute criminalizes the manufacture and distribution of any technology or tool designed to circumvent encryption technology, e.g. digital watermarks of fine art. It also makes it illegal to circumvent technological measures that control access to copyrighted works, e.g., dismantling a museum's requirement for a password or payment before viewing fine art online. So while legislation over the past one hundred years or so places restrictions on duplicating or copying copyrighted material, this latest piece of legislation makes it more difficult in some cases to view original works of visual art in the first place.

[3] 17 U.S.C. section 302 (1998).
[4] 537 U.S. 186 (2003).
[5] 17 U.S.C. section 101 (1994).
[6] 17 U.S.C. section 1201 (1998).

The United States joined the global copyright community, in part, when it signed onto the Berne Convention on Literary and Artistic Works.[7] No longer must works of art carry a copyright notice. Relying upon the European traditions of moral rights, in a very limited fashion, U.S. law recognizes the existence of the right of an artist to be acknowledged as the creator of the original works and the right to prevent destructive alteration to a work even after it has been sold.

What Copyright Protects

Copyright protects the original expression of an idea, but not the idea. Almost any original expression fixed in tangible form is protected the moment it is expressed. Under the Copyright Act of 1976, items of expression include pictorial, graphic and sculptural works, along with architectural works. The U.S. Copyright Office classifies tangible visual art to include: fine art, graphic art, applied art, photographs, prints and art reproductions, maps, globes, charts, technical drawings, diagrams, models, sculptures, statutes, figures and forms. Additional classifications exist for literary, dramatic and musical works.

Section 106 of the Copyright Act of 1976 gives the owner of copyright the exclusive right to reproduce, prepare derivative works based on the original, distribute copies, transfer ownership by license or contract, perform publicly, and display. Another section of this Act, 106 A, grants limited rights of attribution and integrity to artists.

In a sense, there are two significant aspects to the copyright protection granted to artists. The first is the right to control how others copy one's art. This is not a new issue, but historically it was the core copyright concern. Long before the advent of the Internet or digital printing, for instance, Albrecht Durer challenged Marcantonio Raimondi's bootlegging of his prints.[8] Current technologies simply make it easier and cheaper to reproduce art images and redistribute them in digital form.

The second, and newer, control issue is the extension of copyright protection to include preventing "derivative" works of art based on an artist's original work of art. New software enables users at the click of a mouse to create transformative uses of digital content, for example, by placing the reproduction of a painting into a cartoon video. In the art world, the debate is sometimes centered on whether a new work is "interpretative or transforming" of images of art works or "slavish, exact or substantial copies" of such works. The former may qualify for new copyright protection with the latter being subject to infringement claims by the copyright holder.

The argument can be made that the regulatory scheme should distinguish between outright "pirating," by copying original works of art without permission, versus building upon or "tweaking" the original works of others. A weakening of the notion of protecting an artist's derivative rights might lead to more creative artist expressions.

A helpful example of the complexity of what copyright protects and does not protect is found in *Bridgeman Art Library, Ltd. v. Corel Corporation*, a late 1990s U.S. federal district court decision.[9] The art library claimed Corel infringed upon its copyright in its color images of its paintings. Corel digitized transparencies made and owned by the library. The original works of art in question were not protected by copyright. The issue was whether a photograph of an original work of art in the public domain is an original expression of an idea protected by copyright. The court held that while the color photographs reflected a "modest amount of originality required for copyright

[7] 17 U.S.C. section 101 note (amending numerous aspects of Title 17) 1988.
[8] See William F. Patry, *Copyright Law and Practice*, The Bureau of National Affairs, 2000 available at http://digital-law-online.info/patry/partry2.html.
[9] 25 F. Supp. 2d 421 (S.D.N.Y.1998), rehearing found at 36 F. Supp. 2d 191 (S.D.N.Y.1999).

protection…But ‘slavish copying,’ although doubtless requiring technical skill and effort, does not qualify” for copyright protection.[10]

Interestingly, the first time *Bridgeman* was decided the court relied upon U.K. law. Upon spirited review and re-argument using U.S. law and citing British law, the court reached the same decision. In the aftermath of this controversial decision, the Museum Copyright Group (U.K.) determined it is not binding in the U.K. Further, it concluded:

> …as a matter of principle, a photograph of an artistic work can qualify for copyright protection in English law, and that is so irrespective of whether…the subject of the photographs is more obviously a three dimensional work, such as sculpture, or is perceived as two dimensional artistic work, such as drawing or a painting…[11]

The basic law in the U.S. is that an exact photographic copy of a painting cannot be copyrighted because it is not original. However, to the extent the image represents the artist’s own creative expression then it may be copyrighted unless it is deemed a derivative work of an existing copyright.

In the beginning copyright regulated publishers. Nowadays copyright regulates not only publishers, but visual artists and users of art. There is an economic aspect to what copyright protects and does not protect. Publishers of art history images in books or online Web sites view *Bridgeman* favorably because they do not have to pay royalties or seek a license when no copyright is in place. Museums raise substantial revenue from art related reproduction fees and licensing of art images, therefore, they are threatened by “piracy.” Artists are concerned about how their images may be used when they lack control.

Copies

The reason the scope of copyright law has changed to regulate publishers, users and artists are because all three now have the capability to make copies relatively cheaply. Many real world uses of a work of fine art are not regulated by copyright law because it does not entail reproduction. Looking at a painting at a gallery is not regulated by copyright law. Selling a painting is not regulated by copyright law; however, there is a caveat.

When an artist sells a work of fine art the reproduction rights remain with the artist or the artist’s heirs until the work passes into the public domain unless it is expressly assigned by writing. Even when an artist retains copyright to a sold work of fine art the law denies the artist exclusive rights to make copies on First Amendment and public policy grounds.

This exception is known as the “fair use” doctrine in the U.S., a first cousin to free speech. The U.K. refers to exemptions in the exclusivity of copying as “fair dealing;” and is limited to making copies for news reporting, parody and criticism. The Copyright Act of 1976, section 107, lists the following categories as maybe qualifying for fair use: comment, news reporting, criticism, teaching, scholarship and research. This list is not complete. Case law as articulated by the U.S. Supreme Court in *Campbell v. Acuff-Rose Music,* requires a potential user of unauthorized art to consider the purpose or character (profit or nonprofit educational), nature of copyrighted work, amount and substantiality of the portion used in relation to the copyright work as a whole, and the effect of the use upon the potential market of the copyrighted work.[12] These four factors must be reviewed in light of the overall purposes of copyright law.

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[10] As reported in Museums Copyright Group, *Copyright in Photographs of Works of Art* available at http://museumscopyright.org.uk/bridge.html.
[11] Id.
[12] 501 U.S. 569 (1994).

Consider this recent news announcement in The New York Sun.[13] The paper reported the company that owns the rights to Norman Rockwell's Saturday Evening Post cover art is suing the National Review on copyright infringement grounds. The magazine's cover was an exact duplication of the original "Thanksgiving Dinner" painting except a mound of money replaced the turkey on the platter. The "distorted" art accompanied an article about stock investments in America. The National Review claims the alterations were substantial enough to qualify as permissible fair use. This dispute has not been resolved.

In the late 1950s an Alexander Calder black-and-white mobile was donated to a municipal airport. The airport proceeded to repaint the mobile, fix it into place and then add a motor. At that time there was no law in the U.S. protecting the right of the artist to prevent the modification, destruction or distortion of a work of visual art. [14]Compare this situation with a leading French case involving the artist, Bernard Buffet. In the early 1960s he successfully prevented the sale of a single painted refrigerator panel from six painted refrigerator panels he had created as a single painting under the theory it was an alteration of his original work.[15]

The artist, Jeff Koons, once bought a note card with black and white photographs of "puppies." Koons tore the copyright notice off and then sent the card to his assistants to be "copied" as sculpture. He called the work "string of puppies." The sculpture was exhibited and sold for $360,000. Koons' argument that his sculpture was a fair use intent to imitate the photograph for parody failed before the federal court. The sculpture was found to be a copy of the original work of art.[16]

To bring the U.S. in line with its treaty commitment under the Berne Convention, Congress modified the U.S. Copyright Act of 1976 by enacting the Visual Artist's Rights Act (VARA).[17] Under this statute, the creator of a work of fine art has the right to: (1) claim authorship; (2) prevent the use of one's name on art one did not create; (3) prevent the use of one's name as the creator of art that has been distorted, mutilated or modified. Once a work of visual art, e.g. sculpture, has been incorporated into a building with the consent of the creator this third right is limited.

Had the Berne Convention been enacted in the U.S. when Alberto Vargas had his legal disputes with Esquire magazine perhaps the result may have been more favorable for him. Under a written contract Vargas created fifty-two drawings a year for Esquire. The drawings depicted pinup women known as the "Varga Girls." The two parties had a series of contractual disagreements. Esquire continued to use Vargas' drawings over his protestations to stop. Esquire merely renamed the drawings, "Esquire Girls," and continued to publish them without granting him any recognition. Vargas sued unsuccessfully to prevent their magazine from renaming and reproducing the drawings without attribution.[18]

These moral rights – creativity, paternity, and integrity – are limited for the duration of the life of the creator of the work unlike in France where they are perpetual. These rights are non-assignable. They can be waived by writing. The VARA narrowly defines visual art to include paintings, drawings, prints, sculpture or photographs for exhibition, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and numbered consecutively by the artist. The reach of VARA is limited to what one would refer to as traditional visual fine art. In general, it does not extend its legal protection to mass produced posters, magazines, books, audio visual works or motion pictures.

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[13] The New York Sun, February 8, 2007, Rockwell Owner Sues for Infringement at 3.
[14] Supra note 8.
[15] See Tad Crawford, Legal Guide For Visual Artist, Allworth Press: New York, 1999, at 59.
[16] Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992).
[17] 17 U.S.C. section 106A (1990).
[18] Alberto Vargas and Reid Austin, *Vargas,* New York, 1978, pp 42-44.

The changing technology has placed an unprecedented strain on the fair use doctrine. Before the Internet, assume one went to a museum to look at a favorite modern artist's work. Copyright law would have nothing to say about how many times one could view the visual fine art because no copy was being made. (The copyright holder may restrict the photographing of the art.)

Now assume the museum places these same works of fine art on its Web site. May the copyright holder, artist or museum as the case may be, control the number of times one may browse or sample the art online? Does one have a fair use right to look at the art as often as one pleases?

In the analog world the vast majority of fine art uses goes unregulated because they so rarely produced copies. In the digital world the possibility of both infinite exact copying and transformative uses of creative works of fine art places an incredible burden on fair use. It may be that when all fine art is presumptively regulated by copyright law then not only is the original purpose of promoting the arts stifled, but fair use protections are insufficient.

Codes

For many years acclaimed Stanford University law professor, Lawrence Lessig, has argued it is "code" rather than law that ultimately will regulate Internet use.[19] Copyright owners are building their own rules into the technology that delivers copyright works of art.

There are a number of technical means available for an artist to constrain access and use of digital visual images. The Web site where art is viewed may be password protected. Digital rights management schemes are designed to unilaterally restrict users' freedom to examine art or manufacture reproductions. Invisible to the naked eye, digital watermarks are embedded into graphic art files. They serve the purpose of identifying quality and assuring authenticity, yet may double as a unique copyright identification code subject to tracking. By online licensing or terms of service agreements, copyright holders can contractually limit users' ability to use and reproduce protected art.

For instance, the International Olympic Committee (IOC) licenses the five multi-colored Olympic rings to the United States Olympic Committee (USOC). In turn, the USOC may license the use of these rings, as depicted by a digital image of the rings, and even the word "Olympic" or the words "Olympic Games", to selected artists for the purpose of incorporating it into a work of art for display or sale during the Olympic Games. The limited use arrangement between the artist and the USOC is governed by an online licensing agreement that spells out the precise terms of use. Frequently, digital watermarks – some visible and some invisible - are embedded into the art files and made a part of the final work of art.

In my case, as an artist selected by the USOC to create a poster image for the 2004 and 2008 Olympic Games, the initial original work of art was a fine arts painting on canvas. A digital image of the painting was made. The appropriate Olympic ring art files were incorporated into the digital painting image. Limited edition copies of 150 posters were then made available for the public to purchase for the benefit of USOC athletes as official "Olympic" works of art. No further reproduction or other use of the rings or the word "Olympic" was permitted under the license.

In many cases these technical code restrictions are supported by the DMCA or the Copyright Directive in the European Union (EUCD). The extreme danger in the use of technical "codes" and anti-circumvention laws is that exceptions for fair use are frequently not provided. The concern is the delicate balance between fine artists' need to control access, use and ultimately receive compensation versus the granting of others the opportunity for lawful, creative appropriation. At the same time not all works of art may need or call for the same level of protection as an Olympic painting or limited edition, signed poster.

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[19] Lawrence Lessig, Code and Other Laws of Cyberspace, Basic Books: New York, 2000.

Participatory Culture

A 2006 report by two researchers from the University of St. Gallen states the Internet has led to the phenomenon of what they refer to as "participatory culture."[20] Citizens of the online community are not passive receivers of content. In a digital network the distinction between creators and consumers is blurred. State of the art hardware and software has led to the remixing, rearranging, transforming and redistributing of digital content including visual fine art. According to a 2005 Pew Internet and American Life Project, nearly 20% of Internet-using teenagers in the U.S. remix content found online into their own artistic creations.[21] In other words, as Yale law professor, Yochai Benkler, has pointed out: We all take the world as it is and use it, remix it."[22]

Two major examples of participatory culture stand out. The real world refers to the first category of creative expression as public criticism or parody. The cyber world calls poking fun at cultural institutions or works of art online as *spoofs*. The second creative practice is *sampling,* where a portion of one work of fine art is embedded into an element of a new work of art. Variations of these participatory themes existed long before digital sampling in the form of cut-and-paste and mix-and-match collage techniques; however, these transformation or remixing techniques have become a core of creativity on the Internet.

Many young people believe any content that is available on the Internet is automatically in the public domain. The tension between the artists who create works of fine art and the creative online manipulators who reproduce and transform their works is quite apparent. The digital cultural movement is not just about access to art, but also an important part of the economy and even an engine for economic development.

According to Stanford Professor Paul Goldstein, copyright doctrine today remains wedded to the 'economics of the printing press,' not the revolutionary realities of the new technologies.[23] The trick is to develop an acceptable copyright system that does not stifle visual artists' creativity, while protecting the intellectual property interests of the artists in an online world, where many choose not merely to observe art but also have unfiltered access to borrow and collaborate.

What To Do About It?

In 2004, Professor Lawrence Lessig wrote the book Free Culture.[24] In it, he argues, the current copyright regime is in many respects incompatible with the phenomenon of user creativity in a digital networked world. The solution, Lessig maintains, is as follows. A free culture supports and protects the creative output of visual fine artists. The reach of those rights – term of copyright, derivative use of original work (sampling), etc. – must be more limited. The public policy motivation behind this concept is the need for society to encourage the creation of new innovative art, as witnessed by how art is transformed legally or not by the technological tools available on the Internet, without being overly restrained by the past creators of art.

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[20] Urs Gasser, Silke Ernst*, From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and Use Creativity in the Digital Age*, Berkman Center Internet & Society, Research Publication No. 2006-05, June 2006.

[21] Amanda Lenhardt, John Horrigan, Deborah Fallows, *Teen Content, Creators and Consumers*, Pew Internet & American Life Project, November 2, 2005.

[22] See Robert S. Boynton, The New York Times, January 25, 2004, "The Tyranny of Copyright?".

[23] Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y USA (1983), 209.

[24] Lawrence Lessig, Free Culture: The Nature and Future of Creativity, Penguin Books: New York, 2004. See also Siva Vaidhyanathan, Copyrights and Copywrongs, New York University Press: New York, 2003, where the author argues copyright law need rebalancing so as not to hinder cultural artistic production.

In contrast to Lessig's views, Professor Jane Ginsburg of Columbia Law School believes the free culture movement fails to adequately recognize and protect the existing property rights of artists. In her research paper, The Concept of Authorship in Comparative Copyright Law, she writes, "(b)ecause copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can assert."[25]

Professor Goldstein extends Ginsburg's property rights argument further in his "celestial jukebox" analogy.[26] Consumers, including fellow artists, are free to access every artistic creation for a price as established by the market place. In other words, an online user who merely wants to view or observe a work of visual art may do so at a price established by the artist. An online user who wants to transfer the digital rights image to a hard drive for purposes of viewing it multiple times would pay a higher price. Any one desiring to transfer the image for purposes of manipulating or incorporating it into another work of original art pays an even higher price. All situations are governing by contract (licensing) law and the economic free market.

An alternative solution to these ideas has been proposed by William Fisher, Neil Netanel, and other scholars.[27] Their idea is to reform the copyright system based on a different economic model. Their proposal calls for all copyrighted works of art capable of being transmitted online to be registered in a central location. The creators of the art are then paid by the federal government in proportion to the sale or consumption of their art. Money to pay the artists would come from taxes imposed on Internet access and the sale of certain consumer devices, e.g. DVDs, recorders, etc.

A deviation from this government model, under development at the Berkman Center for Internet and Society, Harvard Law School, is a voluntary participatory scheme. Artists who elect to register their art with a private organization would be paid from member subscription fees. Members are then free to create derivative works. The government does not act as a clearing house under this scheme.

The evolving Berkman model is an aspect of the Creative Commons concept founded in 2001 by Lessig, Jonathan Zittrain and many other scholars. This movement grew, in part, as a response to what they believed was a loss of balance between commerce and creativity as articulated by the Founders.

The Creative Commons model permits artists to decide what part of their copyright they wish to retain and what part they will share. Licenses are then issued permitting other artists and consumers to copy, sample or remix a digital work of art. Proper credit must be granted to the original visual artist.

In some ways the Creative Commons registration scheme is similar to what already exists at the Artists Rights Society. It is a New York-based collective organization that serves as a one-step clearing house of rights and permissions for those who wish to reproduce art works in printed and electronic media. Membership includes prominent twentieth-century artists, e.g. Picasso, Andy Warhol and Mark Rothko.

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[25] Ginsburg, Jane C., "The Concept of Authorship in Comparative Copyright Law," (January 10, 2003), Columbia Law School, Pub. Law Research Paper No. 03-51. Available at SSRN:http://ssrn.com/abstract=368481.
[26] Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox, Stanford University Press: Stanford, 2003.
[27] William Fisher, Promises to Keep: Technology, Law and the Future of Entertainment, Stanford University Press: Stanford, 2004. Neil Weinstock Netanel, *Impose a Non-Commercial Use Levy to Allow P2P File Sharing*, available at Berkman Center for Study of Internet & Society web site http://cyber.law.harvard.edu/media.

Protecting the copyright of an artist is important. At the same time a certain amount of freedom is necessary for artists to build upon the creative genius of past artists. The existing copyright system where "all rights are reserved" may need tweaking. Developing a system where an artist can retain all rights to some works of art, limited rights on others and declaring "no rights reserved" on others, thereby freeing the art for others to use, makes sense.

Many artists crave recognition and credit, and quite often they want to receive compensation when their art is used commercially. A private registration, licensing, and monitoring system as developed by the Creative Commons movement is a reasonable response to these needs for those who desire to participate voluntarily. Requiring all works of art subject to digital transmission to be registered, and then receiving payment from a pool of federal taxes collected on Internet related devices seems politically unrealistic and unworkable.

The Internet-inspired digital culture is forcing society to examine its copyright law and policies. The new online culture combined with innovative code driven technologies calls for new rules to respect existing copyrights, while not impeding creativity and the sharing of visual art in the Internet age. It is expected that the participatory culture and Common Culture movements will impact political policy makers by reconsidering the reach of copyright terms and extending the notion of fair use, while protecting the economic interests of commercial visual fine artists.