

The Infringement of Free Art

Gregory Day*

ABSTRACT: The fair use test can hinge on market effects: Did the unauthorized copy take sales away from the original artwork? After all, copyright law assumes that a viable market must exist for a work to deserve protection. The issue is that technology has unsettled the economics of creating original art by empowering people to make literature, visual art, music, and other forms of content in unlimited quantities and at zero-prices. This has quietly inspired a few courts to expand the scope of exclusive rights to include non-price interests like one's integrity or reputation (did the copy harm the artist's reputation?) because zero-price art would ostensibly lack a market. While incorporating an artist's integrity or reputation into the analysis might help copyright to promote what actually motivates contemporary artists, it would also enable artists to squelch criticisms, unflattering portrayals, and parodies of their works, frustrating copyright's goal of disseminating new and meaningful expressions.

This Essay explores how copyright should balance fair use and exclusive rights in the era of "free art" by interviewing scores of artists and authors about why they give their works away and what they expect. It finds that producers of zero-price content have devised a unique rule, which has no basis in copyright law: Third parties may copy and use another's zero-price art so long as it remains free. Subjects expressed anxiety that a "soulless corporation" could use their art in a product or advertising campaign, creating the guise of a partnership. One artist insisted that putting a price tag on art transforms it into "merchandise." While copyright assumes that zero-price content generally lacks a protectable market, the interviews show how copying can discourage artists from creating zero-price content or widely sharing it with global audiences. This Essay asserts that the fair use test must modernize, akin to other bodies of law, in recognizing the importance of zero-price

* Assistant Professor, University of Georgia Terry College of Business; Courtesy Appointment, University of Georgia School of Law. Special thanks to all of the artists and authors who answered questions and dedicated their time. The author would also like to thank the *Iowa Law Review* for their tremendous work. In addition, this Essay benefited from everyone who provided helpful comments at the Emory-UGA workshop held at Emory University School of Law as well as the Academy of Legal Studies in Business's Annual Meeting. Additional helpful comments were graciously offered by Amy Adler, Clark Asay, Natalie Bryant, Brian Frye, Dustin Marlan, Joe Miller Nicole Morris, and Mike Schuster. The author would also like to thank Bill Bush of the University of Georgia School of Law for his research assistance.

markets. After all, the rise of free art has revolutionized the creative process by fostering new mediums and expressions as well as perspectives of those who were historically excluded from the arts—copyright’s precise goal.

I. INTRODUCTION.....	748
II. THE FAIR USE OF FREE ART	756
A. <i>THE MONOPOLY RIGHTS CONFERRED BY A COPYRIGHT</i>	756
B. <i>ENCOURAGING CREATION THROUGH FAIR USE</i>	758
C. <i>THE STRUGGLE TO FIT ZERO-PRICED CONTENT INTO COPYRIGHT LAW</i>	762
1. Fair Use in the Absence of Sales, Licenses, and Priced Transactions	762
2. The Split over Non-Price Economic Injuries and Moral Rights	764
III. ART IN A WORLD WITHOUT SCARCITY	768
A. <i>HOW TECHNOLOGY HAS REVOLUTIONIZED AND DEMOCRATIZED THE (ART) MARKET</i>	768
B. <i>DOUBTS CAST ON FAIR USE BY ZERO-PRICED ART</i>	773
IV. WHY DO ARTISTS REALLY CREATE AND SHARE (FREE) ART?	774
A. <i>QUALITATIVE RESEARCH</i>	775
1. The Fairness of Appropriating Zero-Price Art.....	775
2. Copying’s Economic Effects on Fair Use.....	776
3. The Consequences of Thin Copyright Protection.....	779
B. <i>ZERO-PRICE MARKET EFFECTS AND REFORMING THE FOURTH FACTOR TO PROMOTE FREE ART</i>	781
V. CONCLUSION	784

I. INTRODUCTION

Whether an artwork’s market was harmed by unauthorized copying is essential to copyright protection as well as fair use. Since copyright is said to promote economic incentives, a theory is that creativity would languish if acts of copying prevented artists from recouping the sunk costs of using scarce resources like canvasses and books.¹ Copyright may also enable an artist to

1. Amy Adler & Jeanne C. Fromer, *Memes on Memes and the New Creativity*, 97 N.Y.U. L. REV. (forthcoming 2022) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911640 [<https://perma.cc/4WFC-F5SP>] (restating essential assumptions of copyright, including “that authors want their works not to be copied without their permission because otherwise they will be harmed and disincentivized to create, and that authors can make money directly off their

boost their work's value by making it in scarce quantities—e.g., Edition 1 of 5—which again copying would frustrate. But a party can generally copy another's work without permission or compensation when its market has gone unscathed.²

A primary reason why copyright allows third parties to abrogate an artist's exclusive rights *in fair use* is paradoxically to foster the arts.³ In fact, scholars describe acts of copying like digital sampling and appropriation art as “the central mode of creativity in contemporary culture.”⁴ Given copyright's economic premise, whether an act of copying is considered fair use has often hinged on market effects: The analysis's fourth prong inquires into whether the copy has deprived the original artist of sales (infringing) or created such a novel expression that the original's market remains intact (fair use).⁵ When a work is unlikely to generate revenue, fair use tends to prevail because copyright, as the theory goes, can hardly boost the work's value or incentivize its creation.⁶

creative works by exercising their exclusive rights”); *see also* John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1459 (2013) (“Absent copyright law, a creator—who must recoup her creation costs by charging above-marginal-cost prices—would be unable to compete effectively with a noncreator. As a result, there would generally be no *ex ante* incentive to author creative works.”).

2. *See* Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1748–51 (2012) (explaining the manner in which exclusive rights are intended to foster the incentives to create art, whereas the corollary is that the absence of copyright would cause artists to underproduce art).

3. Clark D. Asay, Arielle Sloan & Dean Sobczak, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 915 (2020) (“Courts use fair use as an ‘equitable rule of reason’ to permit socially beneficial uses of copyrighted works that copyright law, strictly applied, would otherwise bar. The doctrine thereby guarantees ‘breathing space within the confines of copyright.’” (footnotes omitted)); *see also* 17 U.S.C. § 107 (2018).

4. Amy Adler, *Fair Use and the Future of Art*, 91 N.Y.U. L. REV. 559, 562 (2016) (discussing the extent and importance of fair use in creating new works of art).

5. *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013) (“[T]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original, even though ‘the fair use, being transformative, might well harm, or even destroy, the market for the original’” (quoting *Castle Rock Ent., Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 145 (2d Cir. 1998))).

6. *See, e.g., Dhillon v. Does* 1–10, No. C 13-01465, 2014 WL 722592, at *6 (N.D. Cal. Feb. 25, 2014) (“The Court finds that the defendant's use of the protected work had no negative impact upon the potential market for, or value of, the headshot photo [S]he . . . [n]ever sought or received a licensing fee from anyone at any time in connection with the use of the headshot photo.”); *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 25 (1st Cir. 2000) (“There is no evidence, however, that such a market ever existed in this case. Núñez does not suggest that he ever tried to sell portfolio photographs to newspapers”); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 91 (2d Cir. 2014) (“[W]hile ‘[t]he immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor,’ the ‘ultimate aim is, by this incentive, to stimulate creativity for the general public good.’” (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526–27 (1994) (second alteration in original))); *Righthaven, LLC v. Jama*, No. 2:10-CV-1322, 2011 WL 1541613, at *4–5 (D. Nev. Apr. 22, 2011) (noting that the holder had purchased the picture to enforce for the purposes of litigation rather than commerce: “[T]he use is non-commercial; thus, no presumption of harm arises [T]he plaintiff has failed to

The issue is that art may no longer exist in traditional markets. Whereas copyright tends to assume that artists are economically motivated, the digitization process, smartphone, internet, and social media have enabled artists to make “free” literature, music, and visual art, which can then be copied at no loss of quality and distributed to global audiences at zero costs.⁷ As artists *choose* to reject paid projects, share content for free, and welcome appropriation, the goal is often to cultivate their reputation as an activist or non-commercial creator rather than to make money.⁸ This development has altered the arts by allowing individuals to innovate new forms of content without physical mediums or sellable qualities such as street art⁹ and conceptualism.¹⁰ So how should copyright promote the arts when a work’s creative or monetary value is not reflected by its exclusivity or price?

For instance, a possible analysis might suggest that many of Banksy’s works lack a copyrightable market because he sells virtually none of his pieces but instead installs them in public places where he cannot control or sell his art.¹¹ Other artists have similarly accrued fortunes despite freely sharing their works. For instance, even though anyone can obtain an exact unit of the digital piece *Everdays: The First 5000 Days*, the work’s artist, Beeple, sold a non-fungible token of it for \$69,000,000.¹² As such, a work’s value or meaningfulness

allege that a ‘market’ exists for its copyright at all, and the court declines to simply presume the existence of a market” (citing *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1121 (D. Nev. 2006)); *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1277 (11th Cir. 2014) (ruling that the lack of available licenses for a work suggests that the copyright holder has no expectations of profit, negating claims of a viable copyright market); *see also* Andrew Gilden, *Copyright’s Market Gibberish*, 94 WASH. L. REV. 1019, 1021 (2019) (“[C]ourts and scholars now frequently insist that rightsholders can *only* challenge the use of a work if it implicates a genuine economic interest in the protected work.”).

7. Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461 (2015) (describing the waning importance of scarcity in the arts, despite its longstanding importance in economics); Salil K. Mehra, *Competition Law for a Post-Scarcity World*, 4 TEX. A&M L. REV. 1, 2–3 (2016) (discussing the effects of technology on dropping the marginal cost of goods to close to zero).

8. *See, e.g.*, *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998) (providing an example of a copyright holder who issued nonexclusive licenses to use the copyrighted work for free so long as the derivative works are offered for free as well).

9. *See, e.g.*, EXIT THROUGH THE GIFT SHOP (Paranoid Pictures 2010) (explaining how technology explains the modern popularity of street art); Giovana Edid, *Democratization of Art: The Rise of a New Art Market’s Paradigm*, ONE ART NATION (Dec. 9, 2016), <https://www.oneartnation.com/democratization-of-art-the-rise-of-a-new-art-markets-paradigm> [<https://perma.cc/C6T2-ZWRS>].

10. Emily Gosling, *Art Apps, Instagram, and the “Democratization” of Creativity: How Digital Is Changing Art-Making and Being an Artist*, AIGA EYE ON DESIGN (May 30, 2018), <https://eyeon.design.aiga.org/art-apps-instagram-and-the-democratization-of-creativity> [<https://perma.cc/Q6Z5-WQ4J>].

11. Banksy has sued appropriators for trademark infringement but claims that “copyright is for losers.” Enrico Bonadio, *Banksy Finally Goes to Court to Stop Unauthorised Merchandising, Despite Saying Copyright Is for Losers*, CONVERSATION (Feb. 25, 2019, 7:28 AM), <https://theconversation.com/banksy-finally-goes-to-court-to-stop-unauthorised-merchandising-despite-saying-copyright-is-for-losers-112390> [<https://perma.cc/6YXW-UHF4>].

12. Abram Brown, *Beeple NFT Sells for \$69.3 Million, Becoming Most-Expensive Ever*, FORBES

can be untethered from its exclusivity, casting doubts on whether premising fair use in market effects continues to make any sense.

This issue is especially glaring when a third party has copied *and profited* from another's zero-price art. For instance, Jeresneyka Rose created a digital portrait of the late Nipsey Hussle, which she shared over the internet despite its commercial potential: "I knew it would kind of go crazy on the internet, but I didn't want to . . . sell it, unless I'm donating it to a nonprofit [Hussle] may have had or to his family."¹³ Even though Rose intended for her image to remain free, Walmart sold prints of it for \$14.98 without receiving her permission or paying royalties.¹⁴ Walmart's decision to appropriate Rose's art was perhaps driven by the thinness of her copyright; after all, a conventional analysis might suggest that Rose's image lacked a market due to her preference not to sell or license it.

Consider also the controversy stirred by Richard Prince who took images of the SuicideGirls from their public Instagram account; he exhibited the posts at the Gagosian Gallery and then sold prints for \$90,000 a piece (see below).¹⁵ And in a dispute involving the street artist REVOK—who installs his work in public spaces for society to enjoy at no cost¹⁶—the clothing-retailer H&M featured one of his pieces in an ad campaign, suggesting that REVOK had vested anyone with the right to copy his art when he abandoned the ability to control or profit from it.¹⁷

(Mar. 11, 2021, 10:03 AM), <https://www.forbes.com/sites/abrambrown/2021/03/11/beeples-art-sells-for-693-million-becoming-most-expensive-nft-ever/?sh=6203b05e2448> [<https://perma.cc/JZ8L-MNKV>].

13. Heidi Beedle, *Jeresneyka Rose Was Surprised to Find Walmart Carrying Her Artwork*, SE. EXPRESS (Mar. 1, 2021), https://www.southeastexpress.org/news/jeresneyka-rose-was-surprised-to-find-walmart-carrying-her-artwork/article_f70bffb2-7aab-11eb-8a0b-37c738854670.html [<https://perma.cc/V6SW-NNQB>] (alteration in original).

14. *Id.*

15. Jessie Heyman, *SuicideGirls Respond to Richard Prince in the Best Way Possible*, VOGUE (May 28, 2015), <https://www.vogue.com/article/suicidegirls-richard-prince> [<https://perma.cc/X2E8-PA6H>].

16. Bucky Turco, *H&M Surrenders After Graffiti Writers Declare War*, DAILY BEAST (last updated Mar. 15, 2018, 9:39 PM), <https://www.thedailybeast.com/graffiti-writers-declares-war-on-handm-after-fashion-chain-claims-they-have-no-right-to-their-own-work> [<https://perma.cc/GE6Y-3DUF>]; and Sonia Rao, *H&M's Battle with the Artist Revok Shows How Street Art Is Being Taken Seriously*, WASH. POST (Mar. 16, 2018), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/03/16/hms-battle-with-the-artist-revok-shows-how-street-art-is-being-taken-seriously> [<https://perma.cc/2MXM-8WTU>].

17. Jenna Amatulli, *People Are Boycotting H&M Over Alleged Infringement of an Artist's Graffiti*, HUFFPOST (Mar. 15, 2018, 2:09 PM), https://www.huffpost.com/entry/hm-boycott-graffiti-copy-right-infringement_n_5aaa835ce4b045cdoaf5083 [<https://perma.cc/SK6T-SS4K>].



[Richard Prince's exhibit on the left, H&M's advertisement on the right]

The (ir)relevance of market effects has not only led observers and judges to describe fair use's framework as woefully outdated,¹⁸ but a few courts have sought to update the analysis by characterizing an artist's reputation or integrity as a protectable economic interest—even in the absence of monetary damages.¹⁹ One theory is that copyright must guard whatever artists value, suggesting that creative markets should be construed more broadly than sales or licenses.²⁰ If more courts adopt this approach, it could potentially revolutionize the arts by expanding the scope of exclusive rights to the detriment of fair use.

But to most courts, the fair use analysis must continue to assess market effects in exclusively dollars. If copyright protected interests like integrity or reputation, artists could suppress criticisms or parodies of their works and thereby undermine copyright's goal of bringing novel expressions to the public.²¹ Also, Congress passed the Visual Artists Rights Act ("VARA") to enact a minimalist slate of moral rights in compliance with the Berne Convention (an international organization formed in 1886 and joined by the United

18. See, e.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1237 (11th Cir. 2014) ("[T]echnological advances have created a new, more efficient means of delivery for copyrighted works, causing copyright owners and consumers to struggle to define the appropriate boundaries of copyright protection in the new digital marketplace.").

19. See, e.g., Eileen Kinsella, *A Street Artist Is Suing a Grocery Chain for Allegedly Using His Work in an Oprah-Narrated Super Bowl Ad Without His Consent*, ARTNET: NEWS (Aug. 27, 2019), <https://news.artnet.com/art-world/hyvee-mural-street-artist-lawsuit-1636273> [<https://perma.cc/W3WS-RLHS>]. CAW painted a mural on a building which the grocery store Hy-Vee used in advertising. Similarly, Julian Rivera discovered that Ellen DeGeneres had used his signature "Love" image in a Walmart clothing line. Helen Stoilas, *Street Artist Sues Ellen DeGeneres and Walmart for Copyright Infringement*, ART NEWSPAPER (July 30, 2019), <https://www.theartnewspaper.com/news/street-artist-sues-ellen-degeneres-and-walmart-for-copyright-infringement> [<https://perma.cc/ZF6X-M9HF>].

20. Jane C. Ginsburg, *Fair Use Factor Four Revisited: Valuing the "Value of the Copyrighted Work"*, 67 J. COPYRIGHT SOC'Y U.S.A. 19, 20 (2020) (discussing how digital markets have perhaps altered the concept of a market with respect to the fourth factor of the fair use analysis).

21. *Authors Guild, Inc. v. Hathitrust*, No. 11 CV 6351, 2013 WL 603193, at *1 (S.D.N.Y. Feb. 15, 2013) ("[T]he purpose of copyright is to 'enrich[] the general public through access to creative works . . .'" (second alteration in original) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994))).

States in 1988, which endeavors to harmonize national laws with respect to copyright law and moral rights).²² If copyright fostered moral rights such as reputation or integrity, the system might expand beyond the limits set by Congress into areas rejected by Congress. Even if non-price factors affect the economic incentives to create, the orthodox approach is that reputation and integrity (1) cannot satisfy copyright's economic premise, (2) might actually impede copyright's purpose, and (3) would intrude into areas repudiated by Congress.²³

Given the challenges of differentiating infringement from fair use, this Essay reconsiders how courts should identify fair use by exploring what actually motivates artists. It interviews scores of authors and artists about their expectations, delving into what constitutes an artistic market in the post-scarcity economy. The issue is whether copyright should look beyond prices and revenue to factors like reputation or integrity as artists divorce themselves from traditional markets.

The interviews indicate that copyright must differentiate between priced and zero-price markets *just like artists do*. Content creators have developed new rules and norms about appropriation—which have little basis in copyright—hinging on whether an original work was initially shared for free or sold for a price. While copyright assumes that a work tends to lack a market without sales or licenses, subjects described the necessity of preserving their art's "free" nature against acts of commercial copying.²⁴ A chief fear was that a "soulless corporation" could commercialize an artist's work in a product or advertising campaign, threatening their credibility by creating the guise of a partnership.²⁵ But instead of rejecting all copying, subjects welcomed appropriation so long as their art remained free because it allowed them to influence the creative process via another's work.²⁶ So despite copyright law, or perhaps because of it, artists have pioneered new rules of when appropriation is acceptable based on whether the initial work was made for a profit.

22. See generally Graeme W. Austin, *The Berne Convention as a Canon of Construction: Moral Rights After Dastar*, 61 N.Y.U. ANN. SURV. AM. L. 111 (2005) (explaining the role of moral rights in the United States' ratification of the Berne Convention).

23. In one case, although the challenged copying caused the plaintiff privacy and reputational damages—as she was subjected to a fatwa due to the copying—the court ruled that copyright may only protect *commercial* interests, which concern the works value and marketability. See, e.g., *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) (investigating whether the copyright holder could expect economic gain from the contested work); and Gilden, *supra* note 6, at 1021 ("Copyright law in the United States today is typically justified by the need to provide authors with economic incentives to create original works.").

24. See *infra* Section IV.B.

25. Telephone Interview with Beau Stanton (Nov. 2, 2019) (on file with author).

26. See Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 357 (2016) (explaining the role of "raw material" in copyright); see also JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 274 (2015) (explaining that the artistic create for the art, and money provides the means for this, rather than the ends).

In fact, zero-price art has not only democratized the creative process but also fostered new artforms, expressions, and viewpoints. Whereas affluent parties had long dominated the arts evidenced by those who received art degrees,²⁷ entered the profession,²⁸ and collected art,²⁹ technology has eroded the costs of making art in ways increasing the scope of people who may engage in the creative process.³⁰ By promoting diverse viewpoints and removing gatekeepers like galleries, dealers, and publishers, zero-price art has paved the way for new forms of expressions like street art³¹ and digital sampling.³² These effects—i.e., greater spectrums of people who may create and enjoy novel content—promote copyright’s goal of enriching *society*.³³

The problem, as this Essay finds, is that artists would sometimes underproduce zero-price art if they lacked exclusive rights.³⁴ Due to threats of unlimited appropriation, subjects discussed abandoning the creation and sharing of zero-price content in favor of making art for private actors like galleries and auction houses.³⁵ Those who would otherwise benefit society with free art have privatized the creative process or even withdrawn from it. The implication is that the thinness of exclusive rights attached to free art has diminished the incentives to make it, casting doubt on copyright’s emphasis on conventional markets.

27. See Joy Starkey, *History of Art: A Degree for the Elite?*, GUARDIAN (Jan. 9, 2013, 6:59 AM), <https://www.theguardian.com/education/2013/jan/09/history-of-art-a-degree-for-the-elite> [https://perma.cc/9767-H6EN].

28. See Meilan Solly, *Wealth Is a Strong Predictor of Whether an Individual Pursues a Creative Profession*, SMITHSONIAN MAG. (May 2, 2019), <https://www.smithsonianmag.com/smart-news/wealth-strong-predictor-whether-individual-pursues-creative-profession-180972072> [https://perma.cc/4HKR-576H]; Kristen Bahler, *Want to Be an Artist? Hope Your Parents Are Loaded*, MONEY (Apr. 23, 2019), <https://money.com/rich-people-get-more-creative-jobs> [https://perma.cc/YNA7-PTTE].

29. See Rachel Wetzler, *How Modern Art Serves the Rich*, NEW REPUBLIC (Feb. 26, 2018), <https://newrepublic.com/article/147192/modern-art-serves-rich> [https://perma.cc/9UFC-FU8C]; see also Sangeeta Singh-Kurtz, *For the First Time in Nearly a Decade, Rich People Invested More in Art than Wine*, QUARTZ (Mar. 23, 2018), <https://qz.com/quartz/1235444/for-the-first-time-in-nearly-a-decade-rich-people-invested-more-in-art-than-wine> [https://perma.cc/SP65-C6QX] (describing the investing patterns in art of the rich).

30. Gosling, *supra* note 10.

31. See, e.g., EXIT THROUGH THE GIFT SHOP, *supra* note 9 (explaining how technology explains the modern popularity of street art); see also Edid, *supra* note 9.

32. See Mike Schuster, David Mitchell & Kenneth Brown, *Sampling Increases Music Sales: An Empirical Copyright Study*, 56 AM. BUS. L.J. 177, 182–87 (2019) (describing the origins and legal history of sampling).

33. *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 350 (S.D.N.Y. 2017) (“These protections are designed to further the essential purpose of copyright law: the promotion of ‘not simply individual interests, but—in the words of the Constitution—’the progress of science and useful arts’ for the benefit of society as a whole” (quoting *TCA Television Corp. v. McCollum*, 839 F.3d 168, 177 (2d Cir. 2016))).

34. See *infra* Subsection I.I.C.2 and accompanying text (discussing the courts’ refusal to protect reputational interests as non-economic activity).

35. See *infra* Section III.A.

These findings inform common sense ways of modernizing fair use for the contemporary incentives of creating art. Instead of expanding copyright to include all types of interests valued by artists—which would diminish fair use and render an amorphous test to apply—the analysis must understand that “free” art can exist in a zero-price market which copying may discourage. To do so, the fourth factor should lean towards infringement if an act of copying sought a commercial purpose and thus frustrated the original’s zero-priced market. Not only would this proposal further the goals of both copyright and fair use by creating knowledge and promoting meaningful art, but it would also align copyright with the norms established by today’s artists but missed by the fair use analysis.

Note that the zero-price phenomenon spans further than the arts. The term “zero-price” arose from research asserting that the term “free” is a misnomer.³⁶ Scholars asserted that it is now common for Google, Facebook, and similar companies to make services like search results and social media available at zero-prices yet users do in fact “pay” with data, attention, or other forms of consideration.³⁷ The realization of zero-price markets has notably affected bodies of law such as antitrust; for instance, some courts and scholars insisted at first that free services are insufficiently economic to fit the Sherman Act’s framework, though most authorities have now concluded that zero-price markets exist at the forefront of today’s economy.³⁸ The point is that zero-price goods prevail in a market which, while somewhat different than a market of priced goods, is substantial and important.

This Essay proceeds in three Parts. Part II examines zero-prices in the fair use analysis. It first explains that, while copyright is meant to foster the arts, fair use achieves the same goals as exclusive rights by limiting this grant. But since this framework emphasizes prices, zero-price works would typically receive modest or nominal copyright protection. Part III explores the ways that technology has unwound the concept of scarcity; this has not only evolved the process by which artists approach the creative process but also cast doubt on the fair use analysis. Part IV synthesizes scores of interviews about the motivations to create free art, the ways that copying discourages it, and how copyright could, but currently fails to, promote modern creativity. This leads to strategies of reforming the fair use analysis to account for the non-monetary incentives to create noteworthy forms of art.

36. See John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 524–26 (2018) (discussing the problems inherent to the term “free”).

37. See John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 152 (2015) (explaining types of valuable consideration in zero-price markets).

38. See generally Gregory Day, *Antitrust, Attention, and the Mental Health Crisis*, 106 MINN. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3816978 [<https://perma.cc/Wg7N-NVYE>] (explaining how federal agencies and antitrust courts have over the past few years formed a consensus regarding zero-price markets).

II. THE FAIR USE OF FREE ART

Although fair use and exclusive rights are both meant to foster the arts, copyright's purpose is to prevent copying whereas fair use permits it. To assess when an unauthorized copy entails fair use, the analysis has often turned on economic effects: One can typically copy another's art in fair use so long as the original's market remains intact.³⁹ A split has emerged, though, about whether an artist's market may include non-price interests such as reputation, integrity, or privacy.⁴⁰ But since most courts measure an artist's market in exclusively dollars,⁴¹ the reality is that one who has given their art away for free will likely struggle to prevent copying. To explain this landscape, Sections A and B explore the competing and complimentary goals of fair use and copyright. Section C shows the difficulty of establishing an infringement claim without monetary damages as well as discusses why some courts have split over whether an injury to one's reputation may entail a copyright harm.

A. THE MONOPOLY RIGHTS CONFERRED BY A COPYRIGHT

Many courts and scholars subscribe to the utilitarian theory of copyright that the purpose of exclusive rights is to generate *economic* incentives.⁴² The presumption is that artists would lack motivation if third parties could routinely copy their works without permission or compensation.⁴³ For example, an appropriator may usurp sales that would otherwise flow to the original artist.⁴⁴ Third parties could also flood the market with copies of one's art, diminishing its value by increasing its supply.⁴⁵ And whereas most artists incorporate the costs of creation into their works' prices, third parties can avoid these costs, which would enable the copier to undersell the original artist.⁴⁶ In any of these scenarios, artists would ostensibly struggle to profit

39. See *infra* Section II.B (describing the emphasis placed by the courts on interpreting the fair use factors in a manner promoting copyright's economic premise).

40. See *infra* notes 66–74 and corresponding discussion; see also Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1257 (11th Cir. 2014) (finding that the copyright holder's refusal to license work doesn't diminish the market for that work).

41. See, e.g., Garcia v. Google, Inc., 786 F.3d 733, 744–45 (9th Cir. 2015).

42. See, e.g., Fromer, *supra* note 2, at 1750–52 (discussing copyright's utilitarian purpose).

43. See John Cirace, *When Does Complete Copying of Copyrighted Works for Purposes Other than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases*, 28 ST. LOUIS L.J. 647, 649–50 (1984) (explaining that unauthorized copying can undermine the incentives to create).

44. See Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006) (discussing the copy's effect on the market in assessing fair use).

45. See Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 DUKE L.J. 203, 219 (2012) (explaining that copyright prevents another's usage so to avoid economic harm).

46. Oren Bracha & Talha Syed, *Beyond the Incentive—Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1849 (2014) (“Nonexcludability contributes to the [public goods] problem by factoring into the gap between the costs of innovation (i.e., initially generating the information good), and the costs and speed of imitation (i.e., replicating a good generated by another). When the costs of imitation are substantially lower than those of creation

from the creative process and thus discourage society from making original art.⁴⁷

Copyright overcomes the above problems by “grant[ing] the copyright holder ‘exclusive’ rights to use and to authorize the use of his work.”⁴⁸ For a term of the author’s life plus 70 years, copyright offers the right to reproduce, prepare derivative works, distribute copies, display, and record the original work.⁴⁹ To do so, the system sanctions acts of infringement with monetary damages and equitable relief.⁵⁰

Notice that the copyright system is premised—like economics in general—on scarcity. Economic theory holds that a good’s value should increase as its availability declines.⁵¹ In the same vein, copyright creates artificial scarcity by allowing artists to restrict their work’s output and prevent copying.⁵² Illustrating the role of scarcity in copyright’s scheme, many artists list their work’s edition number to signal limited output (e.g., “Edition 1 of 20”) while the Wu Tang Clan issued only a single unit of *Once upon a Time in Shaolin* which it auctioned for \$2 million.⁵³ In fact, copyright is called a “limited

and imitators cannot be excluded from accessing the work, prices may drop to a level that prevents the creators from appropriating enough of the social value of the work to recover their development costs.”).

47. See Fromer, *supra* note 2, at 1746 (“According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with just enough incentive to create artistic, scientific, and technological works of value to society by preventing certain would-be copiers’ free-riding behavior.”).

48. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432–33 (1984) (“This protection has never accorded the copyright owner complete control over all possible uses of his work. Rather, the Copyright Act grants the copyright holder ‘exclusive’ rights to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies” (footnotes omitted)).

49. 17 U.S.C. §§ 106, 302(a) (2018); see also *Am. Soc’y for Testing & Materials v. Public Resource.Org, Inc.*, 896 F.3d 437, 445 (D.C. Cir. 2018) (“This copyright, which ‘vests initially in the author or authors of the work,’ and generally endures for at least ‘70 years after the author’s death,’ endows authors with ‘exclusive rights’ to use or authorize the use of their work in six statutorily specified ways, including ‘reproduc[ing] the copyrighted work’ and ‘distribut[ing] copies . . . of the copyrighted work to the public[.]’ ‘Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . .’” (first two alterations in original) (citations omitted)).

50. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688–89 (2006) (reviewing the prediction that copying of one’s original work should lessen the incentives to create).

51. Lemley, *supra* note 7, at 461 (“Economics is based on scarcity. Things are valuable because they are scarce. The more abundant they become, the cheaper they become.”).

52. See Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837, 841 (2007) (“[I]f use or copying were free to all, price would fall to marginal cost. But because marginal cost is lower than the average cost, the original creator would not be able to recover her initial investment and would therefore refrain from making the investment in the first place. Because they are given a right to exclude others from their work, creators can effect artificial scarcity of their intellectual goods, allowing the price of the intellectual goods to increase and the initial investment to be recouped.” (footnotes omitted)).

53. See Andrew Limbong, *Wu-Tang Clan Album Once Owned by Martin Shkreli Sold by U.S. Government*, NPR (July 27, 2021, 3:14 PM), <https://www.npr.org/2021/07/27/102184593/martin>

monopoly” because it allows artists to exclude competition and, in turn, restrict output and raise prices as the typical monopolist would.⁵⁴ Copyright is thus designed to enhance the value of creation versus copying by enabling artists to sell their works in artificially scarce quantities.⁵⁵ But perhaps limiting the scope of exclusive rights may also benefit the arts, as the next Section explains.

B. ENCOURAGING CREATION THROUGH FAIR USE

An important and evolving limitation on an artist’s exclusive rights is fair use, which also relies on economic indicia to promote creativity.⁵⁶ Some of today’s most important artforms copy, use, or incorporate prior works.⁵⁷ As examples, sampling plays a pivotal role in music⁵⁸ while appropriation artists have created powerful works such as Jeff Koons’s oeuvre,⁵⁹ the Barack Obama “Hope” poster,⁶⁰ and similar pieces worth fortunes by individuals like Andy Warhol and Richard Prince.⁶¹ Critics laud appropriation art as “groundbreaking

-shkreli-wu-tang-clan-album-sold [<https://perma.cc/52HQ-FEH6>].

54. See, e.g., David L. Wardle, *Broken Record: Revisiting the Flaws in Sony’s Fair Use Analysis in Light of the Grokster Decision*, 26 LOY. L.A. ENT. L. REV. 1, 2 (2005) (footnotes omitted) (“The government grants authors and inventors limited monopoly rights, in the form of copyrights for artistic expressions and patents for inventions . . .”) (footnotes omitted).

55. See Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217, 1248–50 (“In contrast, once created, intellectual property such as stories and music are not scarce but can be enjoyed by an infinite number of individuals without diminishing the enjoyment of anyone. Nonetheless, we have granted individuals the right to control these works because without such control, stories and music may be underproduced or underdistributed. In other words, the economic justification for copyright is that without the legal recognition of exclusive rights in reproduction and distribution, unauthorized copying would lead to fewer artists writing stories and music and fewer stories and songs being distributed to interested members of the public” (footnotes omitted)).

56. Iowa State Univ. Rsch. Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980) (explaining that the fair use doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”).

57. See Adler, *supra* note 4, at 562.

58. See generally Adam Behr, Keith Negus & John Street, *The Sampling Continuum: Musical Aesthetics and Ethics in the Age of Digital Production*, 21 J. FOR CULTURAL RSCH. 223 (2017) (explaining the importance of digital sampling in music).

59. Benedikt Feiten, Marilyn DeLaure & Moritz Fink, *How the Artist Banksy Helps Us See the Authoritarianism All Around Us*, ALTERNET (Mar. 16, 2017), <https://www.alternet.org/2017/03/culture-jamming-banksy-excerpt> [<https://perma.cc/78UB-Q5KA>]; see also Jonathan Bailey, *Is Jeff Koons a Plagiarist?*, PLAGIARISM TODAY (Nov. 13, 2018), <https://www.plagiarismtoday.com/2018/11/13/is-jeff-koons-a-plagiarist> [<https://perma.cc/YW9D-VRY9>] (discussing the important role of appropriation in Jeff Koons’s work).

60. See Noam Cohen, *Viewing Journalism as a Work of Art*, N.Y. TIMES (Mar. 23, 2009), <https://www.nytimes.com/2009/03/24/arts/design/24photo.html> [<https://perma.cc/273S-5VW2>] (examining the copyright lawsuit between Shepard Fairey who appropriated an image taken by Mannie Garcia for The Associated Press).

61. See Feiten et al., *supra* note 59; and Thomas Fuller, *Richard Prince and the New Meaning of High Art*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/arts/richard-prince-marijuana.html> [<https://perma.cc/ETR5-VRFK>].

and controversial in their bold acts” which “challenge[] conservative academic notions of authorship, originality, and copyright.”⁶² Copying has even been called the primary means of modern creativity.⁶³ Since exclusive rights without fair use would impede the arts, the doctrine empowers artists to use another’s work absent permission or attribution when society would benefit.⁶⁴

Consider the below examples where a unique work emerged from the copying and altering of prior art.



[Shepard Fairey’s work on the right with the original by Mannie Garcia on the left]

The test of whether a copy was fair or infringing employs four 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.⁶⁵

Note that some factors are considered more important than others, though the saliency of each has evolved over the years. Because financial gain is presumed to motivate artists—eighteenth century author Samuel Johnson stated that “[n]o man but a blockhead ever wrote, except for money”⁶⁶—the fourth factor had long received the greatest weight.⁶⁷ The U.S. Supreme Court

62. George Miscamble, *Appropriation and Critical Thinking*, ELOQUENTIA PERFECTA, <https://eloquentiaperfecta.org/appropriation-and-critical-thinking> [<http://perma.cc/4GCC-GTH4>].

63. Adler, *supra* note 4, at 562.

64. See generally Asay et al., *supra* note 3 (describing the application of the fair use analysis to a subsequent work).

65. 17 U.S.C. § 107 (2018).

66. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (alteration in original).

67. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (“The four statutory factors may not have been created equal. In determining whether a use is ‘fair,’ the Supreme Court has said that the most important factor is the fourth”); Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1489

asserted in 1985 that market effects are “undoubtedly the single most important element of fair use,”⁶⁸ which lower courts have quoted dozens of times in the past few years alone.⁶⁹ The conventional logic was that the system must prioritize economic incentives since copyright is an economic doctrine. So when courts assess fair use, it was—and still is—common for them to emphasize prices and money.⁷⁰

However, the Supreme Court altered the course of fair use and sparked debate in 1994 by introducing the concept of “transformative.”⁷¹ The ruling in *Campbell v. Acuff-Rose Music, Inc.* was that 2 Live Crew’s parody of *Pretty Woman* differed materially from Roy Orbison’s version,⁷² remarking that fair use should prevail when the copy “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”⁷³ Over the following decades, *Campbell* generated vibrant discussion about whether the concept of transformative elevated the first factor—i.e., the copy’s purpose—over the fourth factor of market effects.⁷⁴

Today, market effects remain vital, though the concept of transformative has narrowed and sharpened the analysis. To many courts and scholars, the

(2017) (The predominant view of copyright “embrace[s] an economic utilitarian account of intellectual property that seeks to advance the public interest by providing creators with adequate incentives to innovate [and] reject[s] a moral rights account of intellectual property that concerns itself with (among other things) issues of fairness to creators” (footnotes omitted)).

68. *Harper & Row, Publishers, Inc.*, 471 U.S. at 566 (footnote omitted).

69. See, e.g., *Cancian v. Hannabass & Rowe, Ltd.*, No. 7:18-cv-00283, 2019 WL 3268838, at *8 (W.D. Va. July 19, 2019); and *Comerica Bank & Tr. v. Habib*, 433 F. Supp. 3d 79, 95 (D. Mass. 2020).

70. See *Arista Records LLC v. Myxer Inc.*, No. CV 08-03935, 2011 WL 11660773, at *42 (C.D. Cal. Apr. 1, 2011) (asking if the copy “(1) tends to diminish or prejudice the potential sale of the work; or [(2)] tends to interfere with the marketability of the work; or (3) fulfills the demand for the original work” (citation omitted)).

71. See generally *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (discussing the “transformative” concept analyzing the first factor). The term “transformative” was actually a product of a seminal law review article. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

72. *Campbell*, 510 U.S. at 594; and Asay et al., *supra* note 3, at 917–21 (explaining the importance of *Campbell* on the fair use analysis).

73. *Campbell*, 510 U.S. at 579 (emphasis added) (quoting Leval, *supra* note 71, at 1111); see *Gilden, supra* note 26, at 356 (explaining the changes in the legal field regarding copyright law and raw materials).

74. *Blanch v. Koons*, 467 F.3d 244, 251, 259 n.9 (2d Cir. 2006); *Adler, supra* note 4, at 574–75 (“But the application of the test, though not its wording, changed dramatically in 1994. In *Campbell v. Acuff-Rose Music*, the Supreme Court retreated from its market-focused approach that had emphasized the fourth factor. Instead, the Court elevated the first factor of the test and effectively distilled the fair use inquiry into a single question: whether the work is ‘transformative.’ Specifically, a court must ask whether the secondary work ‘adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.’ If the answer is yes, the use is ‘transformative’ and the other factors recede in importance.” (footnotes omitted)).

modern test applies the first and fourth factors in a harmonious analysis.⁷⁵ The inquiry is not whether the copy has merely caused economic harm, but whether sales were *usurped in the same market*.⁷⁶ If a copy exists in a different market—e.g., those who bought the copy would not have purchased the original—the implication is that the copy exists in a separate artistic space, making it transformative.⁷⁷ But a substitute in the same market tends to be infringing because it deprives the original artist of sales in attacking the economic scheme driving copyright law. The U.S. Second Circuit Court of Appeals described this analysis: “[T]he first and fourth factors are closely linked, as ‘the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.’”⁷⁸ This version of fair use seems to denote the resurgence of the fourth factor.⁷⁹

The point is that no matter whether transformative stems from the first and fourth factors combined⁸⁰ or a collage of all four factors,⁸¹ copyright remains tethered to prices. As a notable scholar stated,

[C]opyright law seek[s] primarily to prevent unauthorized copying that *substitutes* for the market of the author’s work. When there is no reason to think that the defendant’s copy will substitute for the

75. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 120 (2d Cir. 2021).

76. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 96 (2d Cir. 2014) (“Added value or utility is not the test: a transformative work is one that serves a new and different function from the original work and is not a substitute for it.”); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614–15 (2d Cir. 2006) (referencing whether there was a “transformative market”); *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013) (using market effects as well as the first factor to measure transformative).

77. *Cariou*, 714 F.3d at 708–09 (“[O]ur concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.’ . . . [N]either Prince nor the *Canal Zone* show usurped the market for those photographs. Prince’s audience is very different from Cariou’s, and there is no evidence that Prince’s work ever touched—much less usurped—either the primary or derivative market for Cariou’s work.” (quoting *Blanch*, 467 F.3d at 258)).

78. *Goldsmith*, 992 F.3d at 120 (citations omitted) (quoting *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015)).

79. See Ginsburg, *supra* note 20, at 20 (“As a result, courts are bestowing greater attention on the other statutory factors, particularly the factor four inquiry into ‘the impact of the use on the potential markets for or value of the copied work.’” (footnote omitted)).

80. See Jacqueline D. Lipton, *Copyright’s Twilight Zone: Digital Copyright Lessons from the Vampire Blogosphere*, 70 MD. L. REV. 1, 59 (2010) (“The first and fourth fair use factors tend to go to the heart of most copyright holders’ complaints because copyrights have become predominantly economic rights in modern markets and most complaints by commercial copyright holders are aimed at protecting their profits.” (footnote omitted)).

81. See e.g., Nicholas B. Lewis, Comment, *Shades of Grey: Can the Copyright Fair Use Defense Adapt to New Re-Contextualized Forms of Music and Art?*, 55 AM. U. L. REV. 267, 288 (2005) (“All four factors of the fair use test consider the transformativeness of a new work, with each factor’s consideration of transformativeness affecting another factor’s consideration.”).

author's work, there is no threat to the author's creative incentives, and thus, no need for copyright protection.⁸²

The issue, as explained next, is that artists or authors who have given their works away for free might struggle to prevent copying, even when an original piece is significant and injuries result.

C. THE STRUGGLE TO FIT ZERO-PRICED CONTENT INTO COPYRIGHT LAW

Copyright may likely afford nominal protection in instances when an artist has failed to earn money or expressed no intention of doing so. The analysis is muddled, however, when an artist can identify an economic harm to their reputation or integrity as opposed to a direct monetary injury. In fact, whether a court can characterize a non-monetary injury to an artist's reputation, integrity, or attribution as affecting their original work's value is emerging as a divisive issue.⁸³ Consider how a court might apply the fair use analysis in the following scenarios: (1) in the absence of prices and (2) when an artist claims an indirect type of economic injury arising from, for example, reputational costs.

1. Fair Use in the Absence of Sales, Licenses, and Priced Transactions

Fair use may likely prevail when a work lacks a history of priced sales or licenses. The theory is that copying would do little to unsettle the economic incentives of creating original art if individuals had no expectation or likelihood of profiting. While other factors remain relevant, case law emphasizes market effects and thinness of protection without a pecuniary injury.⁸⁴

Take the courts' hostility to infringement claims when artists have refused to license their works. In a pair of cases involving part owner of the

82. Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2441 (2016) (emphasis added) (footnote omitted); see also *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 395 (S.D.N.Y. 2014);

Crucially, this factor "is concerned with only one type of economic injury to a copyright holder: the harm that results because the secondary use serves as a substitute for the original work." Thus any economic harm caused by transformative uses does not factor into this analysis, "because such uses, by definition do not serve as substitutes for the original work."

id. (quoting *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014)); *HathiTrust*, 755 F.3d at 99 ("In other words, under Factor Four, any economic harm' caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.").

83. See generally Ginsburg, *supra* note 20 (explaining the rise of courts counting types of non-monetary harms as affecting a work's value).

84. See Lydia Pallas Loren, *Law, Visual Art, and Money*, 22 LEWIS & CLARK L. REV. 1331, 1348 (2018) ("How valuable the copyright right actually turns out to be depends on the market demand for the work—how popular it is, how much others are willing to pay for copies of it, and other standard market-based factors, e.g. how good the marketing and distribution channels are.").

Miami Heat, Raanan Katz, he sought to suppress an unflattering image of himself by acquiring its copyright.⁸⁵ The court noted that infringement claims are stronger when “economic harm . . . would frustrate the purposes of copyright,”⁸⁶ finding that Katz “disavows any interest in *selling or profiting* from the Photo.”⁸⁷ The copy was ruled fair because “there is no evidence . . . use of the Photo had or would have any impact upon any actual or potential market”⁸⁸ In a similar case, “adult” images of Barbie called “Dungeon Dolls” were found not only to deliver a distinct message but also Mattel’s market remained intact—i.e., the copies rendered no impact “on the copyright owner’s *expectation of gain*”—as Mattel was unlikely to license disparaging images of Barbie.⁸⁹ The same results have occurred when an artist shared content at zero prices as opposed to refusing to license it. Ashley Furniture provides free images of the company’s furniture to franchisees, which Value City Furniture copied.⁹⁰ The copy was considered fair because Ashley Furniture sells furniture products but gives away photographs at no cost, defying the existence of a market.⁹¹ It was similarly held in *Dhillon v. Does 1-10* that copies of headshots had no effect on the incentives to produce the images, as “the plaintiff has failed to allege that any market ever existed for the sale or licensing of the headshot photo”⁹²

There are instances, however, when rightsholders supported an infringement claim in the absence of priced transactions; here, one must generally show that they intended to capitalize on a future market. For example, reclusive author J.D. Salinger sought to prevent third parties from printing his personal letters.⁹³ Salinger’s refusal to license was, to the court, excusable due to the royalties—estimated to exceed \$500,000—that his estate hoped to earn after his death.⁹⁴ Similarly in *Monge v. Maya*, infringement was

85. *Katz v. Google Inc.*, 802 F.3d 1178, 1184 (11th Cir. 2015); *Katz v. Chevaldina*, No. 12-22211-CIV, 2014 WL 2815496, at *9-10 (S.D. Fla. June 17, 2014).

86. *Google Inc.*, 802 F.3d at 1184 (quoting *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014)).

87. *Chevaldina*, 2014 WL 2815496, at *9 (emphasis added).

88. *Google Inc.*, 802 F.3d at 1184.

89. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 805 (9th Cir. 2003) (emphasis added) (citation omitted) (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997); see also *id.* (“Given the nature of Forsythe’s photographs, we decline Mattel’s invitation to look to the licensing market for art in general. Forsythe’s photographs depict nude and often sexualized figures, a category of artistic photography that Mattel is highly unlikely to license. “The existence of this potential market cannot be presumed” (quoting *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 972 (9th Cir. 1992))).

90. *Ashley Furniture Indus., Inc. v. Am. Signature, Inc.*, No. 2:11-cv-427, 2014 WL 11320708, at *10 (S.D. Ohio June 25, 2014).

91. *Id.* at *10-11.

92. *Dhillon v. Does 1-10*, No. C 13-01465, 2014 WL 722592, at *1, 6 (N.D. Cal. Feb. 25, 2014).

93. *Salinger v. Random House, Inc.*, 811 F.2d 90, 92-93 (2d Cir. 1987), *opinion supplemented on denial of reh’g*, 818 F.2d 252 (2d Cir. 1987).

94. *Id.* at 99 (“He is entitled to protect his *opportunity* to sell his letters, an opportunity

found where an individual denied licensing celebrity wedding photographs because he had sold similar images in the past, suggesting he would do so again.⁹⁵

But what if an artist complains of *non-monetary* economic injuries to her market? As explained next, a judicial split has emerged about whether copyright may protect non-price interests affecting an artist's market such as the artist's reputation or integrity.

2. The Split over Non-Price Economic Injuries and Moral Rights

Some courts have begun to conclude that limiting market effects to lost licenses or sales is myopic when an artist was motivated by reputational goals.⁹⁶ The theory is that fair use should consider *indirect* economic effects of copying if it diminished an artist's reputation and, in turn, reduce demand for their work. To John Newman, a clean divide between copyright and moral rights is no longer tenable.⁹⁷ The issue, though, is that inclusion of non-price interests into the fourth factor might suppress novel artworks and thus undermine copyright's purpose. And cases have indeed arisen where courts expanded the fourth factor to embrace non-monetary conceptions of value.

Consider instances where a court found moral rights to entail a protectable interest: Kian Habib uploaded bootleg videos of Prince's performances onto YouTube.⁹⁸ The district court rejected his claim of fair use because Habib's grainy videos could erode the integrity of Prince's music: "[We are] persuaded that Habib's decidedly poor-quality recordings harm the Estate's interest in policing the caliber of secondary uses of Prince's musical compositions. Indeed, the Copyright Act repeatedly demonstrates a commitment to musicians' right to protect the integrity of their compositions."⁹⁹ This form of copying could, after all, levy an indirect type of economic injury if consumers became less likely to purchase Prince albums.

Similarly, the U.S. First Circuit Court of Appeals held that appropriation of a church's religious material could harm the church's reputation if people made errant assumptions of its positions.¹⁰⁰ Like above, the court insisted that

estimated by his literary agent to have a current value in excess of \$500,000.").

95. See *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1168 (9th Cir. 2012).

96. *Bell v. Moawad Grp., LLC*, 326 F. Supp. 3d 918, 929 (D. Ariz. 2018) (finding a copyright holder ostensibly waived protection by virtue of distributing the work online for free); see, e.g., *How to Use Graffiti Art to Improve Your Street Photography*, ADORAMA: 42WEST (Dec. 12, 2017), <https://www.adorama.com/alc/how-to-use-graffiti-art-to-improve-your-street-photography> [<https://perma.cc/6Z5Q-BT5A>].

97. See Newman, *supra* note 1, at 1461–64.

98. *Comerica Bank & Tr., N.A. v. Habib*, 433 F. Supp. 3d 79, 85–88 (D. Mass. 2020).

99. *Id.* at 96.

100. *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1119 (9th Cir. 2000) ("The statute by its terms is not limited to market effect but includes also 'the effect of the use on the *value* of the copyrighted work.' . . . Those rewards need not be limited to monetary

“the fourth factor of the fair use inquiry cannot be reduced to strictly monetary terms. . . . [T]he Copyright Act looks beyond monetary or commercial value and considers other forms of compensation for a work.”¹⁰¹ As one scholar noted, a nuanced way of explaining why the fourth factor should include non-monetary considerations is that matters of integrity or attribution may affect a work’s “value” in ways beyond mere market substitutions.¹⁰²

Most courts, however, assert the opposite: Copyright cannot protect one’s feelings,¹⁰³ privacy,¹⁰⁴ or reputation,¹⁰⁵ even if it might render a form of economic harm.¹⁰⁶ One opinion remarked that copyright is not grounded in morality but rather measures an artist’s injury objectively—i.e., in dollars.¹⁰⁷ In 2015, the U.S. Ninth Circuit Court of Appeals rejected an infringement lawsuit premised on the claim that unauthorized copies eroded the plaintiff’s reputation and privacy:

This relief is not easily achieved under copyright law. Although we do not take lightly threats to life or the emotional turmoil Garcia has endured, her harms are untethered from—and incompatible with—copyright and copyright’s function as the engine of expression.

. . .

rewards; compensation may take a variety of forms.” (citation omitted)).

101. Soc’y of Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 64 (1st Cir. 2012).

102. Ginsburg, *supra* note 20, at 21–27.

103. Mackie v. Rieser, 296 F.3d 909, 917 (9th Cir. 2002) (“[T]he infringement did not in any way influence the market value of ‘The Tango.’ Perhaps recognizing this reality, Mackie sought to introduce evidence of his personal objections to the manipulation of his artwork. Although it is not hard to be sympathetic to his concerns, the market value approach is an objective, not a subjective, analysis. Consequently, Mackie’s subjective view, which really boils down to ‘hurt feelings’ over the nature of the infringement, has no place in this calculus.”).

104. See Gilden, *supra* note 6, at 1038 (“[C]ontemporary courts insist that ‘the protection of privacy is not a function of the copyright law,’” though there are instances where courts “indeed protect[] privacy under the guise of market interests.” (footnote omitted)).

105. Garcia v. Google, Inc., 786 F.3d 733, 745 (9th Cir. 2015) (noting that copyright law cannot provide relief for the plaintiff’s reputation injury); Galvin v. Ill. Republican Party, 130 F. Supp. 3d 1187, 1197 (N.D. Ill. 2015) (“Plaintiffs’ only argument related to market effect is that Defendants’ political commentary harms the reputation of Mr. Galvin’s subjects and thus the value of his photographs. Avoiding this result is simply not a purpose of copyright law.”); Campinha-Bacote v. Evansville Vanderburgh Sch. Corp., No. 3:14-cv-00056, 2015 WL 12559889, at *7 (S.D. Ind. Nov. 5, 2015) (“[T]he unrestricted use of [plaintiff’s] model may negatively affect her professional reputation if the model is used in the ‘wrong context’ or if the false impression is given that she has endorsed its use. However, avoiding this result is simply and clearly not a purpose of copyright law.”).

106. Buccafusco & Fagundes, *supra* note 82, at 2445 (“It is a familiar, even uncontroversial, notion among judges and scholars that American copyright law is not driven by so-called ‘moral’—i.e., non-pecuniary—considerations.” (footnote omitted)); see Dustin Marlan, *Unmasking the Right of Publicity*, 71 HASTINGS L.J. 419, 466 (2020) (claiming that the right of publicity should protect against harms to reputation and dignity as well as commercial interests).

107. Mackie, 296 F.3d at 917.

[A]uthors cannot seek emotional distress damages under the Copyright Act, because such damages are unrelated to the value and marketability of their works.¹⁰⁸

Many courts have held similarly.¹⁰⁹ For example, a photographer took a picture of a political candidate riding in a convertible, which a third party edited to include a sack of money to make the candidate appear like a thief.¹¹⁰ The court denied the photographer's sole claim of market effects—i.e., that appropriation levied reputational costs—as insufficiently economic.¹¹¹ To the court, even if the copy had caused economic harm by eroding his reputation “and thus the value of his photographs. Avoiding this result is simply not a purpose of copyright law.”¹¹²

In *Philpot v. WOS, Inc.*, a concert photographer offered his works at no monetary cost, but sought payment in terms of drinks, food, or other “in kind” items.¹¹³ Importantly, the plaintiff claimed that he demanded attribution of his work which created economic value¹¹⁴ Despite the plaintiff's pleas, the court tilted the fourth factor towards the appropriator, ruling that “[a]lthough the Court accepts that attribution might lead someone to purchase one of Philpot's works, he fails to explain how any amount of advertisement might lead to being paid for two works that he makes available for free.”¹¹⁵

In fact, the inclusion of reputation into copyright's scheme could trespass on the domain of moral rights and impede copyright from achieving its objective. Whereas copyright is supposed to provide economic incentives, moral rights are said to pursue the opposite goal of protecting non-economic qualities like integrity or reputation.¹¹⁶ Some scholars even describe moral

108. *Garcia*, 786 F.3d at 745.

109. *See, e.g.*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1282 (11th Cir. 2001) (Marcus, J., concurring) (“To the extent that Suntrust may have done so to preserve *Gone With the Wind's* reputation, or protect its story from ‘taint,’ however, it may not now invoke copyright to further that goal.”).

110. *Galvin*, 130 F. Supp. 3d at 1190.

111. *Id.* at 1196–97.

112. *Id.* at 1197; *see also* *Peterman v. Republican Nat'l Comm.*, 369 F. Supp. 3d 1053, 1065 (D. Mont. 2019) (“Peterman's own arguments demonstrate the relative strength of the RNC's position on this factor. Peterman argues that ‘[i]t is possible [she] lost additional revenue from customers who might have licensed her images but did not do so because should [sic] could not guarantee the images' exclusivity. In addition, the Montana Democratic Party may not hire [her] in the future to shoot their events because she cannot guarantee her images' exclusivity.’ However, the Copyright Act does not exist to protect artists' general reputations.” (alterations in original) (citation omitted)).

113. *Philpot v. WOS, Inc.*, No. 1:18-CV-339, 2019 WL 1767208, at *2 (W.D. Tex. Apr. 22, 2019).

114. *Id.* at *7.

115. *Id.* at *6–7 (footnote omitted).

116. *See* Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 269–71 (2009) (discussing the non-economic basis of moral rights).

rights as non-pecuniary¹¹⁷ or even “anti-copyright.”¹¹⁸ To emphasize copyright’s tension with moral rights, artists have attempted to eliminate criticisms and parodies of their works by asserting reputational harms; the problem is that such a claim would undermine copyright’s purpose of disseminating new expressions and messages.¹¹⁹ If one could “weaponize” copyright” to extinguish unflattering portrayals and criticisms, the system would impede content promoted by copyright law that would “benefit society’s knowledge base.”¹²⁰

For instance, the Church of Scientology alleged that an unauthorized use of its religious text harmed the Church’s market because the new work portrayed the Church’s founder as a con artist.¹²¹ The court rejected the infringement claim because protecting his reputation would impede the dissemination of salient messages—the opposite of copyright’s purpose.¹²² This too is an improper use of copyright because it sought to impede the creation of a novel and important work.¹²³

Further, rules of statutory interpretation hint that copyright should, or perhaps must, remain distinct from moral rights. Congress passed VARA, not to create a robust slate of moral rights, but to provide only visual works of a “recognized stature” with a limited scope of moral rights.¹²⁴ It took about 100 years for the United States to join the Berne Convention due largely to the organization’s stance on moral rights such as the right to attribution.¹²⁵ As such, the United States enacted a minimalist slate of moral rights that would comply with the Convention.¹²⁶ A logical inference is that courts may not

117. *Id.* at 269 n.37.

118. Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 364 (2018).

119. Buccafusco & Fagundes, *supra* note 82, at 2445.

120. Eric Goldman & Jessica Silbey, *Copyright’s Memory Hole*, 2019 BYU L. REV. 929, 932 (2019) (footnote omitted); *see also* Shyamkrishna Balganes, *Private Copyright*, 73 VAND. L. REV. 1, 3 (2020).

121. *New Era Publ’ns Int’l, ApS v. Carol Publ’g Grp.*, 904 F.2d 152, 159–60 (2d Cir. 1990).

122. *Id.* at 160 (“[E]ven assuming that the book discourages potential purchasers of the authorized biography, this is not necessarily actionable under the copyright laws. Such potential buyers might be put off because the book persuaded them (as it clearly hopes to) that Hubbard was a charlatan, but the copyright laws do not protect against that sort of injury. Harm to the market for a copyrighted work or its derivatives caused by a ‘devastating critique’ that ‘diminished sales by convincing the public that the original work was of poor quality’ is not ‘within the scope of copyright protection.’” (quoting *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1051 (2d Cir. 1983))).

123. *See* Annemarie Bridy, *Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality*, 9 UC IRVINE L. REV. 293, 299 (2019) (reviewing the difficulty with the sculptor’s copyright lawsuit).

124. 17 U.S.C. § 106A(a)(3)(B) (2018).

125. *See* Austin, *supra* note 22, at 116–18 (discussing the problems of enacting moral rights).

126. Xiyin Tang, *The Artist as Brand: Toward a Trademark Conception of Moral Rights*, 122 YALE L.J. 218, 221 (2012) (“The Visual Artists Rights Act of 1990, or VARA, was only reluctantly passed to bring the United States into compliance with the Berne Convention; indeed, the United States resisted joining that international copyright convention in part because of its opposition to

interpret fair use as protecting moral rights since Congress might have rejected this position in enacting VARA. If so, then the implication is that courts can only consider monetary interests as a market effect so as to preserve a clean division between moral rights and copyright.¹²⁷

The point is that courts have begun to wrestle with whether the analysis of market effects may include non-price interests. Nevertheless, the orthodox analysis remains fixated on whether the rightsholder earned revenue from sales or licenses or expects to do so in the future.¹²⁸ And since copyright is supposed to guard economic incentives—and perhaps nothing more¹²⁹—many artists have lost infringement lawsuits when asserting harm to their integrity, reputation, or privacy. Making this issue especially salient, as the next Section explains, the digital era has not only eroded the relevance of conventional economic indicia but also transformed how artists view and create content.

III. ART IN A WORLD WITHOUT SCARCITY

The creative process has evolved in a manner casting doubt on fair use's premise. As artists become able to make content without physical mediums and positive prices, the arts have transformed as well as democratized by empowering historically excluded groups to innovate new types of expressions and messages. The issue is that copyright is premised in classical economic theory yet many artists in today's post-scarcity era reject prices, exclusivity, and other indicia of market economics. Copyright may thus struggle to promote creativity so long as it turns on price signals. Section A of this Part explores the arts' evolution based on zero-prices and the socioeconomic benefits thereof, and then Section B discusses evidence that copyright can no longer identify fair use in especially zero-price markets.

A. HOW TECHNOLOGY HAS REVOLUTIONIZED AND DEMOCRATIZED THE (ART) MARKET

Technology has revolutionized the culture and business of creativity by unwinding the concept of scarcity.¹³⁰ Recall that a good's value has long been modeled as a function of its scarcity: An item's price is expected to rise as it becomes harder to obtain (i.e., scarcer).¹³¹ With art, the historical reality was that people could seldom offer content for free because the scarce nature of

granting artists moral rights.” (footnotes omitted)).

127. Balganes, *supra* note 120, at 5 (asserting that “modern American copyright thinking exhibits a marked reluctance to acknowledge this as a legitimate goal for copyright law, preferring instead to relegate all noneconomic interests to the domain of moral rights”).

128. See *Balsley v. LFP, Inc.*, 691 F.3d 747, 761 (6th Cir. 2012) (ruling that a market existed for adult pictures that the holder sought to suppress because a market could still potentially exist).

129. See, e.g., *Garcia v. Google, Inc.*, 786 F.3d 733, 744–45 (9th Cir. 2015).

130. See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 814–17 (2010) (referring to the “post-scarcity” economy).

131. See *supra* notes 51–55 and accompanying text.

tangible mediums compelled artists to charge positive prices to recoup the sunk costs of recording a song, painting a painting, filming a movie, and so on.¹³² Today, though, technology has altered the arts by allowing people to create and share meaningful content at zero-prices.¹³³ To this end, zero-price art is often distinct and novel from its scarcer and priced counterparts, reflecting a significant level of artistic innovation.

For instance, technology has sparked new mediums (of costless art) such as appropriation.¹³⁴ As for appropriation in music, technology has eased the costs of incorporating and refashioning another's music within a new expression.¹³⁵ One of today's most renowned musicians is Gregg Gillis, known as *Girl Talk*, whose albums are entirely composed of other peoples' music; he adds no (or perhaps minimal) original music and uses a pay-what-you-want-model including a zero-cost option.¹³⁶ Other types of music embracing sampling include hip hop and electronic dance music.¹³⁷ In fact, the "mash-up" has emerged as an integral part of visual art where—akin to musical sampling—paintings, pictures, and prints rely on prior images.¹³⁸ Take artists like Nam June Paik who comment on culture by repurposing others' works, "allowing the viewer to renegotiate the meaning of the original in a different, more relevant, or more current context."¹³⁹ Appropriation and zero-price art

132. See Lemley, *supra* note 7, at 468–69 (discussing the effects of scarcity and physical products on the market for creation and infringing goods).

133. See Newman, *supra* note 37, at 151–52.

134. See *id.*; see also Eyal Gever, *Technology and Art: Engineering the Future*, BBC NEWS (Oct. 4, 2012), <https://www.bbc.com/news/entertainment-arts-19576763> [<https://perma.cc/LWK7-RGGJ>] ("Art is becoming less and less static, taking up many new different shapes, from printing digitally created sculptures in 3D to flash-mobs to photographers lining up hundreds of naked volunteers on the beach."); Glynn S. Lunney, Jr., *A Natural Right to Copy*, 99 B.U. L. REV. 2491, 2493 (2019) (asserting that copying is a natural and common form of activity and art).

135. See generally Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263 (2002) (arguing the easy and costless reproduction of music has made copyright protection obsolete for music).

136. See generally W. Michael Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 OKLA. L. REV. 443 (2015) (discussing *Girl Talk* and the consequences for copyright law and fair use); Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES (Aug. 6, 2008), <https://www.nytimes.com/2008/08/07/arts/music/07girl.html> [<https://perma.cc/UDQ3-XVXG>].

137. Dan White, *Famous Samples in Electronic Music*, DJ TECHTOOLS (Sept. 26, 2013), <https://djtechttools.com/2013/09/26/famous-samples-in-electronic-music> [<https://perma.cc/8FX5-55ZJ>].

138. Ben Murray, *Remixing Culture and Why the Art of the Mash-Up Matters*, TECHCRUNCH (Mar. 22, 2015, 8:00 PM), <https://techcrunch.com/2015/03/22/from-artistic-to-technological-mash-up> [<https://perma.cc/FTH8-KPUF>]; Hayley A. Rowe, *Appropriation in Contemporary Art*, 3 INQUIRIES J., Issue 6 2011, at 1 ("Appropriation refers to the act of borrowing or reusing existing elements within a new work.").

139. See Rowe, *supra* note 138, at 1; Murray, *supra* note 138 ("From Duchamp to Damien Hirst, artists have consistently challenged the idea that meaning ascribed to objects is permanently fixed. All cultural artifacts are open to re-appropriation. As with much else, technology has made this process easier and more visible.").

are thus inextricably linked.¹⁴⁰

Technology has also interjected interaction into the creative process.¹⁴¹ Visitors of *Assemblance* direct colorful lasers through clouds of smoke in creating a vibrant display when one's laser interacts with another's.¹⁴² In *Subtitled Public*, infrared cameras project a verb onto each visitor's chest as they navigate a dark room; their verbs swap when visitors touch, promoting creativity and interaction.¹⁴³ The implication is that artists are innovating new forms of (free) art based on relationships.

Art scholars have likewise credited technology with conceptualism.¹⁴⁴ This is an artform where the underlying idea contributes more to the expression than the finished product.¹⁴⁵ Examples include *Comedian* where in 2019 Maurizio Cattelan created and sold a literal banana duct-taped to a wall for \$120,000 (see below).¹⁴⁶ Here, the artist sent a message about the auspicious role of money in the arts where the *idea* of profit, or lack thereof, premised his criticism.¹⁴⁷ And whereas conceptualism was once limited to those who could physically visit each work, technology has bolstered the form's popularity by making it available over the internet at no cost. Along the same lines, the modern acclaim of street art is attributed to the worldwide audiences who can now enjoy previously fixed and perishable works via social media.¹⁴⁸

140. See Bridy, *supra* note 123, at 304 n.61 (discussing the intricacies of appropriation in art).

141. Thomas Evans & Anna Souter, *The Rise of Technology in Art*, BARE CONDUCTIVE (Oct. 7, 2016), <https://www.bareconductive.com/blogs/blog/the-rise-of-technology-in-art-by-thomas-evans> [<https://perma.cc/U569-7SKX>].

142. Randy Rieland, *7 Ways Technology is Changing How Art is Made*, SMITHSONIAN MAG. (Aug. 27, 2014), <https://www.smithsonianmag.com/arts-culture/7-ways-technology-is-changing-how-art-is-made-180952472> [<https://perma.cc/LN5U-ENKJ>]; and *Collaborate in an Immersive Environment*, UMBRELLIUM, <https://umbrellium.co.uk/case-studies/barbican-assemblance> (last visited Nov. 3, 2021).

143. Evans & Souter, *supra* note 143.

144. See generally Guy A. Rub, *Owning Nothingness: Between the Legal and the Social Norms of the Art World*, 2019 BYU L. REV. 1147 (discussing the lack of legal protections for types of art like conceptualism).

145. *Conceptual Art*, TATE, <https://www.tate.org.uk/art/art-terms/c/conceptual-art> [<https://perma.cc/6MK6-UL64>] (“[T]he idea (or concept) behind the work is more important than the finished art object.”).

146. Natacha Larnaud, *Performance Artist Eats Banana Duct-Taped to Wall that Sold for \$120,000*, CBS NEWS (Dec. 7, 2019, 5:44 PM), <https://www.cbsnews.com/news/banana-art-basel-performance-artist-eats-banana-today-taped-to-wall-that-had-sold-for-120000-2019-12-07> [<https://perma.cc/JZ3X-6HFB>].

147. See Elise Taylor, *The \$120,000 Art Basel Banana, Explained*, VOGUE (Dec. 10, 2019), <https://www.vogue.com/article/the-120000-art-basel-banana-explained-maurizio-cattelan> [<https://perma.cc/8J39-P6CH>] (“Duchampian in nature, the ridiculousness of the whole thing is perhaps what it's all about. There's a reason it's called *Comedian*, after all, a vaudeville reference to slipping on a peel. ‘The genius of Cattelan’s banana is that it draws out the mainstream media’s suspicion that all contemporary art is a type of emperor’s new clothes foisted on rich people,’ Half Gallery owner and art dealer Bill Powers told me when we saw that work together at Basel. ‘Was it Warhol who said, “Art is whatever you can get away with”? Case in point.””).

148. Telephone Interview with Bob Gibson of the London Police (Nov. 4, 2019) (on file with



[*Comedian* by Cattelan]

One artist interviewed for this Essay, Chiharu Shiota, explained how the digitization process has inspired her to make new and different kinds of art. “[S]ince my installations are all deconstructed,” technology and social media have encouraged her to create works that would otherwise disappear, preserving her art so that “the memory of it remains.”¹⁴⁹



[An installation by Shiota located in Osaka, Japan]

Just as salient, the deconstructions of prices and scarcity have enabled traditionally excluded creators to take prominent roles in the arts by not only reducing costs but also removing gatekeepers such as galleries and dealers. By elevating oppressed artists and new modes of creativity, the artforms produced and valued in contemporary society have notably evolved.

Consider how all aspects of the arts were long dominated by affluent parties, illustrated by those who became artists and purchased artworks.¹⁵⁰ The exclusion of lower and middle classes vested power in an aristocracy who directed the arts’ trajectory as well as locked out interlopers.¹⁵¹ An especially formidable barrier were the intermediaries who artists required to distribute their works.¹⁵² Even if one was willing to take a loss in sharing free art,

author).

149. Email Interview with Chiharu Shiota (May 18, 2020) (on file with author).

150. See *supra* notes 27–33 and accompanying text.

151. See *supra* notes 27–33 and accompanying text.

152. See, e.g., Allison Schrager, *High-End Art is One of the Most Manipulated Markets in the World*, QUARTZ (July 11, 2013), <https://qz.com/103091/high-end-art-is-one-of-the-most-manipulated-markets-in-the-world> [<https://perma.cc/KB6E-R9SR>] (explaining the power of galleries in the

publishers, record companies, dealers, and auction houses made this impossible by demanding a cut of the action, or even controlling the action.¹⁵³ These gatekeepers influenced art's evolution, or lack thereof, as they selected which types of expressions and viewpoints to fund, market, and sell.

Today, those interviewed for this Essay spoke enthusiastically about the power stripped from galleries, studios, and publishers.¹⁵⁴ Since an individual can now thrive without following the rules of gatekeepers, power has relocated to traditionally excluded artists and consumers. For instance, a variety of famous musicians like the Weeknd were discovered upon uploading free content onto YouTube—as opposed to obtaining initial publicity from a record company—reflecting a profound shift in the creative process.¹⁵⁵ As Joseph Grazi explained as part of this Essay's interviews, social media is “the best thing to ever happen to artists:”

Artists can now sell directly to collectors without having to share their hard-earned money with a gallery. Galleries will still play an important role, but social media has gotten rid of a lot of the politics of art and the social climbing that used to be the norm. Instagram runs the artworld now. Not blue-chip galleries. Even at events like art Basel, the presence of Instagram is unavoidable, and its power undeniable.¹⁵⁶

Likewise, Marya Layth credits poetry's resurgence to Instagram.¹⁵⁷ As one subject stated, “[i]t's wonderful for being able to encounter so much new work, reach out and communicate with artists.”¹⁵⁸

In important part, the merit of free art advances copyright's purpose. Although copyright incentivizes individual artists, the ultimate beneficiary is supposed to be society.¹⁵⁹ Rather than “the creation of private fortunes,” copyright promotes “the public interest” in terms of bolstering art's quality, as well as increasing the scope of people who may enjoy it.¹⁶⁰ Since zero-price

art trade).

153. *Id.*; see also Email Interview with Marya Layth (Oct. 23, 2019) (on file with author) (explaining the evolution of the poetry market as Instagram spreads artistic works over the internet).

154. See, e.g., Email Interview with Joseph Grazi (Oct. 28, 2019) (on file with author) (discussing the relocation of power away from galleries).

155. Kim Renfro, *How the Weeknd's Insanely Successful Career Started with Anonymous YouTube Videos*, BUS. INSIDER (Aug. 29, 2015, 12:16 PM), <https://www.businessinsider.com/how-the-weeknd-got-his-start-on-youtube-2015-8> [<https://perma.cc/924M-AT97>]; Isis Briones, *12 Major Artists Who Got Their Start on YouTube*, TEEN VOGUE (Mar. 29, 2016), <https://www.teenvogue.com/story/best-artists-discovered-on-youtube> [<https://perma.cc/CRQ7-P5RE>].

156. Email Interview with Joseph Grazi, *supra* note 154.

157. Email Interview with Marya Layth, *supra* note 153.

158. Email Interview with Paul Sepuya (Nov. 7, 2019) (on file with author).

159. *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 350 (S.D.N.Y. 2017).

160. See Carlos A. Garcia & Jonathan Stroud, *Ships in the Night: Resolving Administrative Conflict Between FDA- and Patent-Related Legislation*, 68 AM. U. L. REV. 1111, 1120 (2019) (quoting *Motion Picture Pats. Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917)) (discussing IP's purpose

content enriches large swaths of society with new and meaningful content, this phenomenon should fall squarely within copyright's framework.

But despite the socioeconomic value of widely distributing costless art, copyright assumes that free content lacks a protectable market. The manner in which contemporary artists create and share zero-price work may, as the next Section indicates, be incompatible with longstanding pillars of copyright.¹⁶¹

B. DOUBTS CAST ON FAIR USE BY ZERO-PRICED ART

The problem is that the costless production of art may create tension with core tenets of fair use and copyright protection. Whereas copyright grants exclusive rights to increase the incentives of creating meaningful content, artists and authors have increasingly opted to share important works without any demand for money or exclusivity.¹⁶² In fact, technology has divorced ownership and scarcity so that artists may distribute their works in unlimited numbers without costs yet still retain the ability to sell it for fortunes;¹⁶³ in essence, technology has accomplished what exclusive rights were meant to do in potentially making copyright obsolete.

Take prices. An array of scholars and courts assume that a zero-price work lacks a market, and that condemning appropriation would render little effect on the incentives to create it.¹⁶⁴ No longer is this the case. It is now common for artists such as Banksy who could demand fortunes for their works to make pieces freely available.¹⁶⁵ If certain types of copying would dissuade artists from sharing zero-price art, then the system's fixation with positive prices would deprive society of valuable content. Copyright has, it seems, failed to foresee an era in which artists would enjoy the tools to create free art and the desire to do so.

Perhaps the most salient development is the commodification of non-scarce art. A non-fungible token ("NFT") is a form of blockchain to a non-tangible representation of an item like a digital picture.¹⁶⁶ In 2021, Beeple sold an NFT of a digital image available for free on the internet for \$69,300,000, making it one of "the most valuable piece[s] of art [created] this generation" in terms of value and artistic merit.¹⁶⁷ Notice the

with respect to the grant of patents).

161. See Jessica Meiselman, *When Does an Artist's Appropriation Become Copyright Infringement?*, ARTSY (Dec. 28, 2017, 8:00 AM), <https://www.artsy.net/article/artsy-editorial-artists-appropriation-theft> [<https://perma.cc/Q4Q9-YVUW>].

162. See *supra* notes 7–10 and corresponding discussion.

163. See *supra* notes 11–12 and corresponding discussion.

164. See *supra* Section II.A (explaining the assumption that copyright protects economic incentives).

165. See *supra* Section II.C.

166. Thomas N. Doty, *Blockchain Will Reshape Representation of Creative Talent*, 88 UMKC L. REV. 351, 352–53 nn. 2–3 (2019) (explaining what is a non-fungible token).

167. Sebastian Smee, *Beeple's Digital 'Artwork' Sold for More Than Any Painting by Titian or Raphael. But as Art, It's a Great Big Zero*, WASH. POST (Mar. 16, 2021, 7:00 AM), <https://www.washingtonpost.com/entertainment/museums/beeple-digital-artwork-sale-perspective/2021/03/15/6af1c1>

implications: Although exclusive rights are supposed to increase a work's value by making it scarce, artists can now produce a work in unlimited quantities yet still sell its equity. In this sense, NFTs can perhaps duplicate some of copyright's utility by allowing artists to create revenue in ways independent from exclusivity or scarcity.

How then should copyright protect a work—if it should be protected at all—when the artist has shared it without prices, profit, or exclusive control? Since copyright is meant to increase art's economic value rather than shielding moral or reputational interests, the system assumes that exclusive rights cannot foster free content. Illustrating this tension, Jen Lewis had no expectation of profit when she created and tweeted a comical picture of Kanye West kissing himself, which Elliot Tebele of a popular account reposted without permission.¹⁶⁸ The appropriation angered Lewis because Tebele earns about \$30,000 per post—whereas Lewis shared it for free—but to Tebele, anyone may copy an image that was given away over the internet.¹⁶⁹ Using qualitative research, this Essay shows that producers of zero-price art do not necessarily reject market economics as much as they have ushered in new norms, ethics, and methods, and that exclusive rights should ideally play a role.

IV. WHY DO ARTISTS REALLY CREATE AND SHARE (FREE) ART?

How should copyright apply when artists no longer rely on prices, scarcity, or exclusive control? In this Part, an array of artists, musicians, and authors explain their motivations in giving their works away. The research finds that artists are often driven by *non-price* incentives such as integrity and reputation.¹⁷⁰ Since artists treat zero-price works differently than conventionally sold art, new norms and rules have emerged outside of the copyright system. First, creators of zero-price art *want* others to copy their art so long as it remains free. But second, the thinness of protection afforded to free content can, in many instances, levy indirect economic costs on artists in discouraging them from creating and sharing their works. As such, the interviews indicate that the analysis is currently ill-equipped to distinguish infringement from fair use or even promote the arts. After Section A analyzes the interviews, Section B proposes reform, and then C briefly discusses

540-8369-11eb-81db-bo2fo398f49a_story.html [https://perma.cc/5F3K-Y2Y4] (statement of Metakovan, the buyer of Beeple's NFT).

168. Alexi Horowitz-Ghazi & Sarah Gonzalez, *Episode 904: Joke Theft*, NPR: PLANET MONEY (Apr. 6, 2019, 1:01 AM), <https://www.npr.org/sections/money/2019/04/06/710404524/episode-904-joke-theft> [https://perma.cc/68VE-9XCH]; see also Alexandra Sternlicht, *Fyre-Proof: The Sudden Fall and Swift Reemergence of F*ckJerry's Elliot Tebele*, FORBES (Oct. 24, 2019, 6:30 AM), <https://www.forbes.com/sites/alexandrasternlicht/2019/10/24/fyre-proof-the-sudden-fall-and-swift-re-emergence-of-fckjerrys-elliott-tebele/#3fgbbf7f64e8> [https://perma.cc/K8WT-8ACG].

169. Horowitz-Ghazi & Gonzalez, *supra* note 168.

170. See *supra* Subsection II.C.2.

creative commons licenses.

A. QUALITATIVE RESEARCH

Copyright can only promote the creative process by providing the types of incentives that artists want. To this end, those who were interviewed for this Essay explained how artists have developed new expectations and rules accounting for blind spots in copyright. The interviewees constitute a diverse group of about three dozen poets, musicians, street artists, designers, and others, spanning disparate backgrounds, acclaim, and stages of career. Interviews were all conducted by email or phone calls. An important qualification is that each of the artists had at least some experience with producing and distributing zero-price content, though many of the artists had navigated away from this model over time. The questions—though largely standardized among the interviewees—were open-ended to allow artists maximum freedom to discuss their relationship with art, the market, and appropriation.

1. The Fairness of Appropriating Zero-Price Art

Artists have developed a unique rule about copying which has little basis in copyright: Third parties may copy and use another's zero-price art so long as it remains free—“[i]f it's shared for the act of loving the image and I'm given credit, then I'm very happy. If it's shared for the act of representing a product and generating money for that product, then I would ask for paid use, or for the company to remove it.”¹⁷¹ Artists, in fact, describe zero-price art as fundamentally different than priced content. The street artist Fumero discussed a photographer who had taken a picture of his mural while he painted it. When the photographer asked for permission to make prints of the image, Fumero consented, stating that it was “her art.”¹⁷² However, when she sold pins of the image for \$5, Fumero asserted that the copying was wrongful as “this is not art, *this is merchandise*.”¹⁷³

A sense of fairness drives much of this stance. Since a work shared at zero-prices denies monetary gain, to most interviewees, the artist cannot then demand payment or forms of royalties when others copy it.¹⁷⁴ Libby Schoettle explained that third parties may appropriate her zero-price content but not commissioned works, as “[i]t's hard to argue for money unless it's a wall that I was hired to do.”¹⁷⁵ This sentiment was common among other interviewees;

171. Email Interview with Libby Schoettle (Dec. 26, 2019) (on file with author).

172. Telephone Interview with Fumero (Oct. 28, 2019) (on file with author).

173. *Id.*

174. Email Interview with Libby Schoettle, *supra* note 171.

175. *Id.* (“In each instance they gave me credit in response to my request for credit. I didn't ask for money because these were photographs they took of Phoebe on the street, and not on commissioned walls. . . . It's hard to argue for money unless it's a wall that I was hired to do and they use an image of the entire side of a building. Street art is hard in that not all of it is legal, so

for instance, “if you put something up in public, it’s not yours anymore.”¹⁷⁶ Noteworthy is that this norm derives from the artist’s intuition rather than a rule of copyright.

But if equity dictates that one may copy zero-price art, then this license ends, according to interviewees, when a third-party profits.¹⁷⁷ Beau Stanton noted that individuals may use his art for personal enjoyment, “but if you’re going to try to make money off of it, we’re going to have a problem.”¹⁷⁸ “There’s a huge difference,” one artist insisted, “between inspiring other artists/seeing how your work influenced them versus having your artistic identity stolen *especially when another artist profits off of it.*”¹⁷⁹ Dee Dee drew a similar line, discussing a third party who sold images of her street art at an exhibit: “Anyone purchasing this was not buying it because it was an interesting photograph, they were buying it because they liked *my* artwork.”¹⁸⁰ To the musician Dent May,

if someone wants to use [my recordings] in a way that’s making no money or very little money, I’m cool with it. . . . If someone contacts me to ask if they can use my song in their student film or something like that, I’m going to say yes. But if that student film goes on to get released in a way that makes a significant amount of money, I expect to be paid.¹⁸¹

While the above concerns rely on a sense of equity, the greater motivation to create zero-price art—as well as discouragement—flows from *non-monetary* economic sources such as integrity and reputation.

2. Copying’s Economic Effects on Fair Use

The chief benefits as well as costs of appropriation can stem from its effects on reputation, not loss of royalty fees. It is common for artists to reject

when a company finds a photo and uses it, I think it’s kind of hard to demand credit for it. Of course, it’s nice to receive credit for your art, especially with regard to the social media world we live in today, where online is the most sought after form of publicity.”)

176. Email Interview with Joseph Grazi, *supra* note 154 (“If a big company does a campaign and your arts [sic] in the background, it would be nice of them to acknowledge the artist, but I don’t think they have a ‘legal’ need to. Just kind of a moral one.”); Telephone interview with Bob Gibson, *supra* note 148 (expressing his belief that street art is “street art by its very nature is ‘open to be photographed and shared digitally on social media. That obviously means that it can easily be copied and replicated and made into product. However, without consent from the artist this is abusing the free nature in which the art was given to the public domain. Always ask the artist!’”).

177. Email Interview with Chasers of the Light (Oct 29, 2019) (on file with author) (“[A]nytime another party is financially benefitting from someone else’s work, it’s a shady area and one that needs addressing.”).

178. Telephone Interview with Beau Stanton, *supra* note 25.

179. Email Interview with Chasers of the Light, *supra* note 177 (emphasis added).

180. Email Interview with Dee Dee (Oct. 30, 2019) (emphasis added) (on file with author).

181. Email Interview with Dent May (Nov. 7, 2019) (on file with author) (“No one should be allowed to use my recordings for profit without permission and compensation.”).

commercial projects as a matter of integrity, as interviewees expressed a need to control *who* associates with their art.¹⁸² The manner in which artists have shifted to valuing non-price interests is remarkable since art was historically linked to prices and scarcity, which explains why courts have reflexively measured a work's market in prices.¹⁸³

For example, Beau Stanton described the perils of an “unsavory brand” copying his art, recounting when McDonalds filmed his work on the streets of Bushwick. This caused art circles to question whether he had partnered with McDonalds, threatening to “shatter the public image that I’ve crafted.”¹⁸⁴ Nina Palomba accepts only certain partnerships based on alignment with her brand identity—like her deal with Adidas—but not others, depending on how it might affect her reputation.¹⁸⁵ Bob from The London Police characterized the choice of whether to work with a certain company as an economic tradeoff in terms of whether the partnership is worth the reputational costs: “We always have that balancing act with who we get involved with.”¹⁸⁶ Further, artists noted instances in which they would rather certain corporations cease appropriating their works rather than paying a royalty, demonstrating the value of reputation over money.¹⁸⁷

But in important part, when copying retains a work's zero-price nature, it can enhance the artist's reputation—here, artists *want* to be appropriated.¹⁸⁸ Because “art thrives on community, building on each other's creative advancements is a vital part of all art,”¹⁸⁹ the interviewees described how being copied can foster their influence and profile so long as the work remains free.¹⁹⁰ Laurie Simmons called certain acts of appropriation “flattering.”¹⁹¹ Liu Shiyuan stated, in referencing art's communal nature, that “many people do what I do, the visual looks similar, the result is pretty much the same” but

182. Telephone Interview with Beau Stanton, *supra* note 25; *see, e.g.*, Stoilas, *supra* note 19 (describing a dispute involving Julian Rivera who rejected the appropriation of his art by Walmart and Ellen DeGeneres, as he claims to reject most corporate projects).

183. *See supra* Section II.B.

184. Telephone Interview with Beau Stanton, *supra* note 25.

185. Telephone Interview with Nina Palomba (Nov. 20, 2019) (on file with author).

186. Telephone Interview with Bob Gibson, *supra* note 148.

187. Telephone Interview with Nina Palomba, *supra* note 185.

188. Dent May illustrates this point with a personal experience: “There was some sort of big sunglasses or surf company that used my song in an Instagram video that had tens of thousands of views. I was annoyed they didn’t ask permission, but I let it slide . . . hopefully some of those viewers found their way to my music.” E-mail Interview with Dent May, *supra* note 181.

189. E-mail Interview with Marya Layth, *supra* note 153.

190. E-mail Interview with Joseph Grazi, *supra* note 154; E-mail Interview with Marya Layth, *supra* note 153; E-mail Interview with Liu Shiyuan (Nov. 1, 2019) (on file with author); *see also* Telephone interview with Marissa Huber (Oct. 29, 2019) (on file with author) (“I would say being ‘re-posted’ where my work is shared with links or credit to my social media post is great, but NOT being copied.”).

191. Telephone Interview with Laurie Simmons (Mar. 15, 2020) (on file with author).

if “they got influenced by my art practice, *I’m happy about that.*”¹⁹² Poet Marya Layth asserted, “The reward for the sake of exposure—after all, it is the reason I am being an artist on a public platform is the independence to create and connect. Whether a private account or an influential account shares my work, the gift of connecting with new members of the global public is invaluable. Afterall, art can’t be discovered if it’s not shared.”¹⁹³ This attitude was expressed repeatedly.¹⁹⁴ The musician Owen Pallett provides a zero-price license to whomever may want one:

I operate on a pay-what-you-can basis for any filmmakers who desire a license, or friends who want some arrangement or session work. I believe that any future I have as a professional musician is built on the work that I’ve created and not the money I’ve accrued, and so I try and make myself and my work as available as possible to any interested collaborators/samplers/what-have-you.¹⁹⁵

Adding to this sentiment, artists expressed little fear that appropriation could deprive them of recognition, as you cannot replicate authenticity.¹⁹⁶ “Sure people could copy you,” Joseph Grazi asserted, “but every artist is so unique and individual that I find that unless your art is really boring and uninspired it’s hard to copy a good artist.”¹⁹⁷ To Liu Shiyuan, “the artist’s deep thinking is hidden behind [the work], people will notice it through the artist’s long life [and] art experience... It’s about someone’s life, *no one can copy*” the art.¹⁹⁸ Even though images are easily copied, the photographer Paul Sepuya described instances of appropriation as a “visual citation,”¹⁹⁹ while Laurie Simmons noted that copies of her photos lack key elements of authenticity —“it’s not a Laurie Simmons.”²⁰⁰ This dynamic helps to explain why artists take such umbrage when a company appropriates their zero-price art: The creator is inherently entangled in her work.

In short, artists have developed new types of economic incentives to create which in ignoring price signals exist outside of copyright’s framework. This is remarkable because seldom before has meaningful art been disentangled from priced transactions, reflecting the economy’s greater shift towards zero-priced goods. Even though producers of zero-price art view

192. Email Interview with Liu Shiyuan, *supra* note 190.

193. Email Interview with Marya Layth, *supra* note 153.

194. Email Interview with Joseph Grazi, *supra* note 154 (“You want big accounts to re post your work . . . At some point, if you want people to see your work, you have to put it out there.”); Telephone Interview with Marissa Huber, *supra* note 190 (“If I don’t share who it, who will see it?”).

195. Email Interview with Owen Pallett (Oct. 23, 2020) (on file with author).

196. *See, e.g.*, Email Interview with Libby Schoettle, *supra* note 171 (“[N]o one is going to be me exactly; we are all unique.”).

197. Email Interview with Joseph Grazi, *supra* note 154.

198. Email Interview with Liu Shiyuan, *supra* note 190.

199. Email Interview with Paul Sepuya, *supra* note 158.

200. Telephone Interview with Laurie Simmons, *supra* note 191.

many instances of copying as wrongful, copyright has largely resisted protecting content without a history or prospect of revenue. The thinness of protection afforded to zero-price art may indeed threaten the economic incentives of creating it and its democratizing effects.

3. The Consequences of Thin Copyright Protection

If depriving artists of exclusive rights renders little effect on behavior, then copyright should freely permit third parties to copy zero-price art—after all, exclusive rights would unlikely incentivize the creation of original content. Important policies support this position—one of which is that copyright should resist protecting types of works where it would unlikely promote creativity. This is because each copyrighted item removes art from the public domain while increasing the risks of infringement liability. Since the granting of limited monopolies impairs competition and creates deadweight loss—increasing the “anticommons”—the system should permit copying unless it would diminish the incentives to invest in the artist process.²⁰¹ But if commercializing zero-price art discourages artists as well as causes them to deprive society of free content, the role of zero-prices in the fair use analysis should be revisited.

The interviews offer evidence that commercial copying demoralizes creators of free art—“it’s a real bummer.”²⁰² Artists lamented how it “sucks,”²⁰³ as well as feeling “frustrated,”²⁰⁴ “annoyed,”²⁰⁵ “saddened,”²⁰⁶ and “irritated.”²⁰⁷ Adding to the malaise is the uncertainty of whether copyright would even provide a remedy.²⁰⁸ Dee Dee recounted a third party who copied her street art for a Paris exhibit, explaining that the international hurdles of remedying appropriation was especially aggravating.²⁰⁹ Libby Schoettle lamented, “I have

201. Francesco Parisi & Catherine Ševčenko, *Lessons from the Anticommons: The Economics of New York Times Co. v. Tasini*, 90 Ky. L.J. 295, 323–24 (2002) (explaining the relationship between copyright, deadweight, and anticommons).

202. Email Interview with Chasers of the Light, *supra* note 179.

203. Email Interview with Joseph Grazi, *supra* note 154.

204. Email Interview with Paul Sepuya, *supra* note 158.

205. Telephone Interview with Laurie Simmons, *supra* note 191.

206. Email Interview with Libby Schoettle, *supra* note 171.

207. Email Interview with Chasers of the Light, *supra* note 179.

208. *Id.* (“[I]t’s sad really for artists today, as most are too confused, too busy, or too reluctant to dive into a pool of that red tape to fix the thefts that are occurring . . . it’s just been more headache and hassle to try to stop it, than it is to just be irritated.”).

209. Email Interview with Dee Dee, *supra* note 180 (“A friend who lived in Paris went to the gallery and sent me photos of the red dots on the wall of the photos of my work. I contacted the gallery myself inquiring if I could purchase one that had already been sold and they said I could indeed buy one, so while they were supposed to be one of a kinds he was also selling prints. What made this extra tricky was it was in Paris. Another country. Another language A few very popular street art blogs here were contacted about this to get the story out and they all declined. One said they wanted to see what the artist reactions were first. How can an artist react if they don’t know they are being taken advantage of in another country?”).

thought how sad it would be having my own art taken away that I have spent years developing.”²¹⁰

Without exclusive rights, feelings of discouragement and anger have prompted artists to approach the creative process in ways depriving society of free content. On one front, artists have opted to retain works privately that they would have otherwise distributed to the public. Liu Shiyuan asserted that online appropriation has dissuaded her from sharing her art.²¹¹ Another interviewee lamented, “social media is tricky terrain because technically you’re handing your images, videos and words over to giant tech corporations.”²¹² One artist recounted his experience of finding unauthorized copies of his art for sale on Instagram, as the platform’s algorithm detected that he might want to buy copies of his own work.²¹³ Consider the street artist Nina Palomba who creates original characters; since art posted on social media is often appropriated, Palomba explained that she holds certain characters back from Instagram to protect them from copying.²¹⁴ After Marissa Huber found copies of her works on Amazon, she sought the company’s help in removing the pirated images.²¹⁵

Others discussed withdrawing from the zero-price landscape altogether in favor of gallery work or similar private transactions.²¹⁶ For instance, a variety of interviewees described their evolution away from placing murals and fixtures in public spaces.²¹⁷ Many street artists had indeed experienced individuals and companies profiting off their content,²¹⁸ prompting them to abandon the medium for their reputations’ sake.²¹⁹ And those who continue to display works publicly no longer consider it a primary platform: “I only put images on Instagram that are out in the world in exhibitions or in publications. . . . It’s just about sharing that I’ve already let out into the world.”²²⁰ By implication, weak rights seem to push creators of zero-price art to favor private transactions over freely sharing their works, or even to

210. E-mail Interview with Libby Schoettle, *supra* note 171.

211. See, e.g., E-mail Interview with Liu Shiyuan, *supra* note 190 (“If we can all steal everything on internet, I probably won’t be so interested in using online photos.”).

212. E-mail Interview with Dent May, *supra* note 181 (“Personally, I don’t see social media posts as part of my art. It’s just a way to spread the word about what I’m doing.”).

213. Telephone Interview with Beau Stanton, *supra* note 25.

214. Telephone Interview with Nina Palomba, *supra* note 185.

215. Telephone Interview with Marissa Huber, *supra* note 190.

216. Telephone Interview with Bob Gibson, *supra* note 148.

217. Telephone Interview with Fumero, *supra* note 172 (explaining his migration away from street art in public places to private transactions).

218. See, e.g., Telephone Interview with Beau Stanton, *supra* note 25 (discussing how his art was copied by a large corporation); Telephone Interview with Bob Gibson, *supra* note 148 (finding his art on a pair of shoes); and Email Interview with Dee Dee, *supra* note 180.

219. Telephone Interview with Nina Palomba, *supra* note 185; and Telephone Interview with Bob Gibson, *supra* note 148.

220. Email Interview with Paul Sepuya, *supra* note 158.

withdraw from creating altogether.

* * *

The emergence of zero-price art suggests that copyright ignores the non-price economic incentives of creation. Whereas price signals might have adequately measured creative incentives when art was beholden to the laws of supply and demand, today, individuals can and do produce meaningful works without seeking positive prices. This landscape has inspired artists to adopt the non-copyright rule that third parties are permitted to copy zero-price art so long as it remains free—artists *benefit* from such appropriation. If zero-price content was afforded greater copyright protection, it would not only foster creativity but also conform copyright to the modern economics of art production. Instead of a complete overhaul, the next Section proposes modest ways of reinterpreting fair use to account for how contemporary artists actually approach the creative process.

B. ZERO-PRICE MARKET EFFECTS AND REFORMING THE FOURTH FACTOR
TO PROMOTE FREE ART

The fourth factor of fair use should recognize free art as existing in a zero-price market. This would help to not only align copyright with the expectations and norms of artists, but also modernize the copyright system with other areas of law forced to grapple with zero-price markets. In making this case, copyright should reject overtures to include matters of reputation and integrity into the fourth factor, which would allow artists to condemn criticisms and parodies of their works.²²¹ Rather than expanding the scope of exclusive rights to protect non-price interests, this Essay insists that copyright should consider zero-price art to exist within its own market just as artists do.

In terms of fair use, the fourth factor should assess market effects by delving into whether an act of copying has turned zero-price art into commercial content—a question that artists currently ask. This approach would retain the objectiveness of price signals while also understanding how appropriation may have levied economic costs without direct monetary damages, which can disincline artists from creating original work. After all, since value is determined by the interplay of supply and demand, appropriation of zero-price content can reduce demand for one's art even in zero-price markets. As such, the fourth factor should value the integrity of zero-price markets by scrutinizing the market effects of copying; did the appropriation transform a work originally shared at zero-prices into a commercial venture? And with the first factor—which asks in part whether the copy's purpose was commercial or not²²²—the test would produce a bias against the commercial

221. See *supra* notes 106–15 and accompanying text.

222. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992) (“The Supreme Court has held that

appropriation of zero-price art.²²³

Instances where this approach may meaningfully alter the analysis involve earlier examples like Jeresneyka Rose, Jen Lewis, REVOK, and the Suicide Girls. In each dispute, the appropriator did almost nothing to alter the original work but instead sought to commercialize it where the original artists had chosen not to do so. Currently, the fair use factors might suggest that the appropriator can evade copyright liability because the original artist refused to market their work. But under the proposed approach, the appropriator unsettled the original's zero-price market—creating a market effect—without otherwise transforming the image. Without evidence that the appropriator created a novel or new expression, the factors should tip to infringement since the appropriation discourages artists from creating new content and the copying would do little to add a novel expression to society.

Rather than a radical modification, it would merely align copyright with the rules *currently enforced* by artists as well as acknowledge zero-price markets in a way akin to other bodies of law. After all, the other factors remain salient; a court would still inquire into the copy's purpose or whether it is otherwise transformative in assessing fair use.

This approach is meaningfully different than the popular notion of turning moral rights into an economic interest, which this Essay rejects. Even if matters of reputation can influence a work's value, recall the earlier discussion about why protecting an artist's integrity would problematically allow artists to squelch criticisms or unflattering portrayals of their works.²²⁴ If reputation became part of the fair use analysis, even commercial projects could rely on this theory, which could impose liability on parodies and other forms of mockery. So rather than paying attention to whether the copying harmed the original work's reputation or integrity, the fourth factor should merely gauge whether the original work was given away at zero-prices along with whether the copy was transformative. Thus, while the reality is that a clean division between economic effects and moral rights may no longer exist, the courts should modestly evolve the fourth factor in continuing to rely on price signals.

Further, aspects of this Essay implicate creative common ("CC") licenses, which have slowly gained popularity in promoting "desirable copying." The concept behind a CC license is that artists can grant to others certain rights to use and copy one's work without risking infringement.²²⁵ For instance, an "Attribution 3.0" license permits third parties to copy, adapt, edit, and share

copies made for commercial or profit-making purposes are presumptively unfair.").

223. See Loren, *supra* note 84, at 1351 (discussing the court's decision in the *String of Puppies* case, which ruled that the appropriator had acted "in bad faith" because his goal was seemingly to sell "high-priced art" rather than to contribute meaningfully to the arts and knowledge).

224. See *supra* notes 106–15 and accompanying text.

225. *What We Do*, CREATIVE COMMONS, <https://creativecommons.org/about> [<https://perma.cc/C7LQ-5839>].

the original work so long as the appropriator will “give appropriate credit, provide a link to the license, and indicate if changes were made.”²²⁶ Rather than affecting the fair use analysis, a CC license entails an independent permission between the original and latter artist.²²⁷ If this agreement is breached, a court would still apply the fair use factors before potentially imposing liability.²²⁸ In other words, if the original artist granted CC licenses, those who copy can defend an infringement lawsuit on two grounds: (1) fair use and (2) license.²²⁹

While a CC license can ideally promote some of the non-economic virtues of copying, it imposes such stringent requirements on the copier that it should not and cannot usurp the fair use analysis. For instance, each CC license requires, at a minimum, that the appropriator credit the original artist in addition to citing whatever alterations were made—and in many instances, make no alterations. Recall that the power of appropriation is that the subsequent artist *appropriates* the original by using it in ways not intended or authorized by the first artist. It would indeed take the power and purpose out of appropriation if a CC license was required to copy free art. And in light of the tepid popularity of CC licenses, they canvass only a small scope of works. To this end, the aforementioned reforms of fair use would foster the arts in ways that CC licenses cannot accomplish.

This Essay also rejects a similar type of moral rights argument that copyright should require copiers to attribute a new work to the original artist. This position received support from those interviewed herein, as artists expressed a more charitable view of copying when given recognition: “[T]hey should credit you. If they don’t, that sucks.”²³⁰ The artist Chiharu Shiota was adamant about this point, stating that she “[does]n’t mind when people share my work, but it does bother me if they do not credit my name. If my name is credited together with the pictures then I am fine with it.”²³¹ Further, Dee Dee recalled her anger at an instance of copying occurring that deprived her of

226. *Attribution 3.0 United States: (CC by 3.0 US)*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by/3.0/us> [<https://perma.cc/38NX-J6YM>].

227. *See, e.g.*, 3Lions Publ’g, Inc. v. Scriptnetics, LLC, No. 8:14-cv-1210-T-3oTBM, 2015 WL 3935945, at *4–6 (M.D. Fla. June 26, 2015) (analyzing the dispute under a license defense stemming from the creative commons license and fair use).

228. *Philpot v. Media Rsch. Ctr. Inc.*, 279 F. Supp. 3d 708, 713 (E.D. Va. 2018) (explaining that a license is considered a permission rather than a contract).

229. *See, e.g.*, *Philpot v. World Pub. Libr. Ass’n*, No. 18-00057, 2018 WL 3422777, at *1–2 (D. Haw. June 25, 2018), *rep. & recommendation adopted*, No. 18-00057, 2018 WL 3420795 (D. Haw. July 13, 2018) (analyzing the case using both waiver and fair use defenses).

230. Email interview with Joseph Grazi, *supra* note 154.

231. Email interview with Chiharu Shiota (May 18, 2020), *supra* n.149. (“[R]ecently, my office read an article about a restaurant in China which used rice noodles like thread and created an installation within the restaurant. It was extremely similar to my work, I assumed that the designer was maybe inspired by my work, but we did not know. My name was never mentioned in the article. We forwarded the article and the information to VG Bild-Kunst. If they had mentioned my name within the article that would have been fine.”).

attribution: “[I]n some cases he photoshopped or cropped the artists signatures out of the work so it could not be seen.”²³²

The problem with moral rights is that appropriation art takes much of its meaning by *taking* and refashioning an original work into a new expression. The very definition of appropriation, after all, is “to take exclusive possession of,”²³³ suggesting that permission might contravene the precise nature of sampling, mashups, and appropriation art. Further, the requirement of attribution could diminish the quality of the second work; if so, then attribution would lessen copyright’s efficacy, as the system is meant to promote the arts, not artists. Indeed, this Essay asserts that copyright should remain tethered to economic theory by recognizing zero-price markets. Doing so would indirectly embrace the value of reputation without overly expanding exclusive rights to impede criticisms and parodies. It would also, in important part, align with how contemporary artists are actually approaching the creative process.

V. CONCLUSION

This Essay examined the rise of zero-price art, given copyright’s assumption that individuals are primarily motivated to create original content by the promise of economic rewards. The analysis shows that technology has eroded the concept of scarcity, allowing artists to produce original content at zero-prices which they can then share with global audiences at no cost. This suggests that the incentives to make art might have evolved since artists are no longer compelled to recoup sunk costs. The phenomenon has even democratized the arts by allowing historically excluded parties to make and consume meaningful art. It has also changed the nature of art, as forms like appropriation, conceptualism, street art, mashups, and others have sudden boomed in popularity.

With this in mind, the qualitative research indicates that copyright is ill-equipped for the new era of art. The chief economic incentives to create art—as well as harm of appropriation—can stem from non-price costs. If a commercial account copies zero-price art, it can devastate the original artist’s career, discouraging the creation of free content and the socioeconomic value thereof. But when the zero-price nature is preserved, then appropriation can benefit the artist by enhancing the artist’s exposure, credibility, reputation, as well as influence on the creative process and community. This dynamic can ideally be incorporated into the fourth factor of market effect or even the long ignored second factor.

232. Email Interview with Dee Dee, *supra* note 180.

233. *Appropriate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/appropriate> [<https://perma.cc/DT4M-FC6N>].