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COPYRIGHT SOCIAL JUSTICE IN SERVICE OF ART: LESSONS FROM *ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. V. GOLDSMITH*

*Lateef Mtima**

ABSTRACT

Throughout the twentieth century, copyright protection in the United States was predominantly viewed strictly as a means of instrumentalist economic utility: copyright law provides artists and other creatives with certain ownership rights in their works, which they can exploit commercially. For example, artists may license these rights to others for payments such as royalties, thereby receiving financial reward for their creative achievements. In sum, the social utility function implemented through copyright as economic utility provides artists and other creatives with financial incentives to make art and other expressive works.

Copyright is aesthetically neutered when perceived solely as a mechanism of economic utility. Copyright as economic utility is, at best, agnostic toward non-remunerative motivations to create art and other expressive works, the nature of the creative experience, and arguably even the effect of creative endeavor upon the human condition. While such questions and concerns can be paramount to artists and other creatives, copyright as economic utility eschews such self-actualizing ruminations. Consequently, copyright as economic utility offers little to artists with respect to confronting the questions as to the why, who, or how of art.

This Article will discuss an alternative theoretical rationale for copyright: the theory of intellectual property ("IP") social justice and explore how this rationale manifests in the Supreme Court's recent

* Professor of Law, Howard University School and Founder and Director, Institute for Intellectual Property and Social Justice, an accredited non-governmental organization participant in the World Intellectual Property Organization, which advocates for the recognition and fulfillment of social justice obligations in intellectual property law and policy.

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decision in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*. Under the IP Social Justice rationale, the social function of copy-right is to promote human actualization through creative expression and towards society's ultimate benefit. This Article will focus on the *Warhol* Court's affirmation of artists' attribution rights, and how that affirmation better serves the myriad interests of creatives and society in the creation of art and other expressive works. Accordingly, this Article will demonstrate how copyright as social justice better accounts for and accommodates the full range of interests and social objectives of artists and other creatives, and moreover those of society as a whole, in the production, dissemination, and use of art and other expressive works.

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I. INTRODUCTION

Copyright can only fulfill the social obligations that we impose upon it.

Throughout the twentieth century, the social obligation assigned to American copyright law and other forms of intellectual property ("IP") protection was that of "economic utilitarianism."[1] The prevailing

1. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful Arts.'" (quoting Mazer v. Stein, 347 U. S. 201, 209 (1954))); Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, 92 NOTRE DAME L. REV. 513, 514 (2016)

perspective towards copyright was that its social function was to provide artists and other authors with economic incentives to create expressive works, thereby bestowing upon such creatives certain exclusive property rights in their works, such as the rights to reproduce or distribute their work. Artists and other authors can, in turn, use these property rights to obtain monetary rewards for their achievements, whether by making and selling copies of their works directly to the public, or by licensing these rights to commercial distributors who can reproduce and distribute their works on a mass scale.[2]

Accordingly, copyright as economic utility is concerned with a creative's pecuniary motives for producing expressive works. Whether an artist is motivated primarily by the prospect of financial gain[3] or simply to earn a living to continue her creative pursuits,[4] the copyright exclusive property rights make it possible for artists to obtain financial benefits from their creative efforts. From the perspective of copyright as economic utility, without such remuneration, some authors would not be able to devote their time and energies to creative endeavors, while others would simply lack sufficient incentive to do so.

While copyright as economic utility can foster art making and other expressive activity, when perceived *solely* as a mechanism of economic instrumentalism, copyright is aesthetically neutered — it is indifferent towards an artist's non-remunerative motivations and goals in creating art, from what message the artist seeks to convey to her desire to be recognized for or identified through that message. Consequently, copyright as economic utility can be largely irrelevant to many of an artist's nonremunerative needs and aspirations in creating art.[5]

("[T]he dominant methodological approach in the field emphasizes incentives for aggregate production of information goods. The primary aim of this utilitarian framework is to provide economic encouragement to creators while insuring maximum access to the works creators produce."). *Cf.* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 716 (2007) ("Courts and scholars have justified the patent's right to exclude on the grounds that it provides an incentive to invent, which achieves social utility by advancing the constitutional purpose in promoting the useful arts."). *See generally* ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 2–4 (Harv. Univ. Press 2011) (describing and critiquing the dominant utilitarian justification for IP rights).

2. And thereby increase the potential revenues IP producers can obtain through the dissemination of their achievements. *See, e.g.*, Lateef Mtima, *Symposium Article: Digital Tools and Copyright Clay: Restoring the Artist/Audience Symbiosis*, 38 WHITTIER L. REV. 104, 107, 113–14 (2018).

3. As per Samuel Johnson, "'No man but a blockhead ever wrote except for money.'" JAMES BOSWELL, LIFE OF SAMUEL JOHNSON, LL.D. 302 (Robert Maynard Hutchins ed. 1952).

4. *See, e.g.*, Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 624, 640 (2012).

5. *See, e.g.*, Alina Ng, *The Motivation Paradox: Exploring Copyright's Assumptions About Creativity and the Allocation of Creative Resources*, 10 TEX. A&M J. PROP. L. 327, 331 (2024) ("Many creators . . . engage in creative activities to improve social conditions and

Moreover, a strict economic utility rationale of copyright also ignores many of society's interests in the creation and dissemination of art and other expressive works. Creative expression — from fine art to literature — benefits society in innumerable ways, and just as artists are not always motivated or inspired by the prospect of financial gain, the social value of their accomplishments cannot always be measured by success in the commercial marketplace.[6]

A. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*: Art is Not Always About the Money*

The litigation dispute in *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*[7] illustrates the importance of non-economic interests, aspirations, and outcomes in shaping and achieving the social function of copyright. In *Warhol*, Vanity Fair Magazine obtained a license from photographer Lynn Goldsmith which authorized a one-time use of her photograph of the rock icon Prince as an "artist reference."[8] Vanity Fair, in turn, provided the photograph to the late Andy Warhol. However, in addition to using the photograph as a reference for creating a silk screen image of Prince, Warhol also used the image to create 15 additional, unrelated images.[9] Subsequent to Warhol's death, Goldsmith became aware of these additional works

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highlight specific social issues, ranging from racial inequality to poverty, quality education, and diversity, equity, and inclusiveness. Their motivation for creativity in these cases is primarily intrinsic, with a monetary or other extrinsic motive being a secondary condition pursued only to sustain and support their creative endeavors."). *See* Nathan H. Lents, *Why Do Humans Make Art?*, PSYCH. TODAY (Sept. 5, 2017), https://www.psychologytoday.com/us/blog/beastly-behavior/201709/why-do-humans-make-art [https://perma.cc/F76S-ECP2]; Gerard J. Puccio, *From the Dawn of Humanity to the 21st Century: Creativity as an Enduring Survival Skill*, 5 J. CREATIVE BEHAV., no. 4, Dec. 2017, at 330–31; J.A. Smith, J. Marsh, *Why We Make Art*, GREATER GOOD MAGAZINE (Dec. 1, 2008), https://greatergood.berkeley.edu/article/item/why_we_make_art [https://perma.cc/Q4YY-V3TV].

6. *See, e.g.*, *It's a Wonderful Life*, WIKIPEDIA, https://en.wikipedia.org/wiki/It%27s_a_Wonderful_Life [https://perma.cc/FDJ5-Y6SB]:

> Although it was nominated for five Academy Awards, including Best Picture, *It's a Wonderful Life* initially received mixed reviews and was unsuccessful at the box office. Theatrically, the film's break-even point was $6.3 million, about twice the production cost, a figure it did not come close to achieving on its initial release. . . . *It's a Wonderful Life* is now considered to be one of the greatest films of all time and among the best Christmas films. It has been recognized by the American Film Institute as . . . . No. 1 on its list of the most inspirational American films of all time [and i]n 1990 . . . . was selected for preservation in the United States National Film Registry by the Library of Congress for being deemed as "culturally, historically, or aesthetically significant."

7. 598 U.S. 508 (2023).

8. *Id.* at 515, 517; *see generally References for Artists: A Guide to Using Them Properly*, DRAWING WITH PRI (Sept. 23, 2022), https://drawingwithpri.art/blogs/blog/references-for-artists#google_vignette [https://perma.cc/3U7W-CJ3V].

9. 598 U.S. at 515, 517.

when the Andy Warhol Foundation licensed one of the images to Conde Nast for use as the cover of a special edition commemorating Prince's life, who by this time had also passed away.[10] In response to Goldsmith's objections to this further use of her work, the Foundation brought a declaratory action seeking a determination that Andy Warhol's use was "transformative" and thus legally authorized under the copyright "fair use" doctrine.[11]

When considered through the lens of copyright economic utility, the parties' dispute should not have resulted in protracted copyright litigation. Lynn Goldsmith only charged $400 for each use of her photograph as an artist's reference.[12] Even if she charged a "per follow-on work" rate for the use of the photograph as an artist's reference, the total amount at issue would be a mere $6,000.[13] If Goldsmith's *only* motivation was recoupment of the unpaid license fees, that modest sum could not justify the time, effort, and expense of copyright litigation — it would have made more sense to write off the loss. At the same time, assuming Goldsmith was adamant about receiving compensation, it did not make economic sense for the Warhol Foundation to commence litigation rather than pay the fees. This would be true even if Goldsmith insisted upon a higher license fee than she normally received; given evidence of Goldsmith's normal license rates, both parties would be

10. *Id.* at 515, 518–19, 522.

11. *Id.* Copyright scholar Peter Karol has identified a thorny problem of statutory application insofar as it was the Foundation and not Andy Warhol who was the subject of Goldsmith's ensuing copyright infringement counterclaims. Whereas Warhol might be found liable for creating unauthorized derivative works, on its face, the Foundation appears to have engaged only in the licensing or otherwise "trafficking" in the allegedly infringing works. *See* Peter J. Karol, *What's the Use? The Structural Flaw Undermining* Warhol v. Goldsmith, 71 J. COPYRIGHT SOC'Y 107 (2024). Professor Karol has uncovered an important gap in the statute: while it is unlawful to create an unauthorized derivative work, the statute does not appear to expressly preclude its distribution, and particularly by a third party. As discussed *supra* in Part IV, the copyright owner's remedy against a third party in possession of such a work would be to seek its impoundment under § 503. Assuming, however, that the Foundation did not simply hand over the Orange Prince silk screen image to Conde Nast, but rather provided the magazine with a copy of it for use in producing the final cover image, then the Foundation's conduct implicates the reproduction right.

12. 598 U.S. at 515.

13. For the 15 additional works she could have charged $400 per work for the total additional fee of $6,000. Alternatively, Lynn Goldsmith might have charged a "flat rate" through which to grant permission for the creation of an unlimited number of follow-on works; in either case, based on her prior practices, the total fee at issue would be relatively small. In any event, in her counterclaim, Goldsmith stated her intention "to donate any net economic recovery she may be awarded in this action to one or more groups that are working to protect photographers' rights and copyrights." Amended Answer of Defendants, Amended Counterclaim of Lynn Goldsmith for Copyright Infringement and Jury Demand at ¶ 13, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 382 F.Supp.3d. 312 (S.D.N.Y. 2019) [hereinafter Goldsmith Counterclaim].

aware that a court would be unlikely to award Goldsmith damages greatly in excess of her regular fees.[14]

In short, neither party appears to have been motivated by economic concerns but rather, both parties seem to have assessed the conflict in terms of interests and goals important to them as *artists*. And, perhaps most important, both parties likely believed that it is the proper function of copyright to preserve and protect these non-remunerative interests and goals which they apparently considered critical to the creation and use of art.

B. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*: A Lesson in Copyright Social Justice*

To appreciate the stakes at issue in the *Warhol* litigation and the ultimate resolution of the dispute, it is necessary to look beyond the prevailing rationale of copyright as economic utility. Whereas the economic instrumentality perception of copyright speaks to some of the reasons as to why creatives produce art and other expressive works (as well as to some of society's objectives in promoting such endeavors) the motivations, aspirations, and goals of both artists and society with respect to expressive achievement extend beyond pecuniary incentives and metrics. Accordingly, in order to maximize copyright's beneficial qualitative and quantitative impact upon creative expressive endeavor, copyright protection should be structured and implemented upon a theoretical rationale that is sufficiently capacious to encompass not only economic but also non-economic interests and objectives pertinent to expressive endeavors.

This Article will explore a social justice-based theoretical rationale for copyright as an alternative to the idea that copyright is merely an economic utility mechanism and as a context in which to assess the Supreme Court's analysis in *Andy Warhol Foundation vs. Goldsmith*. Part II of this Article will briefly summarize and contrast these two theoretical rationales of copyright and further discuss why the social justice perspective of the social function of copyright, articulated as *promoting human actualization through creative expression towards society's ultimate benefit*, provides for a more complete and socially efficacious copyright regime.

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14. *See, e.g.*, On Davis v. The Gap, Inc., 246 F.3d 152, 168 (2d Cir. 2001) (calculation of compensatory damage award based on plaintiff's licensing fee); Bryant v. Media Right Prods., Inc., 603 F. 3d 135, 139, 143–44 (2d Cir. 2010) (statutory damage award based on plaintiffs' prior royalties). Subsequent to the Supreme Court's ruling the parties settled the litigation for a payment from the Foundation in the amount of $21,000. *See* Adam Schrader, *Andy Warhol Foundation Settles with Artist Lynn Goldsmith After Landmark Ruling*, ARTNET (Mar. 18, 2024), https://news.artnet.com/art-world/andy-warhol-foundation-settles-with-artist-lynn-goldsmith-after-landmark-ruling-2454120 [https://perma.cc/BTZ9-TUYW].

Part III will then explore one particular non-economic or social justice interest that can be critical to both artists and society with respect to the creation and use of expressive works — the right to be credited with and recognized for one's artistic achievements. While the current copyright statutes expressly provide only limited attribution and related rights to authors,[15] nothing in the statutes preclude artists from using their exclusive "economic" property rights to protect non-pecuniary interests. Indeed, greater acknowledgement and protection of such interests will better enable copyright to fulfill its social function, including enhancing the human actualization incentives to undertake express endeavors, particularly for unknown artists and creatives who hail from marginalized groups and communities.

Finally, Part IV will discuss how the Supreme Court's decision in *Warhol* illustrates how a social justice rationale of copyright can provide a more comprehensive and efficacious means for balancing the manifold and sometimes competing interests which flourish throughout the copyright ecosystem. Both artists and their audience, including follow-on creatives, require much more of copyright than financial incentives, rewards, and metrics. As the *Warhol* decision demonstrates, when more is, in fact, demanded from copyright, copyright can better fulfill the needs and interests of artists in making art, and the needs and interests of society in having art made.

II. COPYRIGHT AS ECONOMIC SOCIAL UTILITY AND AS SOCIAL JUSTICE — A BRIEF COMPARISON

A. Copyright as Economic Social Utility

Throughout much of the twentieth century, American copyright law was predominantly viewed strictly as a means of "economic social utility." The prevailing view was that copyright protection provides artists and other authors with certain exclusive property rights in their works, such as the rights to make and distribute copies of their works, which rights they could exploit directly and/or license to others in exchange for payments such as royalties and thereby enjoy financial rewards for their creative labors.[16]

Copyright was thus considered a consequentialist instrumentalist methodology,[17] one based on the premise that people typically require

15. *See* 17 U.S.C. § 106(A); 17 U.S.C. § 1202.

16. *See, e.g.*, Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173, 176 (2003) ("Ours is a self-consciously utilitarian, not moral, theory of [intellectual property] rights . . . .").

17. *See, e.g.*, David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 8 (2004) ("Utilitarianism is welfare consequentialism. This means utilitarian ethics evaluates

pecuniary incentives to produce artistic and other expressive works, without which incentives many if not most potential creatives would instead devote their energies toward other, remunerative pursuits.[18] By offering the prospect of financial gain, copyright law thus provides an important incentive through which to motivate engagement in expressive enterprise.[19]

Copyright as economic instrumentality contemplates authors setting whatever price they think is appropriate to compensate them for their labors and sufficient to incentivize them to produce further works. In turn, the public, including consumers and other users, will pay whatever price it feels an artist's work is worth. Of course, the price the public is willing to pay can affect an artist's creative output, not only with respect to whether she continues to produce expressive works, but also with respect to what kinds of works she elects to produce. If certain kinds of works fail to fetch satisfactory prices, an artist may decide to redirect her creative energies toward more lucrative creative efforts, such as producing the kind of works for which the public is likely to pay higher prices. Consequently, the commercial marketplace provides a means through which authors can obtain financial rewards and also functions as an indicator of the public's expressive preferences, needs, and interests.[20]

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acts, rules, or states of affairs by their consequences, and evaluates consequences using welfare as a measure."); *see also* WARD S. BOWMAN, JR., PATENT AND ANTITRUST LAW: A LEGAL AND ECONOMIC APPRAISAL 2 (1973) ("Invention, like other forms of productive activity, is not costless. Those who undertake it, therefore, must be rewarded.").

18. *See, e.g.*, Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1074–76 (1997); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 59–60 (2001).

19. *See generally* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–33 (1989) (applying the law and economic analysis of property rights, which presumes that legal protection for property rights creates incentives to maximize the exploitation of resources, to the social function of copyright protection).

20. Finally, while the economic utility rationale of copyright is centered around remunerative incentives and rewards, this theory further cautions that such production incentives and rewards should be cost efficient. In other words, the incentives should be no greater than necessary to stimulate expressive endeavor, especially where the provision of such inducements might negatively affect society's interests in such endeavors as a whole. *See, e.g.*, *id.* at 325; Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985); Lemley, *supra* note 18, at 1045–46. For example, as evident in the *Warhol* litigation, while providing authors with an exclusive ownership right to produce derivative works can increase their prospects for financial returns, it can also restrict the opportunities for other artists to build upon such preexisting work and, thereby, contribute their own expressive works to society. Accordingly, copyright as economic social utility must be structured so as to strike an optimal balance between the provision of property right production incentives and their social cost, i.e., the corollary restrictions upon the public's right to make use of the resulting expressive works. *See* Hughes & Merges, *supra* note 1, at 514 ("The goal is to set the incentives just right, so society receives the maximum number of works of the highest quality at the lowest possible overall social cost."); *see also* McGowan, *supra* note 17, at 13 ("Limiting the term of [copyright protection] is consistent with expression maximization, and

B. The Social Expectation of Copyright as Economic Utility

When considered in the context of art making, the social function of copyright as economic social utility might be initially perceived as providing artists with adequate financial incentives to make art.[21] As a practical matter, however, copyright economic incentives typically have more of an indirect influence on art making, inasmuch as artists rarely receive remuneration simply for *making* art, but usually rather for *sharing* their art, such as through the distribution, performance, or display of their work. Moreover, the amount of the financial reward that the artist receives, i.e., total license royalty revenues, is typically based upon the size of the buying audience for the work.[22] Accordingly, it is perhaps most accurate to describe the immediate effect of copyright as economic social utility as that of providing artists with incentives to undertake or license *the mass dissemination* of their work, whatever the particular kind of art they make.[23]

Incentivizing the mass dissemination of expressive works is, of course, essential to the social efficacy of expressive endeavors. Unshared creative expression is of limited value to the author and provides little, if any, benefit to society. Consequently, economic incentives which encourage artists to disseminate their works to the widest possible audience enhance the public access to art, and thereby increase the number of those that might learn from, be inspired by, and build upon such works. Moreover, while copyright property rights may not directly incentivize artists to create art, in order to obtain financial revenues from disseminating her work, an artist must of course first create works to be distributed. Accordingly, copyright economic incentives can increase the quantity of works produced by artists who make art in the hope of enjoying financial gain.

However, whatever the generally positive effect on art production and dissemination, copyright as economic utility is, at best, agnostic toward the non-remunerative aspects of expressive endeavors.

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probably with utilitarianism."). Consequently, copyright as economic utility not only addresses society's interest in promoting initial creativity, but also its interest in preserving opportunities for further expressive achievements.

21. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 5 (2003); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERSP., no. 1, 1991, at 3–27.

22. Authors' copyright royalties are typically structured by commercial distributors to accumulate on a per copy sold basis, thus the larger the buying audience, the greater the total amount of royalties that will be due to the author. *See, e.g.*, *How Much Do Record Labels Pay Artists?*, RECORD LABEL MAVERICKS, https://recordlabelmavericks.com/grow/how-much-do-record-labels-pay-artists/ [https://perma.cc/2ZM6-YVYY]; *Music Royalties 101 — Intro to Music Royalties*, ROYALTY EXCHANGE (Feb. 10, 2021), https://www.royaltyexchange.com/blog/music-royalties-101-intro-to-royalties [https://perma.cc/JJZ5-3A9E].

23. *See* Mtima, *supra* note 2, at 113–14.

Copyright as economic utility is unconcerned with the nature of the creative experience and arguably even minimizes the effect of creative endeavor upon the human condition. While such questions and concerns may be paramount to artists and other creatives, copyright as economic utility eschews such self-actualizing ruminations. Consequently, copyright as economic utility offers little to artists with respect to confronting the questions as to the *why*, *who*, or *how* of art.[24]

Moreover, although facially aesthetically neutral, copyright as economic utility can nonetheless influence what kinds of art are made. Artists who seek to reach wide audiences, whether for critical acclaim, maximum royalties, or other reasons, are cognizant of the fact that access to mass dissemination venues is typically dependent upon the commercial appeal of their work.[25] Consequently, many such artists sometimes yield aesthetic aspiration to the demands of commercial dissemination.

An undue emphasis on economic metrics can also render copyright inapt toward many of society's interests in promoting artistic endeavor. Artistic creation and other expressive achievement benefit society in innumerable ways — they enable learning, foster self-awareness,

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24. *See, e.g.*, Kirsten Weir, *The Science Behind Creativity*, MONITOR ON PSYCH. (Jan. 30, 2024), https://www.apa.org/monitor/2022/04/cover-science-creativity [https://perma.cc/ZR94-T9TY]; Veronica Winters, *Why Artists Create?*, VERONICA WINTERS PAINTING (Nov. 7, 2022), https://veronicasart.com/why-artists-create/ [https://perma.cc/3DP8-TGJD]; The Artist Editorial, *Why We Make Art*, ARTIST (Oct. 21, 2023), https://www.theartist.me/art/why-we-make-art/ [https://perma.cc/2YHF-WRNJ]. Of course, as discussed *infra* note 88, artists nonetheless often employ their copyrights to preserve such non-economic interests and objectives. *See, e.g.*, Eriq Gardner, *Neil Young Sues Donald Trump Campaign for Copyright Infringement*, HOLLYWOOD REPORTER (Aug. 4, 2020, 10:22 AM), https://www.hollywoodreporter.com/business/business-news/neil-young-sues-donald-trump-campaign-copyright-infringement-1305863/ [https://perma.cc/62XF-Q9SD]; *Songwriters' Copyright Claims Against Political Campaigns Likely to Persist, Evolve*, BLOOMBERG LAW (July 11, 2011, 12:00 AM EDT), https://news.bloomberglaw.com/ip-law/songwriters-copyright-claims-against-political-campaigns-likely-to-persist-evolve? [https://perma.cc/L8UT-47BP]. Creatives and other copyright owners thus employ their property rights to pursue a variety of social justice imperatives. *See, e.g.*, Caitlin Yilek, *Trump Campaign Must Stop Using Isaac Hayes Song After Lawsuit from Family*, CBS NEWS (Sept. 4, 2024, 2:04 PM EDT), https://www.cbsnews.com/news/trump-isaac-hayes-hold-on-im-coming-lawsuit/ [https://perma.cc/4Q4N-8UT7]; 11Alive, *Isaac Hayes Family, Attorneys Speak After Hearing on Donald Trump Lawsuit*, YOUTUBE (Sept. 3, 2024), https://www.youtube.com/watch?v=RrTttWkBQjc [https://perma.cc/QEV3-GJHA]. As explained by Hayes' heirs, in addition to raising Black artists' awareness of their legal rights, the Hayes' Estate further seeks to prevent Hayes' work from being associated with a prominent figure who has been adjudicated guilty of sexual harassment and other misogynistic conduct towards women.

25. Commercial distributors "invest" in the distribution of material that seems likely to achieve success in the commercial marketplace. *See, e.g.*, Mtima, *supra* note 2, at 105, 107, 113–14. To convince a distributer that a particular work is worthy of such investment, it is typically necessary to demonstrate that the work has popular — i.e., commercial — appeal. Consequently, in some situations, a creative might find it necessary to "adjust" the expression of her artistic vision to accommodate popular tastes. *See, e.g.*, Mark McGuinness, *Does Commercial Success = Creative Sell-Out?*, LATERAL ACTION, https://lateralaction.com/articles/commercial-success/ [https://perma.cc/PN36-LQ4H].

promote civic engagement, engender social understanding, and advance culture.[26] However, just as creatives are not always motivated by financial gain as they strive to express, educate, or educe, the social value of their contribution is not always recognized in the commercial marketplace. From historic speeches[27] to iconic entertainment,[28] commercial viability may not be indicative as to the ultimate societal benefit to be derived from expressive achievement.

Perhaps even more problematic, an unduly narrow perspective toward copyright as economic social utility has engendered certain pernicious conditions throughout the copyright ecosystem. Copyright industry license terms and business practices, which favor commercial distributor financial returns, tend to predominate, irrespective of their impact in shaping the environments in which art, and artists, are cultivated.[29] Artistic stagnation, inequitable exploitation of artists, subordination of marginalized creators, misappropriation of non-traditional artistic achievement, and similar existential ills have been historically tolerated as collateral expenses of artistic enterprise.[30] Where the social obligation imposed upon copyright is limited to one of strict economic instrumentalism, copyright constructs an art

26. *See, e.g.*, The Studio Director Team, *The Importance Of Art In Society And How It Helps Us Flourish*, STUDIO DIRECTOR (Nov. 2, 2023), https://www.thestudiodirector.com/blog/importance-of-art-in-society/ [https://perma.cc/T9ZE-SBR7]; *Why The Arts Matter*, NATIONAL ENDOWMENT FOR THE ARTS (Sept. 23, 2015), https://www.arts.gov/stories/blog/2015/why-arts-matter [https://perma.cc/6LDF-GP7P]; Sanjay Jangif, *The Significant Role of Art In Shaping Our Society*, CHITKARA UNIVERSITY (Apr. 7, 2022), https://www.chitkara.edu.in/blogs/the-significant-role-of-art-in-shaping-our-society/ [https://perma.cc/SK79-Y472].

27. *See, e.g*., Martin Luther King Jr., March on Washington for Jobs and Freedom, *I Have a Dream Speech* (Aug. 28, 1963); Martin Luther King Jr., *Letter from Birmingham Jail* (Aug. 1963).

28. *See* WIKIPEDIA, *supra* note 6 (discussing the initial commercial failure of *It's a Wonderful Life*, which decades later, in 1974, led to the lack of renewal of the film's copyright, allowing it to be broadcast without licensing fees and, at which point, it became a Christmas classic).

29. *How Do Record Labels Make Money*, OTHER RECORD LABELS, https://www.otherrecordlabels.com/how-do-record-labels-make-money [https://perma.cc/D2UQ-PBSP]; Michael J. Perlstein, *Music Publishing*, *in* 2 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY, 2–341 (2015); Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213, 222 (2010).

30. *See, e.g.*, K.J. Greene, *Copyright, Culture, and Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L. J. 339, 375–76 (1999); Carter, *supra* note 29, at 213. HANNIBAL TRAVIS, COPYRIGHT CLASS STRUGGLE 17 (Cambridge Univ. Press 2018) ("In theory, the law guarantees a right to anyone to protect, license out, and grow rich from ideas, images, and genre archetypes. . . . The dilemma is that individual creators are often frustrated when they invoke the generous rights that are advertised. Problems persist in remedying content theft by copyright conglomerates, ensuring impartial treatment of distinct types of creators, and guaranteeing due process to the poor or middle-class author.").

dissemination aqueduct wherein the value of art making is found principally in its potential for producing a commercial commodity.[31]

C. Copyright as Social Justice: The Theory of Intellectual Property (IP) Social Justice

A social justice rationale of copyright can be derived from the broader, fundamental theory of IP Social Justice.[32] Much the same as economic instrumentalism, the social justice rationale of IP protection considers IP law, including copyright, to be a critical mechanism through which to achieve important social objectives in the total political economy.[33] In this respect, both rationales contemplate IP law

31. *See, e.g.*, BILL IVEY, ARTS, INC.: HOW GREED AND NEGLECT HAVE DESTROYED OUR CULTURAL RIGHTS 11–15, 18–22, 29–36 (Univ. of California Press 2008) (arguing that the pursuit of commercial profits has superseded the aspiration of cultural evolution in the American copyright ecosystem).

32. For scholarly analyses of the social justice obligations and effects of intellectual property law, see generally THE CAMBRIDGE HANDBOOK OF INTELLECTUAL PROPERTY AND SOCIAL JUSTICE (Steven D. Jamar & Lateef Mtima eds., Cambridge Univ. Press 2024) [hereinafter CAMBRIDGE HANDBOOK]. *See also* INTELLECTUAL PROPERTY LAW: ECONOMIC AND SOCIAL JUSTICE PERSPECTIVES (Anne Flanagan & Maria Lilla Montagnani eds., 2010); MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE (2012); LATEEF MTIMA, INTELLECTUAL PROPERTY, ENTREPRENEURSHIP, AND SOCIAL JUSTICE (2015); Peter Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 PROP. RIGHTS CONF. J. 147, 186–93 (2016); Elizabeth L. Rosenblatt, *Social Justice and Copyright's Excess*, 6 TEXAS A&M J. PROP. L. 5, 15–20 (2020); Lateef Mtima, *IP Social Justice Theory: Access, Inclusion, and Empowerment*, 55 GONZ. L. REV. 401, 410–16 (2020).

33. *See* Lateef Mtima, *Introduction: Intellectual Property Social Justice Theory: History, Development, and Description*, *in* CAMBRIDGE HANDBOOK, *supra* note 32, at 1, 4–6 [hereinafter Mtima, *Introduction*]. Like all other social ordering mechanisms (such as law generally), intellectual property protection is but one part of a complex and organic socio-economic system designed to promote the well-being of the societal body as a whole. *See, e.g.*, John C. Reitz, *Centennial World Congress on Comparative Law: Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121, 1125, 1127–28 (2001) ("Each country's principle of political economy . . . is a normative statement reflecting the conception that predominates within that country of what the appropriate relationship between the individual and the state should be. . . . [T]he United States has an especially market-oriented political economy. . . . The social welfare states of western Europe have more state-centered political economies . . . though less so than socialist states like the People's Republic of China."); VINCENT MOSCO, THE POLITICAL ECONOMY OF COMMUNICATION 24 (2d ed. Sage Publications, London 2009) ("One can think about political economy as the study of the social relations, particularly the power relations, that mutually constitute the production, distribution, and consumption of resources.").

as a species of positive social utilitarianism,[34] through which society advances by encouraging certain kinds of intellectual pursuits.[35]

However, while the economic utility and social justice rationales both regard IP protection as a positive law mechanism, IP Social Justice is arguably more nuanced with respect to the social obligations it places upon the IP legal regime. As summarized above, under the prevailing construction of the economic utility rationale, the social function of IP protection is to provide pecuniary incentives toward the production of intellectual property, which perspective implicitly contemplates IP achievement as inherently beneficial.[36] This perspective, however, overlooks the fact that some intellectual endeavors, from hate speech to germ warfare, while socially pernicious, are nonetheless eligible for IP protection.[37]

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34. For example, in the United States, the positive social utility function of IP protection is articulated as "[t]o promote the Progress of the Arts and Sciences." U.S. CONST. art. 1, § 8. As discussed below, however, while the economic utility rationale of IP protections is consistent with the Constitutional directive, its full achievement requires recognition of the social justice effects and obligations of the IP regime. *See, e.g.*, Krista Cox, *Applying Social Justice Principles in the Practice of Intellectual Property Law*, *in* CAMBRIDGE HANDBOOK, *supra* note 32, at 87 ("The positive social utility aspirations articulated in the IP Clause of the U.S. Constitution emphasize the public benefit in the recognition of IP property rights and thus manifest the IP Social Justice Rationale."). *See generally* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229 (2014) (comparing the instrumentalist effects of economic "democratic" and deontological rationales).

35. *See* Peter Menell, *Property, Intellectual Property, and Social Justice: Mapping the Next Frontier*, 5 PROP. RIGHTS CONF. J. 147, 155 (2016) ("[T]he founders of the nation recognized the need to provide time-limited intellectual property to promote technological progress and expressive creativity."); *cf.* MTIMA, *supra* note 32, at 265 ("Intellectual property social justice provides a context through which to consider the role of intellectual property protection in the total political economy. . . . [I]ntellectual property protection is but one function within a complex and organic social system designed to promote the well-being of the societal body as whole.").

36. Put differently, the economic utility rationale mandates that society should provide incentives toward the production of IP inasmuch as the social benefits that can be derived from such achievements are self-evident.

37. *See, e.g.*, Christopher Buccafusco & Jonathan S. Masur, *Intellectual Property Law and the Promotion of Welfare*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 99 (Ben Depooter & Peter S. Menell eds., 2019) ("Although there is considerable consensus regarding IP law's philosophical orientation, there has been little discussion of its deeper normative goals. Most courts and scholars agree with the idea that IP law should provide incentives to creators, but there has been almost no analysis of why creativity and innovation are good. This is simply taken as given."); Lateef Mtima, *Intellectual Property Social Justice: A Theoretical Rationale*, *in* CAMBRIDGE HANDBOOK, *supra* note 32, at 88 [hereinafter Mtima, *Theoretical Rationale*]:

> As various IP scholars have noted, proponents of the economic utility rationale rarely specify why or how the production of IP is socially positive, but instead generally consider such benefits to be self-evident. . . . However, an explicit requirement that IP protection promote socially beneficial intellectual endeavor is not a merely distinction without a difference; [IP Social Justice] demands more than mere blind faith that economic incentives will ensure IP endeavor

Moreover, the focus on economic incentives and metrics presumes a level playing field of rational actors and social conditions, wherein, among other things, all individuals enjoy equal freedom to develop and exploit their intellectual capabilities as they see fit. However, systemic social inequalities, such as those based on race and gender, while theoretically extrinsic to the IP regime, have engendered entrenched traditions of IP inequality and injustice, which ultimately diminish the social efficacy of IP protection. Thus, rather than promoting widespread IP participation and contribution, economic utility indifference to pertinent social realities instead perpetuates exploitative business practices and industry conditions that discourage those in marginalized groups and communities from developing and sharing their intellectual talents.[38]

> beneficent to the social welfare. Ponzi schemes and weapons of mass destruction can constitute patentable subject matter, hate speech comprises copyrightable expression, and the United States Supreme Court has recently ruled that racial slurs can function as legitimate trademarks. State law IP regimes can also promote socially pernicious activity — trade secret protection encompasses racially discriminatory algorithms[,] and the unlicensed exploitative use of the images and personae of racial minorities is often accommodated by state law deference to First Amendment interests. Accordingly, a legal regime that incentivizes IP endeavor per se, without consideration of the social function of IP in the total political economy, is not one that ensures socially beneficial IP outcomes.;

see also Ng, *supra* note 5, at 332–33, 334–35:

> Despite the law's reluctance to determine a work's social value, not all creative works are created equal. We know this because there are copyrighted works in the market that do not advance public welfare. Some of these works perpetuate incorrect and dangerous racial stereotypes. Other works propagate genocide of entire races or rewrite a nation's history to support a regime's claim to power. Other works take an obscure tune from a faraway or marginalized culture, popularize it, and profit from its sales without recognizing or compensating the original creator. Such works do not advance public welfare, and, arguably, the law should not encourage authors to create them in order to stay true to its constitutional mandate to promote progress. But the law has resolved the entitlement problem in favor of the author regardless of whether the work is socially desirable.

38. *See generally* ANJALI VATS, THE COLOR OF CREATORSHIP: INTELLECTUAL PROPERTY, RACE, AND THE MAKING OF AMERICANS (Stanford Univ. Press 2020). *See also* Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 W. VA. L. REV. 97, 126–27 (2009):

> When the author incentive function is so widely corrupted that authors from significant segments of the population are systematically deprived of their copyright property rights and incentives, it is not only a problem of copyright social injustice, it also constitutes an assault upon the function of copyright social utility. Creative authors who do not benefit from the copyright regime have little incentive to participate in it. When marginalized groups and communities have no expectation of reward from copyright protection, their members lose the institutional incentive to produce artistic works.

Consequently IP Social Justice pragmatically rejects any conceptualization of IP protection as devoid of social justice and related deontological obligations and effects, and instead *prioritizes* the pursuit and achievement of social justice as an inherent and fundamental purpose integral to any legitimate IP regime.[39] Thus, whereas the economic utility rationale of IP protection is arguably agnostic towards socially harmful IP practices and outcomes, IP Social Justice mandates both equitable opportunities for individual fulfillment and widespread societal benefit as essential objectives of the IP regime.[40]

Accordingly, conceived through the lens of social justice, the social function of IP protection is to foster human nourishing, flourishing, and actualization by promoting particular kinds of intellectual endeavors towards society's greater good.[41] Moreover, these social goals are considered to be mutually interdependent and best attained when the IP regime is structured upon precepts of socially equitable access, inclusion, and empowerment.[42] Finally, to ensure that the social justice obligations of IP protection are fulfilled in actual practice, the implementation and administration of IP law must adhere to and be assessed against these precepts not merely as a matter of theory, but in the day to day interpretation and application of the law.

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39. *See* Mtima, *Theoretical Rationale*, *supra* note 37, at 93 n.85:

> Intellectual property social justice occupies a unique space in the IP social reform discourse. Whereas the predominating reformist rhetoric confronts the challenge as one of importing pertinent social values into the IP regime, intellectual property social justice eschews any implicit conceptualization of intellectual property protection as inherently devoid of non-economic/socially benign objectives . . . Intellectual property social justice regards the values of equitable access, inclusion and empowerment as essential and indeed intrinsic to the enterprise.

40. Other consequentialist theorists have similarly advanced human actualization as a more appropriate rationale for IP protection. *See generally* Brett M. Frischmann, *Capabilities, Spillovers, And Intellectual Progress: Toward A Human Flourishing Theory for Intellectual Property*, 14 REV. ECON. RSCH. ON COPYRIGHT ISSUES 1 (2017) (arguing in support of IP protection as in investment in the development of human potential); Mary W. S. Wong, *Toward An Alternative Normative Framework for Copyright: From Private Property to Human Rights*, 26 CARDOZO ARTS & ENT. L.J. 775, 830 (2009). Whereas Capabilities Theory is rooted in ideas advanced by theorists such as Amartya Sen, *see, e.g.*, AMARTYA SEN, DEVELOPMENT AS FREEDOM (First Anchor Books 1999), and IP Social Justice certainly resonates with such theories, IP Social Justice theory is not circumscribed by any one school of social justice philosophy. *See* Mtima*, Theoretical Rationale*, *supra* note 37, at 89 n.68 ("IP Social Justice does not presume any particular teleology for the IP regime and thus does not require that said regime dictate society's specific IP needs or priorities."). *See generally* Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563, 564 (2007) ("Social Justice, after all, is generally taken to require significant obligations towards the poor.").

41. *See* Mtima*, Theoretical Rationale*, *supra* note 37, at 78, 87–90. The IP social justice rationale thus provides a bridge between IP consequentialist and deontological theories. *See* Lateef Mtima, *The Idea Exclusions in Intellectual Property Law*, 28 TEX. INTELL. PROP. L.J. 343, 388–91 (2020); Bracha & Syed, *supra* note 34, at 256–58.

42. Mtima*, Theoretical Rationale*, *supra* note 37, at 90–95; Mtima, *Introduction*, *supra* note 33, at 413–16.

D. Copyright as Social Justice: Applying IP Social Justice to Promote Expressive Endeavor

Perceived through the lens of IP Social Justice, the social function of copyright promotes self-actualization through certain kinds of expressive endeavors, where said endeavors promote society's ultimate benefit.[43] Copyright as social justice is thus initially concerned with what motivates and enables an individual to express herself, how such endeavor can help her attain her full potential, and what she hopes to achieve by sharing her conceptions, perceptions, and formulations with others.

While certainly some authors are motivated principally by the prospect of financial gain, most creatives likely share their individual revelations for a variety of reasons, from seeking confirmation of their personal introspections and discoveries to enlightening and comforting their fellow human beings.[44] Generally speaking, the aim of expressive intellectual endeavor is to find the concepts, words, musical notes, colors, shapes, and movements through which to better understand one's self and one's world, and then to give voice to the ensuing perceptions and imaginings, thoughts and feelings, knowledge and comprehension, and dreams and aspirations. Accordingly, when copyright is structured around the understanding that creatives are moved to express themselves for myriad reasons, and that such motivations can include or be supplemented by financial incentives,

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43. *See* Ng, *supra* note 5, at 338–39:

> Socially valuable works promoting science's progress should advance society and improve the human condition. These works should meet not just a market or technological need but improve social welfare and contribute to the betterment of society. As a normative principle for copyright, creative works that promote the progress of society should meet a social need by imparting knowledge, changing outdated or harmful norms, inspiring action, and facilitating change if copyright takes its mandate of promoting progress seriously. The expression and societal experience of different art forms can play a key role in promoting positive social outcomes.

See Lateef Mtima, *Copyright and the Interdependent Relationship Between Social Utility and Social Justice*, *in* CAMBRIDGE HANDBOOK, *supra* note 32, at 115, 119–20, 128–29.

44. *See* Margaret Chon, *Intellectual Property Infringement and the Right to Say No*, 114 NW. U. L. REV. ONLINE 169, 175 (2019) ("[M]uch of what is protectible by copyright is not intended to be monetized, but rather to contribute to self-actualization and/or the nurturing of sociality to the end of human flourishing."); Colleen Chien, *The Inequalities of Innovation*, 72 EMORY L.J. 1, 49 (2022) ("Cultural factors . . . may be deterring certain groups from participating in inventing [as] '[t]raditional definitions of invention and innovation . . . steeped in Western capitalistic outlooks, prioritize profitability [as contrasted with] an emphasis on aiding the community, advancing artistic expression, repurposing existing resources, and promoting cooperation.'"); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 515 (2009) ("Psychological and sociological concepts can do more to explain creative impulses than classical economics . . . [A] copyright law that treats creativity as a product of economic incentives can miss the mark and harm what it aims to promote."). *See generally* Lents, *supra* note 5.

copyright is better attuned to creatives' needs and goals in undertaking expressive labors, and thus more likely to be effective in incentivizing expressive endeavor.

From works of literature, poetry, and art, to factual, instructive, and informative materials, those who create expressive works believe they have something to say and experience a desire to be heard. This latter truth highlights how human actualization through self-expression is necessarily symbiotic: having a *need* to express themselves, authors, including artists, concomitantly *require* an audience, if only to be certain that they have made a sound.[45] For its part, society in turn has a vested interest in the personal introspection, inspiration, and elucidation that expressive works can initiate, and, most importantly, in the broadest and most diverse range of such expression. Indeed, new and non-traditional expression can bring renewed vitality to old ideas.[46] And, in responding to expressive works, whether by consuming or being consumed by them and ultimately in yielding up new creatives and works, society reignites the cycle of artistic creation and expression.

Accordingly, copyright as social justice mandates that copyright be structured to respond to creatives' manifold needs and objectives and, at the same time, promote society's variegated interests in socially productive expressive endeavors. Copyright as social justice therefore requires that copyright embody *a broad range* of social and aesthetic values, incentives, and metrics, including, but without undue obeisance to, economic utility incentives and metrics. Moreover, the precepts of socially equitable access, inclusion, and empowerment must be explicitly applied to reveal and counteract socially unjust effects and exclusionary impacts within the copyright ecosystem, whether intended or unintended, and thereby guide actions to responsively reform the regime and to maximize individual actualization and fulfillment and corresponding societal gain. By embracing and applying these precepts as a matter of practice, copyright as social justice delivers a copyright regime that is responsive to and respected by creatives, and which

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45. Of course, there are exceptions to the rule. *See, e.g.*, Katie D. Bennett, *Somewhere in an Attic: the Emily Dickinson Publishing Dilemma*, OUPBLOG (Dec. 10, 2016), https://blog.oup.com/2016/12/emily-dickinson-publishing-dilemma/ [https://perma.cc/4MAA-T96W]; Seth Perlow, *Who Gets Emily Dickinson*, L.A. REV. OF BOOKS (Sept. 9, 2016), https://lareviewofbooks.org/article/gets-emily-dickinson/ [https://perma.cc/NGU6-ET77]; *Miles Davis, Jazz Legend, Was an Enigmatic Public Figure*, N.Y. DAILY NEWS (May 26, 2016), https://www.nydailynews.com/entertainment/music/miles-davis-enigmatic-public-figure-article-1.2650887 [https://perma.cc/9Z3F-TFG3].

46. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 581–83, 593–94 (1994) (finding an unauthorized "hip-hop" version of the classic Rock and Roll ballad "Oh, Pretty Woman," to be transformative, in that it parodies the original versions narrative of unrequited love by placing it in the context of urban sex trafficking). Whatever one's individual aesthetic tastes, society advances through a diverse variety of initial creative works, as well as a broad range of creative responses to such initial expression. *See, e.g.*, *infra* note 91.

ensures maximum inclusion and thus the broadest and most diverse range of socially productive expressive achievements.

E. The Social Expectation of Copyright as Social Justice

When considered in the context of art making, the social function of copyright as social justice can be articulated as that of promoting human actualization through widespread and diverse artistic endeavor, all toward society's greater good. Whereas copyright as economic utility is concerned with a specific, *and concededly important* spectrum of incentives and metrics, copyright as social justice acknowledges and more broadly supports the respective and symbiotic interests of artists and society in art and art making, and is consciously concerned with the effect of such endeavors upon the human condition — both that of the individual artist and on society as a whole.[47] Moreover, in recognition of this interdependent relationship between artists and their audience, copyright as social justice mandates that as a matter of actual practice, copyright be promulgated and administered to promote the most socially equitable participation in the making, sharing, and engagement with art, so as to harvest society's full qualitative and quantitative aesthetic potential.[48]

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47. Lateef Mtima & Steven D. Jamar, *Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information*, 55 N.Y.L. SCH. L. REV., 77, 81–82 (2010):

> Together, the recognized rights and interests of authors and of the public are intended to form a synergistic framework to effectuate the social utility objectives of the Copyright Clause. . . . the aim of the copyright law is progress; the means is the granting of limited copyright property rights. . . . The ends sought are the protection of the public interest, progress, and the public good. . . . Copyright is therefore not about profit for the person — it is about 'profit' for society.

48. A copyright regime which assures equitable access thereto and inclusion therein, and which is administered to ensure its socially just construction and enforcement, preserves everyone's secular as well as other incentives to conceive, share, and experience art and engenders widespread engagement with, and universal respect for, the resulting copyright ecosystem. *See, e.g.*, Sharon Sandeen, *The Value of Irrationality in the IP Equation*, *in* INTELLECTUAL PROPERTY LAW: ECONOMIC AND SOCIAL JUSTICE PERSPECTIVES 63 (2010):

> The policy question that arises [where marginalized communities do not participate in the IP system] is whether people will value a system from which they are excluded. If a substantial number of people cannot benefit directly from a system of IPRs, how likely are they to engage in the inventive and creative endeavors that it is supposed to inspire? Of equal importance, how likely are they to respect the IPRs of others?;

cf. Christine Haight Farley, *Registering Offense: The Prohibition of Slurs as Trademarks*, *in* DIVERSITY IN INTELLECTUAL PROPERTY: IDENTITIES, INTERESTS, AND INTERSECTIONS 105, 110, 111–12 (Irene Calboli & Srividhya Ragavan eds., 2015):

> Recent psychological evidence demonstrated the negative effects associated with stereotypical and derogatory references to Native American people. . . . Besides this psychological harm, an additional and more symbolic harm occurs when someone's cultural identity is

Eschewing rigid obeisance to economic mandates in favor of a focus on individual and societal progress, copyright as social justice enhances the social utility of copyright,[49] including its ability to support the nonremunerative interests and aspirations which can spur creative expressive endeavors. One such important consideration in promoting art making and use is the role of proper credit and recognition for creative achievement: the right to be associated with, acknowledged for, and thus in some situations even validated by society's response to one's artistic expression.[50] As discussed in the next section, the preservation of these nonremunerative interests can be critical to creatives and can engender significant public benefits.

III: COPYRIGHT SOCIAL JUSTICE: HUMAN ACTUALIZATION THROUGH ATTRIBUTION

Richard Wayne Penniman, better known as "Little Richard," was an American singer, pianist, songwriter, and composer and is widely

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> literally, and legally, owned by another entity. . . . By trademarking a racial referent, the message is that the referent is owned, and the owner has the legal right to use the racial term; perhaps even the obligation to use it. . . . And by going into business under harmful words, the owner causes others — fans and consumer — to endlessly utter them.

49. Transcending exclusive reliance upon the commercial marketplace to provide the rules of engagement and assessment metrics for the application of copyright to art making and use, copyright as social justice directly confronts and intentionally abhors racist, misogynistic, and other socially counterproductive practices and conditions in the copyright ecosystem as pernicious to copyright's function in promoting widespread and inclusive participation in expressive endeavors. *See, e.g.*, Mtima, *Introduction*, *supra* note 33, at 17; Patrick R. Goold, *Corrective Justice and Copyright Infringement*, 16 VAND. J. ENT. & TECH. L. 251, 279–82 (2014) (explaining how the action for copyright infringement can serve as a means to achieve corrective justice to redress non-economic interests and concerns). Indeed, with regard to the constitutional articulation of the social function of copyright protection, such practices do more to undermine rather than to promote the progress of the arts and sciences, by virtue of their exclusionary and disincentivizing effects. Moreover, these practices can hardly be characterized as socially beneficial IP endeavors and certainly not with respect to those who are unfairly excluded or exploited.

50. Ng, *supra* note 5, at 384–85:

> A more robust understanding of creativity, the effects of extrinsic and intrinsic motivators on authorship and other creative acts, and their correlation with copyright's progress goals would require a closer study of moral rights and their applicability to a broader range of creative works beyond works of visual arts. Because moral rights protect an author's identity and personality, they protect interests important to personhood and human flourishing and should therefore be inalienable. Moral rights are crucial to intrinsically motivated authors creating works for personal growth, self-mastery, or public welfare, as they are insulators from extrinsic motivators.

acknowledged as one of the architects of Rock and Roll.[51] Among his many contributions include such iconic hits as "Tutti-Fruiti," "Long Tall Sally," "Keep-A-Knockin'," "Lucille," and "Good Golly Miss Molly."[52]

Unfortunately, like most Black creatives of his era, Little Richard was denied full access to mainstream audiences by Jim Crow laws[53] and other racially discriminatory social and recording industry practices prevalent during this period.[54] Consequently, various white music "entrepreneurs" took advantage of these restrictions to misappropriate much of the credit, recognition, and financial rewards that should have gone to Little Richard and other black artists.[55]

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51. *See, e.g.*, MARK RIBOWSKY, THE BIG LIFE OF LITTLE RICHARD 168–74 (Diversion Books 2020); *see also Little Richard*, WIKIPEDIA, https://en.wikipedia.org/wiki/Little_Richard [https://perma.cc/RZF4-9TDW]:

> Richard's most celebrated work dates from the mid-1950s, when his charismatic showmanship and dynamic music, characterized by frenetic piano playing, pounding back beat and powerful raspy vocals, laid the foundation for rock and roll. Richard's innovative emotive vocalizations and up-tempo rhythmic music played a key role in the formation of other popular music genres, including soul and funk. He influenced singers and musicians across musical genres from rock to hip hop; his music helped shape rhythm and blues for generations.

52. RIBOWSKY, *supra* note 51, at 53–57; Stephen T. Erlewine & Keith Harris, *Little Richard: 20 Essential Songs*, ROLLING STONE (May 9, 2020), https://www.rollingstone.com/music/music-lists/little-richard-20-essential-songs-15792/ [https://perma.cc/B7G8-SW2K].

53. *See generally* LERONE BENNET, JR., BEFORE THE MAYFLOWER 255–96 (Penguin Books 1961).

54. *See generally* JACK HAMILTON, JUST AROUND MIDNIGHT 1–25 (Harvard Univ. Press 2016); Margo Jefferson, *Ripping Off Black Music*, HARPERS, Jan. 1973, at 45; Ribowsky, *supra* note 51, at 53–57; Neela Kartha, *Digital Sampling and Copyright Law in the Social Context: No More Colorblindness!!*, 14 U. MIAMI ENT. & SPORTS L. REV. 218, 219–23 (1997); Carter, *supra* note 29, at 228–29; JAME LINCOLN COLLIER, THE MAKING OF JAZZ: A COMPREHENSIVE HISTORY 106 (1978); *see also What Little Richard Deserved*, THE NEW YORKER (Apr. 26, 2023), https://www.newyorker.com/culture/culture-desk/what-little-richard-deserved [https://perma.cc/G2GA-A6QA] ("When the owner of Specialty Records, Art Rupe, purchased the rights to "Tutti Frutti," which would become [Little] Richard's first hit, he paid fifty dollars, and . . . gave [Little Richard] half a cent for each record that got sold — a fraction of what white stars at the time were getting."). *See* CHARLES WHITE, THE LIFE AND TIMES OF LITTLE RICHARD: THE QUASAR OF ROCK 57, (Da Capo Press 2d ed. 1994).

55. *See* Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 624–25, 639–47 (2022) ("The [copyright] registration system, with its lax policing standards, facilitated the fleecing and expropriation of Black musical works. . . . Registration is complex. It is intimidating to artists and also expensive for multiple registrations. And the myth that registration is not needed pervades the artist community. Registration is also punitive. Failing to register leads to harsh consequences, including deprivation of statutory damages and attorney's fees, no presumption of ownership, and copyright termination headaches. . . . All these dynamics create a perfect storm for further marginalization of Black artists."); CHUCK BERRY, THE AUTOBIOGRAPHY, 108–09, 118–20 (Harmony Books 1987); NELSON GEORGE, THE DEATH OF RHYTHM AND BLUES 108 (1988) ("Blacks Create and then move on. Whites document and then recycle. In the history of popular music these truths are self-evident."); K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American*

One common practice of the era was to recruit white performers to record their own versions of recordings initially made by black artists.[56] Inasmuch as the original versions were generally restricted to air play on black radio stations, once the white "cover record" versions were played for the larger, mainstream radio audiences, they not only enjoyed greater commercial success but often also received undue acclaim for their "originality."[57]

One of the many white recording artists who benefited from the practice of "white cover recordings" was Pat Boone, who is regarded as one of the most popular singers of the twentieth century.[58] Pat Boone has sold over forty-five million records, including thirty-eight different "Top 40" hits.[59] It was the practice of white cover recordings, however, that launched Boone's career:

> Pat Boone's version of Fats Domino's "Ain't That a Shame" was a hit. This set the stage for the early part of Boone's career, which focused on covering R&B songs by Black artists for a white American market. . . . A number-one single in 1956 by Boone was a second cover and a revival of a then seven-year-old song "I Almost Lost My Mind" by Ivory Joe Hunter. . . . Many of Boone's hit singles were covers of hits from Black Rock and Roll artists. These included . . . "Tutti Frutti" and "Long Tall Sally" by Little Richard; "At My Front Door (Crazy Little

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Reparations, 25 CARDOZO ARTS & ENT. L.J. 1179, 1184, 1188–90 (2008) ("In the context of cultural production, Ellisonian invisibility is concrete in all its bitter irony."). Fortunately, in Little Richard's case, due recognition eventually came during his lifetime. In 1986 Little Richard was inducted into the inaugural class of the Rock and Roll Hall of Fame and was also inducted into the Songwriters Hall of Fame. In 1993 he became a recipient of a Lifetime Achievement Award from The Recording Academy and the Rhythm and Blues Foundation and, in 2015, Little Richard received a Rhapsody & Rhythm Award from the National Museum of African American Music. "Tutti Frutti" was included in the National Recording Registry of the Library of Congress in 2010, which notes that Little Richard's "unique vocalizing over the irresistible beat announced a new era in music." WIKIPEDIA, *supra* note 51.

56. *See, e.g.*, DANIEL WOLFF, YOU SEND ME: THE LIFE AND TIME OF SAM COOKE 156–58 (William Morrow & Co. 1995). A related practice was to have white artists attempt to emulate the vocal stylings of the underlying black recording artist. *See* Robert F. Brauneis, *Copyright, Music, and Race: The Case of Mirror Cover Recordings*, *in* CAMBRIDGE HANDBOOK, *supra* note 32, at 183. In both situations, white audiences were typically unaware of the original works upon which the white recording were based.

57. *See, e.g.*, *Hound Dog (song)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Hound_Dog_(song) [https://perma.cc/2ZXW-7KGU].

58. *Pat Boone*, WIKIPEDIA, https://en.wikipedia.org/wiki/Pat_Boone [https://perma.cc/A5VW-XU6Z].

59. *Id.* According to BillBoard, Pat Boone was the second biggest-charting artist of the late 1950s, second only to Elvis Presley, and ranked at number nine in its listing of the Top 100 Top 40 Artists 1955–1995. *Id.* ("Until the 2010s, Boone held the Billboard record for spending 220 consecutive weeks on the charts with one or more songs each week.").

> Mama)" by the El Dorados; and . . . "I'll be Home" by the Flamingos . . . .[60]

As was the case for many other white cover recording artists of the era, Boone's cover recording success was due partly to the fact that the general public was largely unaware of the original recordings by black artists.[61] Indeed, in many instances, both the original and the white cover versions were released during the same period, but with the latter white artists typically enjoying greater commercial success given the access to mainstream radio airplay.[62] In fact, in some instances when mainstream audiences were exposed to the original black recordings, they were mistakenly dismissed as "copies" of the more popular white cover versions.[63]

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60. *Id.*; *see also* Kartha, *supra* note 54, at 232–34. Boone had signed with Specialty Records which was owned by Art Rupe. However, Rupe had already "acquired the right to cover Tutti Frutti and asked Boone to cover the record. Allegedly, Boone has admitted that he did not wish to do a cover of 'Tutti Frutti' because 'it didn't make sense' to him; however, his record producers persuaded him into making a different version, claiming that the record would generate attention and money." Tutti Frutti, WIKIPEDIA, https://en.wikipedia.org/wiki/Tutti_Frutti_(song) [https://perma.cc/DB9S-JZ28]; *see generally* Waylonvids, *Rock and Roll: The Early Days,* YOUTUBE (Sept. 6, 2021) https://www.youtube.com/watch?v=Tpmj2E8sTqI [https://perma.cc/W8XU-VMZN] (discussing the black artistry origins of Rock and Roll and the beginnings of the practice of white cover recordings).

61. WOLFF, *supra* note 56, at 56–58; *Billboard Magazine Used to Refer to R&B Songs as "Race Records,"* BLACK HISTORY, https://www.blackhistory.com/2020/02/billboard-magazine-rb-songs-race-records.html [https://perma.cc/269Z-664U]; *Cover Version*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cover_version [https://perma.cc/3FDF-DD2Z]; *Naming Black Music Charts 1942 to 1992*, WALL OF SOUND (Dec. 20, 2006), https://wallofsound.wordpress.com/2006/12/20/naming-black-music-charts-1942-to-1992/ [https://perma.cc/R38L-FSEJ]; Chris Jancelewicz, *The 'Whitewashing' of Black Music: A Dark Chapter in Rock History*, GLOBAL NEWS (Jul. 30, 2019), https://globalnews.ca/news/4321150/black-music-whitewashing-classic-rock/ [https://perma.cc/649S-JA32]; Julie Jacob, *Taking Off the White Mask: It's Time to Recognise the Black Roots of Western Popular Music*, THE LOVEPOST (Feb. 25, 2021), https://www.thelovepost.global/taking-off-the-white-mask-its-time-to-recognise-the-black-roots-of-western-popular-music/ [https://perma.cc/6DKH-BT6N]; Richard Carter, *White 'Cover Records' Ripped Off Great Black R&B Sounds*, AMSTERDAM NEWS (Oct. 12, 2012), https://amsterdamnews.com/news/2012/10/12/white-cover-records-ripped-off-great-black-rb/ [https://perma.cc/C3R3-JF6S].

62. Pat Boone's cover of *Tutti Frutti* is generally regarded as a "sanitized" version of Little Richard's original. Tim Londergan, *Tutti Frutti: Little Richard and Pat Boone*, TIM'S COVER STORY (Mar. 16, 2015), https://timscoverstory.wordpress.com/2015/03/16/tutti-frutti-little-richard-and-pat-boone/ [https://perma.cc/L6BH-CC55]; Gil Kaufman, *Pat Boone Remembers Little Richard: 'He Knew His Music Was Good for Me… And I Was Good for His Music'*, BILLBOARD (May 5, 2020), https://www.billboard.com/music/rock/pat-boone-remembers-little-richard-9376326/ [https://perma.cc/7DXB-H6MT]. Boone's version reached number twelve on the national pop chart, with Little Richard's reaching only number twenty-one in February 1956. *All US Top 40 Singles for 1956*, TOP40WEEKLY.COM (Nov. 30, 2013), https://top40weekly.com/1956-all-charts/ [https://perma.cc/54W5-MQM6].

63. *Time Is on My Side*, WIKIPEDIA, https://en.wikipedia.org/wiki/Time_Is_on_My_Side [https://perma.cc/H354-CJ35].

The practice of white cover recordings illustrates what can happen when the work of marginalized creatives is used by mainstream artists without proper acknowledgement and attribution. Particularly where the work of a marginalized creative arises within culturally indigenous and other artforms unfamiliar to the general public, mainstream audiences can mistakenly attribute aspects of the works' originality to the well-known, follow-on artist.[64] Indeed, in some cases, established follow-on artists affirmatively cultivated such misperceptions, thus capitalizing on the public's acclaim.[65]

Certainly, most unknown artists encounter challenges finding an audience. However, the struggle can be especially difficult for creatives from marginalized groups or communities. Striving to create and share one's art under such conditions can be discouraging, but to further endure the misappropriation of your artistic achievement by mainstream artists, while you languish in obscurity and impecuniosity, can all but extinguish an artist's creative fires. Moreover, mainstream follow-on use of marginalized artist achievement without attribution is ultimately detrimental to the artists and the public alike.[66] It is impossible to know what effect timely recognition and financial reward might have had on the artistic output of Black creatives of Little

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64. *See, e.g.*, *I Shot the Sheriff*, WIKIPEDIA, https://en.wikipedia.org/wiki/I_Shot_the_Sheriff [https://perma.cc/7DC3-VPCC]. Indeed, the failure to give proper attribution to the originating creatives in such situations is often the first step toward the cultural appropriation of an indigenous art form. Litigation in recent years regarding credit for and ownership of certain Black dance routines has implicated both this issue and the larger problem of the application of Western cultural mores as dispositive as to what should–and should not–be considered "creative." *E.g.*, Adi Robertson, *The 'Carlton Dance' Couldn't be Copyrighted for a Fortnite Lawsuit*, THE VERGE (Feb. 15, 2019), https://www.theverge.com/2019/2/15/18226180/copyright-office-alfonso-ribeiro-carlton-fresh-prince-dance-rejected-fortnite-nba-2k-lawsuit [https://perma.cc/3M6E-EY5B] (reporting that Black actor Alfonso Ribeira withdraws his infringement suit in connection with the unauthorized use of his complex "social choreography" dance routines in a video game after the Copyright Office refuses to register the routines as unprotectable "social dances"). *But cf.* Mirtha Donastorg, *Black Creators Are Starting to Own The Rights to Their Viral Choreography*, THE PLUG (Oct. 21, 2021), https://tpinsights.com/black-creators-are-starting-to-own-the-rights-to-their-viral-choreography/ [https://perma.cc/H958-CXV2].

65. In various interviews, Pat Boone has staunchly defended the artistic merit value of white cover recordings. For example, in a PBS interview on the Tavis Smiley show which aired on May 29, 2015, Boone remarked: "Here is the bottom line. There were lots of rhythm and blues artists and they were doing well in their genre and they were famous and they had the charts and everything. (But) the only ones anybody knows today are the ones that were covered by the Beatles, by Elvis, by me and by many artists." Roger Schlueter, *White Singers Paid the Fees, But Black Singers Didn't Get the Money*, BELLEVILLE NEWS-DEMOCRAT (Feb. 23, 2017), https://www.bnd.com/living/liv-columns-blogs/answer-man/article134070984.html [https://perma.cc/69G6-9EXZ]; *see also* Steven Gaydos, *Pat Boone Reflects on Elvis, Little Richard and the Early Days of Rock and Roll*, VARIETY (July 22, 2020), https://variety.com/2020/music/spotlight/pat-boone-elvis-little-richard-cultural-appropriation-1234713942/ [https://perma.cc/YFM7-6UZ7].

66. *See, e.g.*, Brauneis, *supra* note 56, at 198 (explaining how the court decision validating the practice of white mirror cover recordings led to the denial of copyright protection for *all* fixed vocal artistry).

Richard's era.[67] And white cover artists might have been incentivized toward deeper exploration of their own talents, but for the easy commercial success and public acclaim offered through cover recordings.

As Judge Sotomayor observes in *Warhol*, Lynn Goldsmith established herself as a talented "rock photographer" during a time when women were largely relegated to misogynistic roles in the Rock and Roll ecosystem.[68] There is an obvious irony in the fact that at the center of the *Warhol* litigation lies the image of a Black composer and recording artist, who, like his antecedent artistic innovators, was one of the most creative and influential musicians of his era, but forced by the "copyright externalities" of race to mount a legendary campaign for the creative control, credit, and compensation due his aesthetic genius. So much more than their mainstream peers, marginalized artistic pioneers require credit and recognition for their achievements if they are to sustain their careers.[69] Where copyright is manipulated to diminish

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67. Had Little Richard been publicly acclaimed as an innovating influence at the height of his career, such recognition could have encouraged his artistic growth and enhanced his commercial success. One can only speculate how such developments might have influenced the course of Rock and Roll. Other recent commentators have also explored how copyright social justice considerations and imperatives, particularly the recognition of attribution interests, can help to shape both individual and systemic redress for copyright inequities perpetuated by unjust legal and social conditions extrinsic to the copyright regime. *See e.g.*, Timothy J. McFarlin, *A Copyright Restored: Mark Twain, Mary Ann Cord, and How to Right a Longstanding Wrong*, 2023 WIS. L. REV. 45, 89–92 (detailing the historical facts of Mark Twain's claiming sole copyright authorship in connection with his role as amanuenses in recording Mary Ann Cord's recounting of her life as an enslaved person, and arguing for attribution of copyright authorship to Cord as a remedy for, inter alia, the deprivation of her personhood rights in the expression of her lived experiences).

68. 598 U.S. at 516. *See also* Goldsmith Counterclaim, *supra* note 13, at ¶ 9, 10. Indeed, given the problematic history of race and gender inequity in the United States, copyright as social justice, which consciously confronts the reality of how such "copyright extrinsic" customs and practices have undermined the social function of copyright, effectively restores copyright protection to its full social efficacy. As the courts and copyright practitioners continue to embrace IP social justice theories and strategies, historically marginalized creatives will increasingly perceive and employ copyright as a mechanism which promotes and protects their interests as artists. *See, e.g.*, *Blurred Lines of Copyright*, ETHICS UNWRAPPED, https://ethicsunwrapped.utexas.edu/case-study/blurred-lines-copyright [https://perma.cc/Q8XZ-KN4V] (discussing successful litigation by the Estate of Marvin Gaye in connection with pop hit *Blurred Lines*); Yilek, *supra* note 24 (discussing copyright litigation by the Estate of R&B legend Issac Hayes against the Trump Campaign).

69. *See* Peter S. Menell & Lateef Mtima, *Exploring the Economic, Social, and Moral Justice Ramifications of the Warhol Decision*, 47 COLUM. J.L. & ARTS 449 (2024) (detailing the intersection and preservation of authors' economic and social justice interests through copyright protection). Of course, attribution and recognition for one's creative achievements can be important to creatives from all backgrounds. *See, e.g.*, *Alex Anderson (cartoonist)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Alex_Anderson_(cartoonist) [https://perma.cc/P7VT-EM6C] (recounting how the co-creator of such iconic cartoons characters as Rocky and Bullwinkle and Dudley Do-Right, for decades declined to assert his copyright interests inasmuch as he had not been involved in the development of the television program which showcased these characters. However, when he "saw a 1991 documentary about the

these rights, however, it discourages expressive endeavor rather than incentivizing it. While creatives such as Little Richard and Lynn Goldsmith are often relegated to the margins of their creative industries, as discussed in the next section, a social justice-cognizant application of copyright can help to mitigate such frustration of copyright's overarching function of cultivating an inclusive creative ecosystem.

IV: *ANDY WARHOL FOUNDATION FOR THE VISUAL ARTS, INC. V. GOLDSMITH*: A COPYRIGHT SOCIAL JUSTICE ANALYSIS

Justice Sotomayor frames her analysis of the parties' claims by placing the respective interests and status of Andy Warhol (via the Warhol Foundation) and Lynn Goldsmith on equal par:

> This copyright case involves not one, but two artists. The first, Andy Warhol, is well known. His images of products like Campbell's soup cans and of celebrities like Marilyn Monroe appear in museums around the world. Warhol's contribution to contemporary art is undeniable. The second, Lynn Goldsmith, is less well known. But she too was a trailblazer. Goldsmith began a career in rock-and-roll photography when there were few women in the genre. Her award-winning concert and portrait images, however, shot to the top. Goldsmith's work appeared in Life, Time, Rolling Stone, and People magazines, not to mention the National Portrait Gallery and the Museum of Modern Art. She captured some of the 20th century's greatest rock stars: Bob Dylan, Mick Jagger, Patti Smith, Bruce Springsteen, and, as relevant here, Prince.[70]

By placing the two artists on equal footing, the Court acknowledges that the dispute involved equally legitimate, albeit conflicting concerns regarding the creation of art: fostering initial creative expression while at the same time preserving opportunities for such achievements to be used by subsequent, "follow-on artists" to create further works. Through this approach, the Court affirms that one

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[characters] which did not mention his name, he filed suit . . . Anderson, who had not received public recognition for creating Dudley Do-Right, Bullwinkle and Rocky, learned the characters had been copyrighted in [his co-creator's] name alone. Consequently, Anderson sued . . . to reclaim creator credit. . . . [and] received a settlement and a court order acknowledging him as 'the creator of the first version of the characters of Rocky, Bullwinkle and Dudley.'").

70. 598 U.S. at 514–15.

important function of copyright is that of reconciling these sometimes-competing interests to promote creative expressive endeavor.[71]

One of copyright law's key mechanisms for achieving the "balancing act between creativity and availability [of expressive works] (including for use in new works)" is the fair use doctrine.[72] While copyright law provides authors with certain exclusive property rights, the fair use doctrine allows the public, including other artists, to engage in these rights under certain conditions.[73]

When a follow-on artist invokes the fair use doctrine in defense of her unsanctioned use of a preexisting copyrighted work, the first fair use factor requires the court to:

> consider[] the reasons for, and nature of, the . . . use of [the preexisting] work. The "central" question it asks is "whether the new work merely 'supersede[s] the objects' of the original creation . . . ('supplanting' the original), or instead adds something new, with a further purpose or different character." . . . In that way, the first factor relates to the problem of substitution — copyright's bête noire. The use of an original work to achieve a purpose that is the same as, or highly similar to, that of the original work is more likely to substitute for, or "'supplan[t],'" the work.[74]

In construing the first fair use factor, Justice Sotomayor noted the obvious fact that merely because a follow-on artist adds something new to a preexisting work, it does not necessarily follow that the result embodies a further purpose or character different from the underlying work.

> Although new expression may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor. . . . Many secondary works add something

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71. "The [Copyright] Act . . . 'reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.'" *Id.* at 526.

72. *Id.* at 526.

73. *Id.* at 527. In determining whether a particular unauthorized use should be allowed as a fair use, § 107 of the Copyright Act directs courts to consider the following factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; "(2) the nature of the copyrighted work"; "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and "(4) the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107.

74. 598 U.S. at 528 (internal citations omitted).

> new. That alone does not render such uses fair. Rather, the first factor (which is just one factor in a larger analysis) asks 'whether and to what extent' the use at issue has a purpose or character different from the original.[75]

Further, the extent to which the resulting work embodies a purpose or character different from the original may also be dispositive. "The larger the difference, the more likely the first factor weighs in favor of fair use. The smaller the difference, the less likely."[76]

Where the follow-on artist has sufficiently imbued her resulting work with a further purpose or character different from the underlying work, the result is generally considered to be "transformative."[77] Justice Sotomayor further observes, however, that the degree of "transformativeness" is also a consideration in determining whether the use should be allowed as a fair use.

> That is important because the word "transform," . . . appears elsewhere in the Copyright Act. The statute defines derivative works, which the copyright owner has "the exclusive righ[t]" to prepare to include "any other form in which a work may be recast, transformed, or adapted." In other words, the owner has a right to derivative transformations of her work. . . . To be sure, this right is "[s]ubject to" fair use [and therefore the] two are not mutually exclusive. But an overbroad concept of transformative use, one that includes any further purpose, or any different character, would narrow the copyright owner's exclusive right to create derivative works. To preserve that right, the degree of transformation required to make "transformative" use of an original must go beyond that required to qualify as a derivative.[78]

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75. *Id.* at 525, 529. Moreover, whether the new expression provides a different purpose or character is objectively determined. "Nor does the subjective intent of the user . . . determine the purpose of the use. [T]he meaning of a secondary work, as reasonably can be perceived, should be considered to the extent necessary to determine whether the purpose of the use is distinct from the original . . . [which requires] . . . an objective inquiry into what use was made, *i.e.*, what the user does with the original work." *Id.* at 544–45.

76. *Id.* at 529.

77. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

78. 598 U.S. at 529 (internal citations omitted). While the Court appears to rely solely upon *Campbell* as an example of a "go beyond" use, lower courts have recognized other transformative uses which would seem to warrant "go beyond" status, such as where the unauthorized use achieves a *different expressive function* than that intended by the author of

Justice Sotomayor points to *Campbell v. Acuff-Rose Music, Inc.*[79] and its analysis of 2 Live Crew's rap parody of Roy Orbison's classic Rock and Roll ballad Pretty Woman, as an example of a transformative use that "goes[] beyond" the parameters of the derivative work right.[80] Indeed, given 2 Live Crew's objectives in commenting upon and criticizing Orbison's somewhat rosy depiction of unfulfilled romantic yearnings, the purpose and character of 2 Live Crew's use is diametrically different from that of the original work. Thus, a parody is a use of the underlying work which, by its nature, is one distinctly different from that of the subject work.[81]

Finally, transformative follow-on uses that are distinctly different in purpose or character from the works they build upon also address a further consideration in applying the first fair use factor — the justification for the unauthorized use. "[T]he first factor also relates to the justification for the use. In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create."[82] Accordingly, even a transformative use requires justification, although in the case of such a use that is different in purpose and character, the justification may be self-evident.[83]

Justice Sotomayor thus provides a roadmap for balancing society's diandrous interests of fostering initial creative expression while also encouraging follow-on creative endeavors. In applying the first fair use factor in evaluating a follow-on use, courts should not merely inquire as to whether that use adds something new to the original work but must further determine whether the use objectively achieves a distinctly different purpose or character, whereupon the court should then assess

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the underlying work. *See, e.g.*, Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) (use of copyrighted images to create a search index); Authors Guild, Inc v. Hathitrust, 755 F.3d 87 (2d Cir. 2014) (use of copyrighted texts to create a full-text searchable database); Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) (same). In its amicus brief in support of Lynn Goldsmith, the Institute for Intellectual Property and Social Justice distinguishes between such permissible functional or "utilitarian transformation" and the claim of "aesthetic transformation" at issue in *Warhol,* which the Court disallowed as sharing the same, expressive purpose as the underlying work. The *Warhol* dissent appears to conflate utilitarian and aesthetic transformation. *See* 598 U.S. at 571–73.

79. 510 U.S. 569 (1994).

80. 598 U.S. at 531 ("Criticism of a work, for instance, ordinarily does not supersede the objects of, or supplant, the work. Rather, it uses the work to serve a distinct end.").

81. *Id.* at 528. Moreover, "2 Live Crew's version of Orbison's song…also had a different aesthetic." *Id.* at 542. Accordingly, the use in *Campbell* achieved a level of "aesthetic transformation" that the use in *Warhol* failed to attain, as the parody objectively "goes beyond" the aesthetic transformational uses that the copyright owner can reasonably expect to fall within her domain.

82. *Id.* at 531.

83. By comparison, "[a] use that shares the purpose of a copyrighted work, by contrast, is more likely to provide 'the public with a substantial substitute for matter protected by the [underlying artist's] interests in the original wor[k] or derivatives of [it],' . . . which undermines the goal of copyright." *Id.* at 531–32.

the degree of such transformativeness. The greater the degree of transformation, the more likely the use will also be justified as furthering the fundamental purpose of copyright. Finally, courts should weigh all these aspects against other relevant considerations, such as whether the use is commercial in nature, in making the ultimate determination as to whether the use should be allowed as a fair use.[84]

A. Balancing Derivative Right Versus Fair Use Transformation (and Achieving Copyright Social Justice)

Justice Sotomayor could have readily resolved the parties' dispute strictly in terms of its implications for the economic interests provided under the derivative work right (and still reached the same ultimate conclusion). Had the Court accepted the Warhol Foundation's formulation of transformative fair use, a follow-on artist's right to transform a preexisting work would all but eclipse the market for licensing photographs for artist reference and similar derivative uses, inasmuch as the addition of virtually any new expression to a work will add some new meaning.[85] Consequently, only follow-on uses that add no new expression, and thus no new meaning, would be precluded, but not as violating the derivative work right but rather as resulting in unauthorized literal or near-literal copies of the original work, which would violate the underlying artist's *reproduction rights*. In short, acceptance of the Foundation's arguments would practically extinguish the independent economic interests afforded authors by the derivative right, and, therefore, the Court could have held in favor of Lynn Goldsmith on that basis alone.[86]

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84. *Id.* at 525 ("[W]hether an allegedly infringing use has a further purpose or different character . . . is a matter of degree, and the degree of difference must be weighed against other considerations, like commercialism.").

85. "*Campbell* cannot be read to mean that § 107(1) weighs in favor of any use that adds some new expression, meaning, or message. Otherwise, 'transformative use' would swallow the copyright owner's exclusive right to prepare derivative works." *Id.* at 541. Indeed, under the Foundation's theory of fair use transformation, even Warhol's initial silk screen image would not require a license, provided the Foundation could point to some "new meaning" therein. In fact, the Foundation asserted copyrights in the unauthorized images, apparently in light of Warhol's additions to the original photograph. *Id.* at 519.

86. "It will not impoverish our world to require AWF to pay Goldsmith a fraction of the proceeds from its reuse of her copyrighted work. Recall, payments like these are incentives for artists to create original works in the first place." *Id.* at 549. Indeed, in light of the commercial nature of the Foundation's use, to hold otherwise would effectively shift a market to the follow-artist that Congress intended for the copyright owner. *See, e.g.*, Cariou v. Prince, 784 F.Supp.2d 337, 344 (S.D.N.Y. 2011) (describing that a gallery owner cancels plans to exhibit plaintiff Cariou's photographs and reprint his book for signings, on learning of defendant Prince's "appropriation art" exhibition featuring Cariou's work, for fear of appearing to be capitalizing on Prince's success and notoriety, and not wanting to exhibit work that had been "'done already' at another gallery."). The facts in *Cariou* are starkly reminiscent of the inequities which inured to black recording artists from the practice of white cover recordings.

Nonetheless, although unnecessary to preserving the economic benefits of the derivative work right, Justice Sotomayor also considered certain "non-economic" human actualization concerns in balancing the parties' competing interests, thereby pursuing an analysis more consonant with the broader rationale of copyright as social justice. Considering the human actualization interests of Lynn Goldsmith as the originating artist, Justice Sotomayor observed that she worked hard to build her reputation as a leading rock photographer in an era "when women on the scene were largely dismissed as groupies."[87] And as Lynn Goldsmith urged, critical to establishing that reputation was proper attribution for her creative achievements, which is essential to gaining recognition and creating opportunities for further success.[88]

Beyond expanding an artist's prospects for economic gain, the derivative work right further bestows a form of "moral rights" protection to artists, empowering them to require attribution and impose other such "non-economic" conditions when licensing the use of their works.[89] Through proper use of their derivative work rights, artists can control the ways in which their works are used in the production of follow-on works, including ensuring that they receive credit and recognition for their creative accomplishments which give rise to follow-on works.[90]

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87. 598 U.S. at 516. "By her mid-30s, [Lynn] had chronicled the lives and tours of Bruce Springsteen, Michael Jackson, Bob Dylan, Patti Smith, and the Rolling Stones. [Lynn's] work appeared throughout the music press and on album covers." *See Lynn Goldsmith*, WIKIPEDIA, https://en.wikipedia.org/wiki/Lynn_Goldsmith [https://perma.cc/E88L-YQXX]. Nonetheless, as the Court observed, "Goldsmith received neither a fee nor a source credit" in connection with the Conde Nast publication. 598 U.S. at 520. As discussed above, recognition of her work as the basis for the Warhol silk-screen was likely more significant — and ultimately far more valuable — than the minimal license fees involved.

88. Goldsmith Counterclaim, *supra* note 13, at ¶ 21, 24, 25, 31, 43, 44. *See, e.g.*, Jon M. Garon, *Commercializing the Digital Canvas: Renewing Rights of Attribution for Artists, Authors, and Performers*, 1 TEX. A&M L. REV. 837, 839–45, 863–67 (2014) (discussing both the economic and nonremunerative benefits of attribution, including the benefit to an artist's reputation, and comparing such benefits to those provided by the right of publicity).

89. *See* Chon, *supra* note 44, at 170 ("[A]lleged infringers might also commit incursions upon the dignity or tranquility of the IP holder, or impose an agenda that the IP holder does not share."). *See generally* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (including the Visual Rights Act of 1990, Title VI, § 603(a), 104 Stat. 5128, which added 17 U.S.C. § 106A to the Copyright Act and established rights of attribution and integrity for works of visual art); *see also Copyright Remedy Clarification Act and Copyright Office Report Before the Subcomm. on Patents, Copyrights and Trademarks of the Comm. on the Judiciary*, 101st Cong. 2749–2750 (1989). Whereas the reproduction right precludes base copying of copyrighted material, the derivative work affords a measure of dignity to an artist's creative choices and statements by precluding the unauthorized use of such material, subject to the dictates of the fair use doctrine. *Cf.* MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 8D.02[C] (2023) ("[T]he exclusive right 'to prepare derivative works could be conceptualized as an author's integrity right.'").

90. 598 U.S. at 550 ("Lynn Goldsmith's original works, like those of other photographers, are entitled to copyright protection, even against famous artists.").

Moreover, attribution can be especially critical to artists hailing from marginalized groups or communities. Such creatives are often cultivated through engagement with non-traditional art forms and genres, to which they make their own creative contributions, including works which render their native art forms more accessible to mainstream audiences.[91] When well-known and other mainstream artists misappropriate such achievements, society applauds the unprecedented "originality" of the follow-on artist, unaware of the unsung, marginalized creators who are the actual "artistic couriers" of these unfamiliar genres.[92]

Further, marginalized artists can offer new perspectives toward traditional, mainstream art forms. Here too, appropriation without attribution denies them recognition and financial reward, while the mainstream, appropriating artists enjoy commercial success and artistic acclaim, and in some cases, the ignition (or rejuvenation) of entire careers.[93] Attribution enables marginalized and lesser-known creatives to gain attention, respect, and reputational clout that can propel their careers. At the very least, it protects them from the indignity of misappropriation and provides them with encouragement to continue their artistic labors through the knowledge that there is an audience for their work (even if that audience consists principally of mainstream artists who covet their artistic accomplishments).

As for the artistic aspirations of the follow-on artist, the Court expressly preserves her right to transform the works of prior artists by infusing them with new purpose or different character, and thereby develop and share her own creative talents to society's ultimate benefit. By contrast, where the follow-on use does not embody a new purpose or character, society gains no creative advancement.[94] In such cases, it serves both copyright social utility and social justice to grant the underlying artist the right to set the terms for such reuse of her work. This not only protects her economic interests, but it also precludes

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91. Gerald Early, *Motown*, BRITANNICA MONEY (July 28, 2024), https://www.britannica.com/money/Motown [https://perma.cc/R925-2C93] ("Motown brought together rhythm-and-blues, gospel, and pop influences as it sought to 'cross over'…to reach a wide audience that included white teenagers."); Richard Havers, *What Made Motown Records So Great?*, DISCOVER MUSIC (July 6, 2014), https://www.udiscovermusic.com/playlists/what-made-motown-records-so-great/ [https://perma.cc/7PHD-KK2Z].

92. Of course, pursuant to both the derivative work right and the reproduction right, artists can elect to license such uses as non-transformative derivative works or as non-literal copies respectively. In light of the absence of any meaningful creative contribution by such users, both the economic utility and social justice rationales warrant relegation of that decision to the copyright owner, to ensure proper attribution and compensation.

93. Justin Timberlake, *Justin Timberlake — Sanctified (Live at SNL)*, YOUTUBE (Mar. 8, 2024), https://www.youtube.com/watch?v=E3ZoiIC7Sfk [https://perma.cc/5P9P-Q39P].

94. 598 U.S. at 531 ("The more the appropriator is using the copied material for new, transformative purposes, the more it serves copyright's goal of enriching public knowledge . . .").

follow-on artists, especially those who already enjoy acclaim and public status, from intentionally or unintentionally misappropriating recognition due to the initial, and lesser known, underlying artist.

Whereas Justice Sotomayor endeavors to balance the myriad and sometimes competing interests critical to art making, the dissent is narrowly obsessed with what it perceives as a threat to the interests and contributions of follow-on artists, particularly those of great renown. While devoting pages to describing and supporting the benefits of artistic appropriation, the dissent is all but dismissive of Lynn Goldsmith's artistic achievement and interests.

> The[re is] dazzling creativity evident in the Prince [silk-screen] portrait . . . [Andy Warhol] started with an old photo, but he created a new thing. . . . If Warhol had used Goldsmith's photo to comment on or critique *Goldsmith's photo*, he might have availed himself of [the first] factor's benefit (though why anyone would be interested in that work is mysterious).[95]

Even more problematic, however, is that the dissent's characterization of the Warhol image as transformative is based on deference to considerations long regarded as wholly inapt to judicial interpretation and application of copyright:

> Today, the Court declares that Andy Warhol's eye-popping silkscreen of Prince — a work based on but dramatically altering an existing photograph — is . . . not "transformative." . . . You've probably heard of Andy Warhol; you've probably seen his art. You know that he reframed and reformulated — in a word, transformed — images created first by others. Campbell's soup cans and Brillo boxes. Photos of celebrity icons: Marilyn, Elvis, Jackie, Liz — and, as most relevant here, Prince. That's how Warhol earned his conspicuous place in every college's Art History 101. . . . Andy Warhol is the avatar of transformative copying.[96]

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95. 598 U.S. at 573–75, 581–91 (Kagan, J., dissenting).

96. *Id.* at 558–59, 61 ("The silkscreen enabled [Warhol] to make brilliantly novel art out of existing 'images carefully selected from popular culture.' . . . The use of 'elements of an extant image[ ] is Warhol's entire modus operandi' . . . . The majority does not see it. And I mean that literally. There is precious little evidence in today's opinion that the majority has actually looked at these images . . .") (internal citations omitted). There is at least one

In the dissent's artistic eye, the Warhol image is "eye-popping."[97] Apparently, even more important is the fact it was produced by the revered "avatar of transformative copying."[98] However, while the dissent gushingly stakes these observations, as well as its legal analysis, in the purported fundamentals of the Art History 101 college curriculum, bedrock tenets of "Copyright 101" have long cautioned against judges' individual aesthetics and artistic reverence infecting judicial application of copyright law.[99]

To be sure, the dissent is properly concerned about the artistic interests and contributions of follow-on artists. However, its sanctification of Warhol's "dazzling creativity" blinds it to the aesthetic value of Lynn Goldsmith's "old photo," the importance of her attribution interests, and ultimately even society's interest in a proper balancing of all the relevant social interests and benefits at issue.[100] "The dissent thus misses the forest for a tree."[101] As manifest in the majority opinion, copyright as social justice ensures a more socially equitable and efficacious result.

B. Remedying Follow-on Artist Infringement: From "Joint Authorship" to Monetary Damages

In fashioning judicial remedies to redress follow-on artist infringing use of preexisting works, courts should of course address all of the copyright owner's affected interests, both economic and social justice in nature. At the same time, however, courts should remain mindful of copyright's function in balancing society's dual interests in incentivizing both initial works of art and also follow-on artistic works.

To achieve this balance, courts should consider the same factors as those weighed by Justice Sotomayor in assessing whether the follow-

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observation offered by the dissent that is ironically consistent with the present analysis, particularly the discussion of the effect of "appropriation creativity" on an initial artist's attribution interests, as set forth in *supra* Part III: "Think Soup Cans or, in another vein, think Elvis." *Id.* at 561.

97. *Id.* at 558.

98. *Id.* at 561.

99. *See* Bleistein v. Donalson Lithographing, Co., 188 U.S. 239 (1903); *see also* Brauneis, *supra* note 56, at 193–94 (detailing how the judge in Supreme Records v. Decca Records, 90 F. Supp. 904 (S.D. Cal. 1950), applied his personal musical tastes, including his views regarding the vocal stylings of an African American singer, in dismissing the singer's claims of artistic misappropriation by a white recording artist). Finally, while deference to widespread acclaim and concomitant commercial success is arguably consistent with the copyright as economic utility rationale, as discussed above, it impermissibly transfers to established follow-on artists' commercial opportunities intended for the underlying, albeit lesser-known artist.

100. 598 U.S. at 573 (Kagan, J. dissenting). Consequently, the social-justice cognizant approach of the majority more effectively balances the non-economic interests of *both* the underlying (right to attribution) and the follow-on (freedom to transform) artists.

101. *Id.* at 549 (majority opinion).

on use in Warhol could be characterized as a transformative fair use. Thus, for example, where the follow-on use involves merely adding new expression but without infusing new purpose or different character, courts should consider the full range of injunctive and monetary remedies available under the Copyright Act,[102] inasmuch as such use is effectively equivalent to unauthorized (non-literal) reproduction, "copyright's bête noire."[103] At the other end of the spectrum, where the follow-on artist's use is held to be transformative but nonetheless *unjustified*, courts should be especially circumspect in fashioning a remedy, so as to avoid chilling legitimate efforts to build creatively upon preexisting copyrighted material.

1. Injunctive Remedies

Injunctive relief will typically be appropriate in follow-on infringing work situations, ordinarily in the form of a mandatory injunction that proper attribution be given whenever at all possible.[104] Requiring attribution not only preserves the human actualization interests of the initial artist but could also promote follow-on artistic endeavors by encouraging preemptive, voluntary attribution "best practices" among follow-on artists. Widespread adoption of such best practices could help to establish a "safe harbor" for limiting damage awards, particularly in cases wherein the follow-on artist demonstrates a reasonable belief that her unauthorized use was fair.[105] For example, had attribution been provided in connection with Andy Warhol's further use of Lynn Goldsmith's photograph, given the evidence of Warhol's creative additions and Goldsmith's practice of licensing her work for "artist reference" use, the award of a reasonable license fee would seem to be sufficient compensation for Warhol's unauthorized creation of a derivative work.[106]

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102. *See* 17 U.S.C. §§ 502–06.

103. 598 U.S. at 528.

104. For example, such relief may not be possible where the follow-on work has been sold to a party beyond the court's jurisdiction.

105. Where the follow-on use includes attribution to the underlying artist, that should typically militate against a finding of misappropriation, leaving only the question as to whether permission should nonetheless have been sought and a concomitant license fee paid. Given the difficulty of delineating the boundary between derivative right uses and aesthetic transformative fair uses which "go beyond" the derivative work right (where attribution has been given), a compensatory award of a reasonable license fee should prove sufficient. Accordingly, some follow-on artists might opt to provide "prophylactic attribution," *even where they believe their use qualifies as transformative a fair use*. Acknowledging the source upon which a transformative work has been derived in no way diminishes the achievement of the follow-on artist.

106. For more information on the importance of attribution to artists see generally K.J. Greene, *Goodbye Copyright? The Rise of Trademark and Rights of Publicity in the Hip-Hop Music Industry*, 27 CHAPMAN L. REV. 335 (2024).

Of course, in some situations, post hoc attribution alone may not be sufficient. Where the follow-on work substantially reflects the creative contributions of the underlying artist notwithstanding significant and meaningful creative contributions by the follow-on artist, a judicial characterization of the follow-on work as a work of *joint authorship* would protect the interests of both artists.[107] As joint authors, each artist would enjoy equal copyrights in the subject work. For example, neither artist would have independent authority to sell or otherwise transfer the work, and each artist would be otherwise required to account to her co-joint author for any revenues derived from exploitation of the work.[108] A characterization of joint authorship would therefore acknowledge the creative achievements and artistic and other interests of both artists, and also preserves society's interest in encouraging both initial and follow-on works.[109]

The key impediment to judicial characterization of unauthorized follow-on works as a works of joint authorship is the requirement imposed by some courts that each author specifically intended to create a joint work.[110] Arguably however, the follow-on artist manifests such "intent," in that she intentionally incorporates her own creative contributions in concert with those of the initial artist, with the specific

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107. *See* 17 U.S.C. § 101 ("A joint work is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of unitary whole.").

108. 17 U.S.C. § 201(a); Childress v. Taylor, 945 F.2d 500, 508 (2d Cir. 1991) ("Joint authorship entitles the co-authors to equal undivided interests in the work . . . ."). Indeed, the risk of post-hoc characterization of an unauthorized follow-on work as a work of joint authorship provides additional incentive to the follow-on artist to give attribution to the underlying artist, as that would thereby likely limit the remedy for any alleged violation of the derivative work right to the payment of a license fee.

109. 945 F.2d at 504:

> In common with many issues arising in the domain of copyrights, the determination of whether to recognize joint authorship in a particular case requires a sensitive accommodation of competing demands advanced by at least two persons, both of whom have normally contributed in some way to the creation of a work of value. Care must be taken to ensure that true collaborators in the creative process are accorded the perquisites of co-authorship. . . . Copyright law best serves the interests of creativity when it carefully draws the bounds of 'joint authorship' so as to protect the legitimate claims of both sole authors and co-authors.

110. *Id.* at 505–06:

> [The legislative history] appears to state two alternative criteria — one focusing on the act of collaboration and the other on the parties' intent. However, it is hard to imagine activity that would constitute meaningful 'collaboration' unaccompanied by the requisite intent on the part of both participants that their contributions be merged into a unitary whole, and the case law has read the statutory language literally so that the intent requirement applies to all works of joint authorship.

goal of creating a unitary (albeit follow-on) work.[111] As for the underlying artist, the necessary "intent" could be found post-hoc, by virtue of her election to seek a characterization of joint authorship as a remedy for the infringement. Accordingly, a finding that both artists "intend" that their respective contributions be considered a joint work is not wholly inconsistent with the prevailing judicial prerequisites to copyright joint authorship.

Finally, courts should resort to the remedy of confiscation of the infringing work in only a narrow group of follow-on artwork infringement cases.[112] While confiscation is a routine remedy in connection with base copying, in follow-on art situations, confiscation could chill legitimate efforts to infuse preexisting works with new purpose or different character. Consequently, the remedy of confiscation should be restricted to those situations in which the follow-on contributions are found by the objective observer to be specious or trivial, such that the result is essentially a non-literal copy of the original work.[113] Such an approach would serve to preserve legitimate efforts to build upon preexisting works, while discouraging sham misappropriation machinations.[114]

2. Monetary Damages

Typically, an award of monetary damages will also be necessary in follow-on artist infringement cases, to address not only the underlying artist's economic interests but also as a dimension of copyright social justice.[115] In calculating these awards, courts should consider any relevant evidence of the underlying artist's preexisting licensing rates and practices. In many cases, such evidence will provide a ready basis upon which to structure an appropriate compensatory award.[116] Alternatively, an award of statutory damages might best serve the goals of copyright in some unauthorized follow-on work cases, especially

111. Of course, the follow-on artist can easily avoid the possibility of a judicial post hoc joint authorship characterization by seeking a license to create a follow-on work, which would typically require only that proper attribution be afforded to the underlying artist.

112. *See* 17 U.S.C. § 503 (impounding and disposition of infringing articles).

113. Confiscation is of course a standard remedy in base reproduction cases. *See* 17 U.S.C § 503(a)(1). Confiscation might also be appropriate in infringing follow-on work cases, where the follow-on work impugns the reputation of or contravenes values important to the underlying artist.

114. For example, the unauthorized works in *Cariou v. Prince*, 784 F.Supp.2d 337, 344 (S.D.N.Y. 2011), *see supra* note 86, discussed the addition of lozenges to plaintiff's photographs, which doctored photographs were then simply blown up in size, could be considered non-literal copies intended to misappropriate plaintiff's work. A court could order that such unauthorized non-literal copies be turned over to the plaintiff copyright owner.

115. *See* Menell & Mtima**,** *supra* note 69, at 502–06.

116. *See* 17 U.S.C. § 504(a)–(b); of course, an award of attorneys' fees might also be appropriate and necessary to make the artist plaintiff whole. 17 U.S.C. § 505.

where there is no pertinent evidence of past licensing conduct.[117] Moreover, the discretionary ranges provided by the statute will enable courts to give due consideration to the *Warhol* assessment factors, such as the degree of any transformation of the underlying work, as well as whether the unauthorized use involved proper attribution to the underlying artist.[118]

V. CONCLUSION

Economic property rights can play an important role in promoting intellectual property endeavors. However, exclusive reliance on economic incentives and metrics needlessly restrains the social utility of copyright, especially where economic instrumentalism is narrowly conflated with the parameters of the commercial marketplace. As manifest in the Warhol decision, copyright as social justice responds to a more fulsome range of individual and societal creative needs and aspirations, and thereby enhances the social function and efficacy of copyright in the total political economy.

117. 17 U.S.C. § 504(c). Statutory damages might otherwise be most appropriate where the infringement is flagrant and/or where the infringing follow-on artist refuses to accommodate a request for proper attribution.

118. Furthermore, given that the plaintiff can elect statutory damages at any time before judgement, she will have an opportunity to assess the evidence of the *Warhol* factors as well as that regarding the defendant's conduct overall, which might indicate that a discretionary damage award to deter inequitable conduct is warranted.