COPYRIGHT AND CULTURAL CAPITAL

*Xiyin Tang**

ABSTRACT

This Article explores the oft-ignored relationship between copyright law and class stratification. Copyright law widens and perpetuates the gulf between the elite and the masses in three ways. First, within copyright doctrine, the values of originality, lone artistic creation, and a fetishism of the original over the copy (evident in the Visual Artists Rights Act of 1990) align with the American highbrow's claim to avant-garde newness, utter originality, and the demoted status of art forms dependent on copies (chromolithography, photography, industrial arts). Second, copyright's legal remedies—including control over rote copying and the derivative works right—facilitate the highbrow's obsession with limited production and against appropriation ("watering down") by the middle brow and low brow. Third, a copyright holder's monopoly power puts a high price on cultural fluency that may be impossible to achieve for those in emerging economies and the less affluent. In this way, copyright law incorporates, perpetuates, and exacerbates the cultural and capitalist class divide. As the late '80s and early '90s gave way to what I term a reverse-culturalization, or, the highbrow appropriating from the low-brow and making it high art, the relevance of copyright to the domestic artistic elite has diminished. Instead, copyright is now being deployed by big Hollywood studios and the recording industry as a means of denying equal access to knowledge in foreign countries. If the sociologist Pierre Bourdieu had written many years ago that it is only the rich, upper-class who can afford to engage in limited production or the coded literary language of highbrow culture, we are now seeing that adage playing itself out in the global arena with respect to culture as a whole—with copyright as its means of separating the cultural elite from the culturally less affluent.

* Visiting Fellow, Yale Law School, Yale Information Society Project; J.D., Yale Law School; B.A., Columbia University. A special thank you to Barton Beebe, for his insight and for being a continuing source of inspiration, and Ken Plevan, for his mentorship and guidance.

INTRODUCTION

Probably, the tight nexus between trademark law and class stratification is all too well known. Trademarked names like BMW, Louis Vuitton, and Tiffany's do *more* than differentiate the goods from other competitors in the marketplace: they also differentiate those who own the goods from those who do not.[1] And yet to some, that separation of the haves and the have-nots may be as American as apple pie. Under a Weberian capitalist system,[2] work hard and you, too, can trade in your rusty Honda for a gleaming Mercedes-Benz. Trademark law helps create and perpetuate a version of the American dream exemplified by designer brands, which serve as status symbols for the wealthy and wish lists to aspire to for the upwardly mobile.

What has been less explored, however, is the relationship between *copyright* and class distinctions. Copyright law, via the designation of certain works as worthy of protection, and certain works that are not, may engage in a process of cultural consecration.[3] Similarly, that it may also create a mechanism for control—in the

1. *See, e.g.*, THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 43-63 (Penguin Books 1994) (1899); Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 886 (2010) (noting that "the commodification and consumption of attribution [is] a sign of social distinction"); Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1362 (2011) ("Luxury goods, for example, are typically purchased not simply because of the higher quality of those goods but also to indicate to others that the purchaser is a person of means who can afford high-quality or high-status goods, and consumers pay extra for this effect.").

2. *See generally* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Claude Teweles, et al. eds., 3d Roxbury ed. 2002) (1905) (tracing the rise of capitalism to the Calvinist belief in the moral value of working hard).

3. *See* John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1238, 1240 (2012).

form of how it is displayed, disseminated, and used in subsequent works—has created an entire counter-movement called Access to Knowledge.[4] And indeed, the question of who controls a work, and how, has enormous ramifications for the struggle between knowledge-access, power, and, ultimately, equality.[5] But what are the reasons behind that quest for control, and how can we expect the paradigm of control and copyright to change in the next few decades? This is a critical question that this Article hopes to answer in small parts.

Many presume—rightly, I think—that the quest for copyright control, and more of it, derives from a profit-making motive.[6] If the Constitution's Progress Clause specifically contemplates a trade-off between copyright term and author incentive, then the copy*left* must ask just how much copyright protection we should award an author so that she may create (and we may award no more), while the copy*right* could just be engaged in a power-grab—the longer the term, the better![7] But this Article argues that copyright serves as *more* than just economic incentive—it is also a form of control that can be harnessed by the cultural elite.[8] Copyright doctrine itself has fostered and created a discursive space through which we talk about notions of authorship, originality, artistic merit, creativity, ownership, and uniqueness.[9] That is, not only have judges deciding copyright cases engaged in a definition (and, as we will see, a

---

4. *See generally* Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008) (providing background of and explaining the "access to knowledge" movement).

5. *See* Jack Balkin, *What is Access to Knowledge?*, BALKINIZATION (Apr. 21, 2006, 7:05 PM), http://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html.

6. This holds especially true in the new digital age, "[a]s copying costs approach zero asymptotically." James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 42 (2003). Thus,

> intellectual property rights must approach perfect control. If a greater proportion of product value and gross national product is now in the form of value-added information, then we have still another reason to need strengthened protection. A five-dollar padlock would do for a garden shed, but not for a vault.

Id.

7. These are the fundamental opposing positions in the recent cases *Golan v. Holder*, 132 S. Ct. 873, 878 (2012), challenging the constitutionality of restoring copyright status to foreign works previously in the public domain, and *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003), stating that the twenty year extension of copyrights in the 1998 Copyright Term Extension Act did not violate the constitution.

8. *See* discussion *infra* Part IV.

9. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (stating that a necessary aspect of copyright law is originality); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884) (focusing on the fact that the work was the author's own original mental conception and was an "intellectual invention, of which plaintiff is the author").

subsequent re-definition) of what art *is*,[10] but the tool of copyright itself may be later used as a means of preserving a work of high culture from denigration by, as the famous literary critic Dwight Macdonald might say, the unruly mass and midcults.[11]

Part I will discuss *how* judges have shaped a very specific discursive space for copyright law, in which uniqueness, originality, and artistic genius are constructed value judgments about the quality of a work, drawing lines between art and non-art. Part II will explore how the word, the value system, and the legal rights inherent in copyright have been wielded by highbrow culture to both prove and perpetuate its elevated status. Part III will then examine the opening of the ivory gates of cultural capital in the late '80s and early '90s via a proliferation of fair use, a focus on "transformativeness," and changed cultural and technological conditions that resulted in what I term a *reverse-culturalization* of high culture. Lastly, I will examine copyright's continued importance in the global arena as it erects the final barrier between class stratification and a fully equal vision of democracy.

This Article was written right on the heels of the publication of Dwight Macdonald's *Masscult and Midcult: Essays Against the American Grain*,[12] a collection of essays by the critic, who passed away almost 30 years ago. Macdonald's essays espouse a relentless, unapologetic enthusiasm—really, a crusade—for an America untainted by popular culture and dominated by a ruling intellectual elite.[13] Yet what relevance or significance should we attribute to Macdonald's writings today, and what can the publication of these essays *now* teach us about cultural elitism? Is there something to be admired or salvaged of Macdonald's vision? I take up the tricky problem of a desire for prestige rather than profit in the very last Part of this Article.

I. COPYRIGHT'S DISCURSIVE SPACES

As prior legal scholars have noted, it is an illusion that judges

---

10. *See, e.g.*, *Burrow-Giles*, 111 U.S. at 60 (defining plaintiff's photograph as an original work of art based on various factors).

11. *See* DWIGHT MACDONALD, *Masscult and Midcult*, *in* MASS CULT AND MIDCULT: ESSAYS AGAINST THE AMERICAN GRAIN 3 (2011).

12. *Id.*

13. *See id.* at 8, 10-11. In the essay *Masscult and Midcult*, a representative excerpt published independently and later included in the collection, Macdonald writes:

> Yet this collective monstrosity, 'the masses,' 'the public,' is taken as a human norm by the technicians of Masscult. They at once degrade the public by treating it as an object, to be handled with the lack of ceremony of medical students dissecting a corpse, and at the same time flatter it and pander to its taste and ideas by taking them as the criterion of reality (in the case of the questionnaire-sociologists) or of art (in the case of the Lords of Masscult).

Id. at 9-10.

deciding copyright cases are merely engaged in legal reasoning absent of aesthetic judgment.[14] Indeed, the very "legal" standards that are hotly contested in copyright cases—whether a work is original rather than a slavish copy, whether it is a work of "fine art" worthy of moral rights protection under the Visual Artists Rights Act, and whether it is "creative" rather than utilitarian—are also all judgments about the artistic *value* of a work, and what constitutes "art" worthy of protection versus non-copyrightable, presumptively non-art.[15] While the latter statement will receive more attention in Part II of this Article, I explore each of the former ideas: originality, uniqueness, and the creative artistic genius, in turn.

A. Originality: The Sine Qua Non of Copyright Law

"The *sine qua non* of copyright is originality."[16] Justice O'Connor had proclaimed the prior, seemingly incontestable statement in the famous 1991 case *Feist Publications, Inc. v. Rural Telephone Service Co.*[17] That hallmark of copyrightability laid down in *Feist*, however, has a long precedent in copyright law, most notably first addressed in the case *Burrow-Giles Lithographic Co. v. Sarony*.[18] The case centered on whether a photograph—a novel medium then—is copyrightable.[19] Crucial to the Court's finding that a photograph *is* copyrightable is that the photographer had made a

> useful, new, harmonious, characteristic, and graceful picture, and that said plaintiff made the same . . . entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph.[20]

That the photograph was made from the author's "*own original mental conception*" was the ultimate factor determining copyrightability.[21] Justice Miller quotes the English judge Lord Justice Bowen in saying that "photography is . . . art" for "the author is the man who really represents, creates, or gives effect to the idea,

---

14. See Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998), for a wonderful article written about this.

15. *Burrow-Giles*, 111 U.S. at 60; Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (examining Visual Artists Rights Act and determining if it applies to the work at issue); Harvester, Inc. v. Rule Joy Trammel & Rubio, L.L.C., 716 F. Supp. 2d 428, 435 (E.D. Va. 2010) (stating that a work is original when it has some degree of creativity).

16. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

17. *Id.*

18. 111 U.S. at 58-61.

19. *Id.* at 55.

20. *Id.* at 60 (internal quotations omitted).

21. *Id.* (emphasis added).

fancy, or imagination."[22]

To a contemporary Western reader, that a bare modicum of originality is required in an artwork may seem obvious. But that has not always been the case. In fact, our current fetishism for a spark of the "original"—something that represents an artist's *fancy* or imagination—is a very modern idea that has developed apace since the late nineteenth century.[23] Before then, copying and the "copy *qua* copy" remained the gold standard in the world of Western painting.[24] Going back to the Renaissance and extending far into the nineteenth century, "Academy" painters, or, the well-established painters who ruled the salons and the art world,[25] were focused on how to make the most "*ingenious* . . . copie[s]."[26] We see this idea playing out in a famous "dialogue" between two fictional characters in the seminal 1711 work by the artist and critic Roger de Piles, *Dialogue Upon Colouring*.[27] The interlocutors conclude that the finest painters should strive to "copy [for] two or three [y]ears without intermission the [p]ieces of *Titian*, and of others who were [m]asters of [c]olouring; and to use their utmost [e]ndeavours to discover the knack of it, till they have contracted a good [h]abit."[28] That the mark of a fine artist is exact replication reached its apex in the French art academy—which represented the official art and thus the ruling elite—in the nineteenth century.[29] Copying was the core of the curriculum,[30] and "[m]aking a good copy" was "a work of art in its own right, worthy of the original chosen as model."[31] In fact, "copyists often felt superior [to the masters]" because in the copying process, they could discover the personal defects of an original old Master painting.[32] "The Academy itself encouraged this fetishistic view of the copy . . . ."[33]

In sharp contrast, it was the radical artists *outside* the Academy that began to cry for the merits of "[p]ersonal originality," finding

---

22. *Id.* at 61 (emphasis added).

23. *See, e.g.*, *id.* at 60 (focusing on the works originality to determine its copyrightability).

24. ALBERT BOIME, THE ACADEMY AND FRENCH PAINTING IN THE NINETEENTH CENTURY 42-43 (Yale Univ. Press 1986) (1971).

25. *See* Beth Gersh-Nesic, *Art History Definition: Academy, French*, ABOUT.COM, http://arthistory.about.com/od/academic-art-academies/a/french-academy.htm (last visited May 9, 2014).

26. ROGER DE PILES, DIALOGUE UPON COLOURING 3 (1711) (emphasis added).

27. *Id.* at 35-36.

28. *Id.*

29. *Cf.* BOIME, *supra* note 24, at 5 (discussing the establishment of "the Institut" as a successor to the old "Academy" and as "a representative body of intellectuals and artists typifying the ideals of classical culture").

30. *Id.* at 122.

31. *Id.* (citation omitted) (internal quotation marks omitted)).

32. *Id.* at 124.

33. *Id.*

their "slogan to rally the public and the artists to their radical position" in the Originality Decree of 1863.[34] This stated that "[p]ersonal originality, a quality so essential to artists but which modern teaching does so little to develop, is still more deplorably restricted by the system of competitions in operation in our School."[35] While the Academy was linked with aristocratic, bourgeois ideals of finish and copy fetishism,[36] the "Independents," as these radicals called themselves, continued to focus on the quest for originality—a democratic concept that focused on "a mark of personality and subjectivity, accessible to all."[37] As we will see, originality and singularity both triumph by the end of the nineteenth century as they also become—ironically—tools of the elite,[38] in direct contradiction to the mindless, unoriginal, insipid productions of Dwight Macdonald's despised mid and masscults.[39] By the mid-twentieth century, the zeal for originality and the focus on individual personality will reach its apex, leaving far behind its original democratic ideals in the name of "high art."

B. Moral Rights, Museums, and The Unique Art Object

If the prior Section has focused on the cultural turn in France from copy fetishism to original singularity, this Section will trace parallel developments in the American context from the early nineteenth century to the beginning of the twentieth century. And perhaps nowhere does this turn best exemplify itself as in the sacred space of high culture: the museum.

But the museum did not start out as a bastion of the cultural elite. Lawrence Levine, in his book *Highbrow/Lowbrow*, fascinatingly describes what he terms the "[s]acralization of [c]ulture," by which museums, whose initial purpose was to educate and entertain the unruly masses, eventually became austere spaces fit only for the cultural elite.[40] Let us take the Boston Museum of

34. *Id.* at 181 (citation omitted).

35. *Id.* (citation omitted) (internal quotation marks omitted).

36. *See id.* at 124.

37. *Id.* at 9.

38. *See, e.g.*, LAWRENCE W. LEVINE, HIGHBROW / LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA 152, 160 (1st ed. 1990) (discussing works such as plaster casts, which were originally welcomed in museums as sources for education, that were relegated to the basements of museums and replaced by originals; conversely, copies of original paintings, which were once heralded, were considered ugly by the end of the nineteenth century).

39. *See* MACDONALD, *supra* note 11, at 4-5.

40. LEVINE, *supra* note 38, at 151-69. The Metropolitan Museum of Art in New York serves as one perfect example of this cultural snobbery. Levine writes:

> When in 1891 New York's Metropolitan Museum of Art, after prolonged prodding by political leaders, decided to open its doors to the public on Sunday afternoons, the staff braced itself to greet a crowd of twelve thousand that was younger, more working class in its composition, and less used to the

Fine Arts as an example. Initially, the museum's "collection was a combination of art and artifact, originals and reproductions. This blend suited its didactic purposes"—that is, to take itself seriously as a space for education.[41] Thus, "[a]t its first meeting the Board of Trustees agreed that the museum should be 'a comprehensive gallery of reproductions, through plaster casts of the many treasures of Antique and Medieval Art, or photographs of original drawings.'"[42] This purpose, which its founders backed when the museum opened in 1876, would not hold sway for long. By the beginning of the 1900s, a struggle began over whether plaster casts and reproductions were a "profanation," meant to be replaced by originals, which rendered these casts "mere plaster without a soul."[43] As may be predicted, this ideal of originals as superior eventually won out. By 1909, "the casts—and many of the museum's original goals—were relegated to the basement of the museum's new building."[44]

Plaster casts—deemed cheap reproductions unworthy of exhibition—were not alone in this process of elevating the singular and dethroning the copy. Chromolithography—"the process by which original paintings were reproduced lithographically in color and sold in the millions to all segments of the population"[45]—underwent a similar devaluation by the end of the nineteenth century. Whereas originally "hailed as a vehicle for bringing art 'within the reach of all classes of society,'" by the 1890s "the term 'chromo' had come to mean 'ugly' or 'offensive'"—perhaps precisely *because* it was populist rather than elite.[46] "Thus while at the Philadelphia Centennial Exposition in 1876 chromolithographs were exhibited as 'fine' arts along with sculpture, painting, and engravings, seventeen years later at Chicago's Columbian Exposition of 1893 they were classified as, and exhibited with, 'industrial' or 'commercial' arts."[47]

This culturally-created distinction—between the industrial, or mass-produced, work, and the fine, singular original—came to even greater prominence in 1990, when Congress enacted the Visual Artists Rights Act (VARA).[48] VARA, which essentially conveyed a

---

> decorum of art museums than the Metropolitan's usual run of visitors. The *New York Times* announced that "Kodak camera fiends" would be barred and that visitors would have to check canes and umbrellas at the door "so that no chance should be given for anyone to prod a hole through a valuable painting, or to knock off any portion of a cast."

Id. at 182-83.

41. *Id.* at 151.
42. *Id.*
43. *Id.* at 152 (internal quotation marks omitted).
44. *Id.* at 154.
45. *Id.* at 160.
46. *Id.*
47. *Id.*
48. 17 U.S.C. § 106A (2012).

distinct set of "moral rights" on *fine artists only*, allowed those lucky enough to be deemed a "visual" artist to prevent the alteration, mutilation, destruction, or modification of their work.[49] But these vastly expanded rights are only available for "a painting, drawing, print, or sculpture, existing in a single copy, [or] in a limited edition of 200 copies or fewer."[50] Thus, quantity—and reproducibility—matters. Mass-produced objects—a.k.a., those *without* a limited quantity of 200 or fewer—*do not* receive special protection. Even the legislative history accompanying VARA exhibits rhetoric highly fetishistic of the original. "[W]hen an original of a work of visual art is modified or destroyed, it cannot be replaced," Congress says.[51] "This is not the case when one copy of a work produced in potentially unlimited copies is altered."[52] Therefore, mutilation of a singular work is sacrilege; mutilation of a copy, on the other hand, is no big deal. This idea perfectly exemplifies what Susan Sontag argues to be "the emerging distinction between high and low culture . . . based in part on an evaluation of the difference between unique and mass-produced objects."[53] When we preserve originals, Congress notes, we "protect[] our historical legacy."[54] On the other hand, anything mass-produced is just "generally produced and exploited in multiple copies."[55] Congress' dichotomy between legacy versus exploitation, historical value versus mass-market production, perfectly encapsulates the early twentieth century's move to sacralize the original and denigrate the copy.

C. The Artistic Genius

Perhaps no other figure in recent memory best exemplifies the utterly "original," deeply individualistic, risk-seeking painter than the 1950s Abstract Expressionist painter Jackson Pollock. Better yet—his large-scale paintings, which consisted of flung brushstrokes mimicking the movements of his own body—were inherently irreproducible.[56] A Pollock painting thus became tied to the bodily process through which it was made, and thus, conversely, to the individual man, alone in his studio, skin and hands immersed in the painterly matter of his work.[57] Better yet, Pollock's own life

49. *Id.*

50. *See* 17 U.S.C. §§ 101, 106A (2012).

51. H.R. REP. NO. 101-514, at 9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919.

52. *Id.*

53. LEVINE, *supra* note 38, at 164.

54. H.R. REP. NO. 101-514, at 6.

55. *Id.* at 9.

56. *See* HAL FOSTER ET AL., ART SINCE 1900: MODERNISM, ANTIMODERNISM, POSTMODERNISM 350 (2004) (noting that Pollock's marks were "inimitable").

57. *See id.* at 358 ("By famously laying the canvases of his dripped paintings on the floor and flinging liquid paint onto them from sticks dipped into open cans, Pollock had given his work over to gravity . . . .").

mimicked such ferocious individualism—he was a whiskey-swilling, fast-living, pained artist, whose tragic death (suspected to be of his own making) in a car accident at the age of forty-four only heightened his legacy as the last great frontier of American painting.[58] Pollock thus represented the Western ideal of the liberal, autonomous individual—unconstrained by external elements, completely dictated only by the sheer perseverance of his own will. If, in the last century, the ideal of the fully autonomous individual has been challenged, the artist exists as a response to reinforce our faith in that ideal.[59] He is beholden to no one, constrained by nothing, and, rather than being acted *upon* by the world, he exerts his will onto it.[60]

No wonder then that when Congress passed the Architectural Works Copyright Protection Act[61] in 1990, a little ripple of outrage amongst the legal community ensued.[62] Underlying almost all of the criticism, by both commentators and courts alike, was the idea that architects do *not* act with absolute autonomy—they are constrained by a series of external limitations, be they zoning codes or client demands or market factors like "the expectations and design tastes of . . . prospective consumers."[63] Perhaps to further justify the general abhorrence to copyrighting architecture, commentators took care to note that architects—implicitly in direct contradiction to other lone, individualistic creative artists—"are often influenced by other architects."[64] Another commentator notes that architecture is more like computer programming, in which "'an extensive body of computer science literature, *rather than the individual programmers'*

58. *Id.* at 356.

59. The fully autonomous individual has most severely come under attack in feminist theory. *See* Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 519-20 (1982); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149 (2000).

60. *See* West, *supra* note 59, at 159-61.

61. Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5089, 5133 (1990) (codified in scattered sections of 17 U.S.C.).

62. *See, e.g.*, James Bingham Bucher, Comment, *Reinforcing the Foundation: The Case Against Copyright Protection for Works of Architecture*, 39 EMORY L.J. 1261 (1990); Gregory B. Hancks, Note, *Copyright Protection for Architectural Design: A Conceptual and Practical Criticism*, 71 WASH. L. REV. 177 (1996); Todd Hixon, Note, *The Architectural Works Copyright Protection Act of 1990: At Odds With the Traditional Limitations of American Copyright Law*, 37 ARIZ. L. REV. 629 (1995); Clark Proffitt, Comment, *Poetry or Production, Functionality in the Architectural Works Copyright Protection Act*, 39 ARIZ. ST. L.J. 1263, 1283 (2007); Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering Out "Total Concept and Feel*," 101 NW. U. L. REV. 1851 (2007).

63. Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC, 716 F. Supp. 2d 428, 441 (E.D. Va. 2010).

64. Bucher, *supra* note 62, at 1270.

creativity, provides numerous common programming techniques.'"[65] This "network of relationships between the creator and others" thus necessarily militates *against* copyright protection, went another argument.[66] We get the hint: if you are truly creative, you create ab initio, alone, inspired, without relying on past precedent or others' ideas.[67] If you are, on the other hand, working in a less creative field like architecture, you necessarily rely on collaboration with others.[68] Thus, you do not work creatively.

The conversation surrounding whether architecture is an "art" form that can be copyrighted is arguably just the apex of the "individual creator"/"mere team effort" dichotomy, most notably existing in copyright today as the work-for-hire doctrine (which posits that the more control an employer has over the work, the less likely the employee who created it is entitled to its copyright).[69] Levine has also documented the latenineteenth-century/early twentieth-century shift from democratic music—which encouraged performers to reinterpret the old masters, and which relegated the author-creator of a work to the background—to music for the elite, which triumphed the genius, untouchability of a singular composition and its composer.[70] Thus, though "[b]efore the nineteenth century the names of composers were often omitted from concert programs," by the mid-nineteenth century, performances were billed not as "the performing artists but [as] Mozart, Handel, Bellini, and Beethoven."[71] And, as the twentieth century approached, actors were increasingly "admonished not to take liberties with the text of a Shakespearean play"[72] (whereas before, Shakespearian plays were performed as mash-ups with such titles like *Shakespeare's Jubilee*),[73] and "singers and soloists were obliged increasingly to stick to the sacred text of the great masters."[74] Art was therefore understood not as an interpretation and re-interpretation by others, but rather as a whole, autonomous work, with its creator the ultimate genius behind its conception.[75]

I point out here that while this Article specifically argues that

---

65. Su, *supra* note 62, at 1873 (emphasis added) (quoting 4 MELLVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[F] (2006)).

66. Bucher, *supra* note 62, at 1268.

67. *See id.* at 1267-68.

68. *Id.*

69. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989).

70. LEVINE, *supra* note 38, at 137.

71. *Id.*

72. *Id.* at 138.

73. Specifically, the *Jubilee* consisted of "scenes from a number of Shakespeare's plays concluding with a grand procession." *Id.* at 23. It was, in effect, the early nineteenth-century version of the late twentieth-century mash-up.

74. *Id.* at 138.

75. *See id.* at 137.

this idea of creating and its creations as solitary, artistic genius has fallen significantly in the digital age, some legal scholars argue that the "Romantic" author paradigm—as an ideal to aspire toward—continues to exist. Specifically, Peter Jaszi and Martha Woodmansee, who have conducted considerable research in the historical conditions of the construction of authorship, argue that while "[m]ost writing today . . . is collaborative, . . . it is still being taught as if it were a solitary, originary activity."[76] Thus, "[d]espite growing recognition of the socially constituted nature of the individual human subject, . . . teachers too often remain loyal to a reductively 'expressive' model of composition, which defines their task as one of helping students 'find a voice'—articulate the authentic, originary selves that lie deep within."[77]

II. COPYRIGHT AND CULTURAL CAPITAL(ISM)

So what does the prior Part's discussion of the various ways in which what constitutes real "art" has been constructed in copyright—that it is made alone, that it is singular, that it is original, and, ideally, in limited quantity (the more irreproducible the better)—have to do with class stratification? Specifically, how were the genres of "highbrow" and "lowbrow" constructed in our cultural canon? While I have pointed out changes in the mid-nineteenth century that hint at this emerging dichotomy,[78] this Part will discuss the perfection of the high/low distinction in the twentieth century, as copyright—and its primary function, the control of copies—was deployed by critics of the cultural elite to fight against the uncultured mass public.

A. Copyright, Authorship, and Highbrow/Lowbrow

The prior Part's title—"Copyright's Discursive Spaces"—is a riff on an essay by art historian Rosalind Krauss titled "Photography's Discursive Spaces."[79] In the essay, Krauss, an authoritative voice in the art history field, sets about to reframe the dialogue surrounding the work of Timothy O'Sullivan, who serves a special function within the "art-historical construction of nineteenth-century landscape photography."[80] She argues that while O'Sullivan's works have been framed in the museum and appropriately labeled "art," much of this process of art world legitimation depends on a process of "historical

76. Martha Woodmansee & Peter Jaszi, *Introduction* to THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 1, 9 (Martha Woodmansee & Peter Jaszi eds., 1994).

77. *Id.*

78. *See supra* Part I.A.

79. ROSALIND E. KRAUSS, *Photography's Discursive Spaces*, *in* THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS 131-50 (1985).

80. *Id.* at 131.

reconstruction" engaged in by the museum.[81] She asks, "[i]s the interpretation of O'Sullivan's work as a representation of aesthetic values—flatness, graphic design, ambiguity, and, behind these, certain intentions toward aesthetic significations: sublimity, transcendence—not a retrospective construction designed to secure it as art?"[82]

While Krauss' point is one that I made above in regard to the copyright context,[83] she goes beyond questioning discursive spaces as ones in which we engage in historical construction and value-making.[84] Rather, in order to make her argument even more powerful, Krauss seemed to believe she needed to engage in a process of consequently dethroning O'Sullivan's work—that is, to prove its non-artness.[85] For only by proving its historical origins as "non-art" can Krauss illustrate the move by museums to make it art even more pointedly.[86] Yet what I find especially curious about Krauss' subsequent de-throning of O'Sullivan's work is the way that copyright is used as a weapon in its demise. Specifically, Krauss argues that because copyright was not vested in O'Sullivan—but with the publishers (i.e. as a work for hire)—we cannot rightfully think of him as having "authored" the work.[87] Krauss suggests that rather than labeling an O'Sullivan with the "arty" title of a "landscape photograph," we could see it instead as a "view" (a form of image made specifically to be viewed via a stereoscopic lens, rather than printed):

> Further, *view* addresses a notion of authorship in which the natural phenomenon, the point of interest, rises up to confront the viewer, seemingly without the mediation of an individual recorder or artist, leaving "authorship" of the views to their publishers rather than to the operators (as they were called) who took the pictures. Thus, authorship is characteristically made a function of publication, with copyright held by the various companies, e.g., Keystone Views, while the photographers remain anonymous.[88]

Krauss choosing to call the company which holds the copyright (for example, Keystone Views) the "author" of these works and O'Sullivan himself simply the "operator" who "took the picture," inescapably links copyright with authorship; and labels those who do not hold the copyright as appropriately anonymous operators,

81. *Id.* at 134.
82. *Id.*
83. *See supra* Part I.
84. KRAUSS, *supra* note 79, at 142.
85. *See id.* at 139-41.
86. *See id.* at 141.
87. *See id.* at 140.
88. *Id.*

working behind the scenes.[89] To put it simply, in order to prove the non-artness of O'Sullivan's work, Krauss had to invoke—among several other factors—the legality of ownership.

But who holds the copyright has served as more than an easy reference by the art historical community to de-legitimize a work as low, rather than high, culture. As we will see in the following Section, copyright holders can also practice one of the reigning joys of copyright power: the right to limit the proliferation of copies.

B. Bourdieu and The Field of Limited Production

How can both the right to control rote copying and the derivative works right work to ensure the entrenchment of high art? The French literary critic Pierre Bourdieu, though he does not take up copyright specifically, offers a compelling analysis of the importance of limited production and artistic purity to the dominant cultural class.[90] In his famous work, *The Field of Cultural Production*, Bourdieu asserts that the more limited production becomes, the higher the cultural status.[91] He splits the field of cultural production into two sectors: the "field of restricted production" ("a system producing cultural goods") and the "field of large-scale cultural production" ("organized with a view to the production of cultural goods destined for non-producers of cultural goods, [or,] 'the public at large.'")[92] The former is what we would term "highbrow" art; the latter middlebrow, or "masscult," as Macdonald would call it.[93] In cultural production, economic success is inverse to that of cultural dominance, with the "heteronomous" class (i.e., "those who dominate the field economically and politically," aka "bourgeois art") reaping the economic rewards from mass production while the "autonomous" class (i.e., the avant-garde) gains cultural distinction but little in profit.[94] What the avant-garde accumulates, however, is "symbolic capital," which equates to prestige and authority, while conversely disavowing economic profits because of limited production.[95] Yet this is precisely the point; the "autonomous" class produces not for others, but for themselves—they are the producer's producer. Moreover, Bourdieu has pointed out that it is likely that the autonomous class can bear to disavow economic profits precisely because of their upper-

89. *Id.* at 139-40.

90. PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION (Randal Johnson ed., 1993).

91. *Id.*

92. *Id.* at 115.

93. *See generally* MACDONALD, *supra* note 12 (explaining and offering numerous examples of "masscult").

94. BOURDIEU, *supra* note 90, at 40-41.

95. *Id.* at 75.

class status—both financial and sociological—in the world.[96]

If middle-brow culture is "the product of the system of large-scale production," it is so "because these works are entirely defined by their public."[97] Thus, they may choose mass mediums like television (which, when Bourdieu was writing, was the '80s equivalent of the internet) to disseminate their works.[98] And perhaps most significantly, middle-brow art "oscillat[es] between plagiarism and parody"—most notably of the highbrow.[99] High art, on the other hand, does not recycle what is old and what it cannot imitate; rather, it strives for original creation.[100] Such is the precise *point* of the avant-garde—because they do not write for the public at large, but for those within their field who are also their competitors, there is a desire to out-do, or trump, one's peer in terms of newness and originality.[101] Thus, to "mak[e] one's mark," one must "initiat[e] a new epoch," win "recognition, in both senses, of one's difference from other producers, especially the most consecrated of them; it means, by the same token, creating a new position, ahead of the positions already occupied, in the vanguard."[102]

The "autonomous" and closed-off nature of the field of restricted production thus explains the desire for artistic purity, for absolute control over the work as a means of maintaining its integrity. In a closed-off system dependent on its own "internal dialectic,"[103] no derivative or parodic interpretation is allowed—the work as the author has presented it, Bourdieu argues, possesses a "meaning *objectively* inscribed in a work," and "tends to play a determining role in this process by stressing the efforts of artists and writers to realize

---

96. Bourdieu referred to the class one was born into as one's *habitus*; thus, he notes:

> The propensity to move towards the economically most risky positions, and above all the capacity to persist in them (a condition for all avant-garde undertakings which precede the demands of the market), even when they secure no short-term economic profit, seem to depend to a large extent on possession of substantial economic and social capital.

Id. at 67.

97. *Id.* at 125.

98. *Id.* ("Such is the case with the bourgeois theatre of the *belle-époque*, which is nowadays broadcast on television.").

99. *Id.* at 128.

100. *Id.* at 118 ("Few works do not bear within them the imprint of the system of positions in relation to which their originality is defined; few works do not contain indications of the manner in which the author conceived the novelty of his undertaking or of what, in his own eyes, distinguished it from his contemporaries and precursors.").

101. *Id.* at 116 ("No one has ever completely extracted all the implications of the fact that the writer, the artist, or even the scientist writes not only for a public, but for a public of equals who are also competitors.").

102. *Id.* at 60.

103. *Id.* at 119.

their idiosyncrasy."[104] If the lofty moral rights rhetoric surrounding fine arts (the most limited of all the fields of limited production, as those that qualify for VARA protection must be 200 copies or fewer[105]) has emphasized the personal, close identification the artist feels for his work, Bourdieu's rhetoric of artistic integrity confirms it—the artist not only "feels himself to be recognized through [his work]," but also "because he recognizes himself within it."[106] Just as VARA's integrity right has been justified out of the belief that the loftiness of original works is secured by keeping it as the artist intended it,[107] so the purity of other "restricted production" works existing in copies—such as films and books—can equally be secured via the derivative works right.[108]

C. Masscult and Midcult

Though Bourdieu was writing in the early '80s, his conceptions of avant-garde newness and originality (as opposed to the mass-circulated, populist works of middlebrow culture) were already present much earlier on, especially in the criticism of two highbrow crusaders: Clement Greenberg and Dwight Macdonald.[109] Whereas the former was an art critic, the latter dedicated himself to periodicals and literature, making for an extraordinary team of cultural snobbery all helmed by the magazine *Partisan Review*.[110] In two representative essays from the magazine, *Avant-Garde and Kitsch* and *Masscult and Midcult*, Greenberg and Macdonald, respectively, espoused the exact same ideals against appropriation and toward original creation.[111] Together, their writings constitute a

---

104. *Id.* at 118 (emphasis added).

105. 17 U.S.C § 101 (2012). VARA, codified in 17 U.S.C. § 106A (2012), limits rights under the Act to "work[s] of visual art." *Id.* § 106A(b).

106. BOURDIEU, *supra* note 90, at 118.

107. *See* H.R. Rep. No. 101-514, at 6 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6916; Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1986 (2006) ("[T]he essence of moral rights protection is the idea of respect for the author's original meaning because it embodies the intrinsic creative process. For the author's meaning to be conveyed properly, both the integrity of his work and choice of attribution must be respected." (footnote omitted)).

108. 17 U.S.C. § 103 (2012).

109. *See generally* Randal Johnson, *Preface to* BOURDIEU, *supra* note 91, at vii, viii; Clement Greenberg, *Avant-Garde and Kitsch*, 6 PARTISAN REV. 34 (1939), *available at* http://www.sharecom.ca/greenberg/kitsch.html (last visited May 10, 2014); MACDONALD, *supra* note 11, at 3.

110. *See Greenberg, Clement*, DICTIONARY OF ART HISTORIANS, http://www.dictionaryofarthistorians.org/greenbergc.htm (last visited May 10, 2014); Jennifer Szalai, *Mac the Knife*, NATION, Dec. 12, 2011, at 18 (describing Dwight MacDonald's life).

111. Greenberg, *supra* note 109, at 36; MACDONALD, *supra* note 12, at 3-71, 291 (indicating that the spring 1960 issue of *Partisan Review* was the original publication of the essay). *See generally* Dwight Macdonald, *Masscult and Midcult*, 27 PARTISAN

ready parallel to the same fetishes preoccupying copyright's discursive space.

Greenberg terms lowbrow art "kitsch," and he notes that kitsch requires a previously established culture to appropriate from.[112] Thus kitsch necessarily borrows the "devices, tricks, stratagems, rules of thumb, [and] themes" from the avant-garde art, waters it down, and serves it up to the mass public.[113] The avant-garde's right to copyright status is thus infinitely greater than that of kitsch—the more the creators of kitsch appropriate, the less likely they will be given copyright protection, either because they have created a derivative work, or simply because the work of kitsch has infringed for being too substantially similar.[114] A recent infringement case centering around J.K. Rowling's *Harry Potter* series (though by no means what Greenberg would acknowledge to be a high form of art) evinces the same sort of indignation at an infringer's pilfering of the author's best "stratagems": Rowling compared the defendant's "taking of her work to plundering all of the 'plums in [her] cake.'"[115]

Better yet, if copyright scholars commonly cite 19th century Romanticism as the genesis of our current copyright law's conception of the inspired artistic genius,[116] it was Greenberg—the spokesman for modernism—who unabashedly espoused and made these ideals into a sort of manifesto for the modernist age. "The avant-garde poet or artist," he writes, "tries in effect to imitate God by creating something valid solely on its own terms, in the way nature itself is

---

REV. 203 (1960).

112. Greenberg, *supra* note 109, at 39-40.

113. *Id.* at 40.

114. Substantial similarity is defined as "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 711 (S.D.N.Y. 1987) (quoting Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)). *Steinberg* serves as a perfect example of the battle between highbrow originality and lowbrow appropriation. The plaintiff was a cartoonist for the highbrow magazine *The New Yorker*, and the court noted that he drew in a "whimsical, sketchy style." *Id.* at 708, 710. Whereas the plaintiff is described as an "artist whose fame derives . . . from cartoons and illustrations he has drawn for *The New Yorker*," the defendant (Columbia Pictures) is described as merely "in the business of producing, promoting and distributing motion pictures." *Id.* at 708. The defendant was accused of appropriating a cartoon of a map of New York for a promotional movie poster. The highbrow won. The defendant lost. *Id.* at 708-09.

115. Warner Bros. Entm't Inc. v. RDR Books, 575 F. Supp. 2d 513, 526 (S.D.N.Y. 2008) (alteration in original).

116. *See, e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 459, 490 (1991) (arguing that authorship is a socially-constructed category reliant on the Romantic notion of an inspired genius); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425, 427-30 (1984) (arguing same position as Jaszi, *supra*).

valid."[117]

Yes, Romanticism was alive and well in '60s America, as Macdonald further proves in his essay *Masscult and Midcult.*[118] The highbrow artist pours his soul into his work, it is his lifeblood, his innermost being.[119] He quotes the great father of 19th century Romanticism, William Wordsworth:

> "What is a poet?" asked Wordsworth. "He is a man speaking to men . . . a man pleased with his own passions and volitions, and one who rejoices more than other men in the spirit of life that is in him." It is this human dialogue that Masscult interrupts, this spirit of life that it exterminates.[120]

Macdonald perfectly espouses the "personhood" argument that has been used to justify legislation meant to protect the purity of art from assault,[121] legislation based precisely on the loftiness of art, like VARA.[122] For example, one court deciding a VARA case mimics Macdonald's rhetoric perfectly when it noted that moral rights are

> meant to capture those rights of a spiritual, non-economic and personal nature. The rights spring from a belief that an artist in the process of creation injects his spirit into the work and that the artist's personality, as well as the integrity of the work, should therefore be protected and preserved.[123]

But the Midcult (Masscult's cousin, who panders to the masses but under the guise of high culture) does not just err by appropriating (i.e. infringing)—it also errs when it comes to the reproduction and proliferation of these copies.[124] That is, Midcult dares to circulate such insipid writings to as many people as it possibly can: the magazine *Horizon* (a terrible Midcult publication), for example, "has some 160,000 subscribers, which is more than the combined circulations, after many years of effort, of *Kenyon*, *Hudson*, *Sewanee*, *Partisan*, *Art News, Arts, American Scholar, Dissent, Commentary,* and half a dozen of our other leading cultural-critical magazines."[125] Bourdieu's inverse relationship between high culture and low profit is implicit here: *Partisan Review*, after all, is Macdonald's own magazine.[126] That it has a small circulation is not its bane, but proof of its elite status. There are, after all, only so few

117. Greenberg, *supra* note 109, at 36.

118. *See generally* MACDONALD, *supra* note 11.

119. *See id.* at 4-6.

120. *Id.* at 7.

121. *Id.* at 9-11.

122. H.R. REP. NO. 101-514, at 9-11 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6919-21.

123. Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).

124. MACDONALD, *supra* note 11, at 34-40.

125. *Id.* at 35-36.

126. *See id.* at 33 n.* (Macdonald describing status as editor of *Partisan Review*).

of the educated class who can appropriately take part in the specialized language of high culture.[127] As Bourdieu had noted, "the gulf separating experimental art . . . from popular art forms" is one of "literary language": the understanding of such "demands the almost reflexive knowledge of schemes of expression which are transmitted by an education explicitly aimed at inculcating the allegedly appropriate categories."[128] The masses, condemned instead to a base understanding of "popular language," must therefore content themselves with cheap watered-down appropriations.[129]

Macdonald died in 1982,[130] shortly before the publication of Bourdieu's work and—more significantly—right before a cultural revolution was about to occur. In the next Part, we look at the famous Supreme Court case that changed the artistic meaning of what it meant to "appropriate," and a new cultural landscape that turned copying into high art, and mass popularity into the new cool.

III. THE TWENTY-FIRST CENTURY AND REVERSE CULTURALIZATION

A. The 2 Live Crew Case and "Transformative" Use

So we leave the halcyon days of the '60s when New York intellectuals like Greenberg and Macdonald dominated the scene. For something strange began happening in the '70s and '80s. For one, in 1976, Congress officially codified the "fair use" doctrine, which up until then had been purely judge-made law.[131] The fair use doctrine is a four-factor test that is a defense to infringement if the balancing of four factors (including "purpose and character of the use," "amount and substantiality of the portion used," and "effect of the use upon the potential market")[132] weigh in favor of the defendant. It was the first time that Justice Story's earlier proclamation that "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout"[133] was officially recognized.

Secondly, as other commentators have pointed out, industry bigwigs (what Macdonald would call the Masscult and Midcult), like Hollywood and the Recording Industry Association of America, showed a newfound, fervent interest in copyright, and began to push

---

127. BOURDIEU, *supra* note 90, at 119-20.

128. *Id.* at 119.

129. *Id.* at 119-20.

130. Wolfgang Saxon, *Dwight Macdonald is Dead at 76; Critic had Acerbic View of Politics*, NYTIMES.COM (Dec. 20, 1982), http://www.nytimes.com/1982/12/20/obituaries/dwight-macdonald-is-dead-at-76-critic-had-acerbic-view-of-politics.html.

131. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

132. 17 U.S.C. § 107 (2012).

133. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

for tighter rights and regulations around the same time.[134] As we will see in the following Section, this development coincided and clashed with a new movement in the art world that used appropriation and copying as the new highbrow form.[135]

And then in 1994, the Supreme Court decided the famous case *Campbell v. Acuff-Rose Music, Inc.*, which pitted the soft rock, white, smoothly vanilla artist Roy Orbison against a raunchy group of black musicians who had previously been the subject of an obscenity prosecution: 2 Live Crew.[136] Perhaps surprisingly, the Supreme Court held that 2 Live Crew's parody may be a defensible fair use, reversing the lower court in what would become a benchmark case for parody and the fair use doctrine.[137]

2 Live Crew was a rap group whose lyrics were outrageous enough to spawn a prior obscenity prosecution (obscenity, as one of the few categories of speech outside the ambit of the First Amendment, can thus be readily analogized to the lowest of the low arts).[138] Prior songs included lyrics that, as scholar Kimberle Crenshaw accurately describes it, involved "cunts being fucked until backbones are cracked, asses being busted, dicks rammed down throats, and semen splattered across faces."[139] The lyrics to their take on Orbison's "Pretty Woman" were no different.[140] The parody refers to a "[b]ig hairy woman" who "look[s] like 'Cousin It'," a "[t]wo timin' woman" with a "teeny weeny afro."[141] Orbison's version, on the other hand, simply croons, "Pretty woman, walking down the street, Pretty Woman, the kind I like to meet, Pretty Woman, I don't believe you, you're not the truth, No one could look as good as you."[142] Perhaps most tellingly, one lower court judge in the *Campbell* case referred to the Orbison song as "bland and banal,"[143] and another judge referred to it as "white-bread."[144]

Before the lawsuit, Acuff-Rose (which held the copyright to Orbison's song) had already adamantly refused to give permission for

---

134. *See* Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 311-23 (1989); *see also* Kapczynski, *supra* note 4, at 820-21.

135. *See infra* Part III.B.

136. *Campbell,* 510 U.S. at 569-71.

137. *Id.* at 572.

138. *See* Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment."); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1283 (1991).

139. Crenshaw, *supra* note 138, at 1284-85 (internal quotation marks omitted).

140. *See Campbell*, 510 U.S. at 595-96.

141. *Id.*

142. *Id.* at 595.

143. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1155 (M.D. Tenn. 1991).

144. Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 1433 (6th Cir. 1992).

the 2 Live Crew parody (it is not hard to see why).[145] Surprisingly, however, the Supreme Court held that 2 Live Crew's use may be defensible as fair use.[146] While it may be hard to wax poetic about such bawdy lyrics, the Court goes ahead and elevates the song anyway:

> 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.[147]

The Court here has done the ultimate flipping of high and low: in order to signify the important artistic contribution of the purposefully crass 2 Live Crew parody, it had to demote and demystify the culturally prominent Orbison song as blissfully naïve and, at its core, morally rotten. At best, the Court was hammering home its point about the "transformative" nature of the parody: "the more transformative the new work, the less will be the significance of other factors."[148] Here, borrowing becomes not just a crutch for an author's lack of imagination—it may, in fact, be evidence of his ingenuity and perceptiveness.

The 2 Live Crew case was not just a triumph for parody as a genuine form of art, nor just proof that the derivative may be more meaningful than and thus be wholly transformative of the original (contrary to what Macdonald or Greenberg would have us believe). Rather, overshadowing the whole case is the question of race, authority, and precedent—that the appropriation of a song might not just have artistic meaning, but political meaning as well. As we will see below, in the decade leading up to the 2 Live Crew case, a new group of "highbrow" artists took up copying and appropriation as a way of commenting on the false authority of the original—an authority based on whiteness as uniqueness, on whiteness as power.

B. The Remix Age

Specifically, to my mind, the phrase "the remix age" refers to two things: the ability by ordinary consumers of culture to appropriate those bits of culture and make their own works,[149] and the collaging by established "high art" artists like Jeff Koons, Richard Prince, and

---

145. *Campbell*, 510 U.S. at 572-73.

146. *Id.* at 572 (reversing and remanding for further proceedings).

147. *Id.* at 583.

148. *Id.* at 579.

149. *See, e.g.*, Cory Doctorow, *Walking on Eggshells: Borrowing Culture in the Remix Age Student Documentary*, BOING BOING (May 14, 2010, 3:36 AM), http://boingboing.net/2010/05/14/walking-on-eggshells.html (describing "appropriation, creative influence, re-use and intellectual property in the remix age").

Robert Rauschenberg in which they cobble together "original" artworks from newspaper bits, magazine ads, and others' artwork. The first belongs to the realm of Macdonald's "Masscult,"[150] the second belongs to the realm of Greenberg's "high art."[151] Yet because both rely on copying as the new sine qua non of meaning-making, the highbrow can no longer take the positional stance that to appropriate is to water down, or that borrowing is low-brow. Nor is Bourdieu's bright line between producer and consumer (and that the highbrow only produces for other producers, while the lowbrow produces for consumers) so clear-cut.[152] For these days, it may very well be that the producer is also the consumer, and vice-versa.

Copyright scholar Lawrence Lessig refers to the former blurring of the producer/consumer divide as a shift from Read-Only culture to Read-Write culture, where a previously untouchable work is now fair game for play, re-interpretation, and re-contextualization.[153] If we recall Levine's earlier documentation of the shift from cultural engagement in the 19th century to audience passivity in the 20th,[154] then the new shift Lessig describes is yet another swing of the pendulum. Engagement by the audience is once again the new norm. Thanks to new technology in which ripping a portion of a prior song or film and then splicing it with another can be done by amateurs at home, even ten-year-olds can remix and then upload their creations onto YouTube.[155] Our generation's new highbrow—whether it's intellectuals like Lessig or indie rock musicians like Girl Talk—*advocate* this copying, borrowing, and appropriating: the now-famous Girl Talk himself was once just a guy who bought a computer program called AudioMulch and began mixing tracks in his room.[156] A few years later, indie music snob Pitchfork (a modern day, website version of *Partisan Review*, if you will) named Girl Talk's album *Night Ripper* one of the best of the year.[157]

I term this phenomenon *reverse-culturalization*. That is, the post-60's era is one in which the highbrow appropriates *from* the low-brow, and it is that appropriation that becomes the new highbrow art. For example, Jeff Koons, a noted highbrow artist, made a derivative work from a photograph called "String of Puppies," which Koons derided as "typical, commonplace and familiar," and "part of

150. *See* MACDONALD, *supra* note 11, at 3, 7, 31-34.

151. *See* Greenberg, *supra* note 109, at 36.

152. *See* BOURDIEU, *supra* note 90, at 116.

153. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 28-31 (2008).

154. *See supra* notes 70-74 and accompanying text.

155. *See* LESSIG, *supra* note 153, at 14.

156. *Id.* at 11-12.

157. *Id.* at 11; Sean Fennessey, *Girl Talk: Night Ripper*, PITCHFORK (July 17, 2006), http://pitchfork.com/reviews/albums/9208-night-ripper/.

the mass culture."[158] Yet Koons insisted on copying verbatim from the photograph, giving his artisans instructions that the "work must be just like photo—features of photo must be captured."[159] Koons insisted that in doing so, he had engaged in a long lineage of art-making dating back to the Cubists, Dadaists, and Marcel Duchamp.[160] In short: he was attempting to prove to the lay judge the "high artness" of his work.[161]

And indeed, Koons belongs to a large group of highbrow artists who engage in appropriation techniques and then rely on fair use as a defense against infringement.[162] Interest in this issue is currently high, as the famous art-world darling Richard Prince was recently sued by a relatively unknown photographer named Patrick Cariou for copying verbatim Cariou's photographs of Rastafarians.[163] But while the Koons/Prince school of artists presents interesting case studies for the reversing of the high/low paradigm, the artists I am most interested in are a group called "the Pictures Generation."[164]

The Pictures Generation were a group of artists who roughly worked in the decade between 1974 and 1984.[165] They were, in a sense, the pioneers of the reverse-culturalization movement.[166] They called themselves the Pictures artists because they chose to work with photographs rather than paintings, which still reeked of low-brow art at the time.[167] Better yet, they chose the derogatory name "Pictures" to symbolize the lowest of the low—"that is, as a palimpsest of representations, often found or 'appropriated,' rarely original or unique."[168] And perhaps best of all, most of these artists were women[169]—including arguably the most famous of them all—Cindy Sherman, who just recently had a solo retrospective at the Museum of Modern Art (that bastion of high-art culture).[170] While it

158. Rogers v. Koons, 960 F.2d 301, 305 (2d Cir. 1992).

159. *Id.* (emphasis omitted).

160. *Id.* at 309.

161. *See id.*

162. Darren Hudson Hick, *Appropriation and Transformation*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1155, 1166-68 (2013).

163. Cariou v. Prince, 784 F. Supp. 2d 337, 342-44 (S.D.N.Y. 2011).

164. Hence the Metropolitan Museum of Art's recent exhibition, "The Pictures Generation, 1974-1984." *The Pictures Generation, 1974-1984*, METRO. MUSEUM OF ART, http://www.metmuseum.org/exhibitions/listings/2009/pictures-generation (last visited May 10, 2014); *see also* Jerry Saltz, *Great Artists Steal*, N.Y. MAG. (May 10, 2009), http://nymag.com/arts/art/reviews/56585/.

165. Saltz, *supra* note 164.

166. *Id.*

167. *Id.* ("Back then, photographs were entirely separate from the elite fine arts such as painting . . . .").

168. FOSTER ET AL., *supra* note 56, at 580.

169. *See* Saltz, *supra* note 164.

170. *See MoMA Exhibitions: Cindy Sherman*, MUSEUM OF MODERN ART, http://www.moma.org/visit/calendar/exhibitions/1170 (last visited Feb. 7, 2014).

is true that the Pictures artists made an artistic statement that borrowing is cool with their copied photographs of film stills and re-photographed photographs,[171] it is the political message behind such borrowing that seems to me the most interesting of all. Specifically, if Bourdieu was interested in forms of cultural power—who has it, how it is obtained, and how these positions are solidified—the women of the Pictures Generation made such questioning, and the social construction of power, into art.

One "Pictures" artist, Sherrie Levine, appropriated from male "modernist masters"[172] partly out of the frustration of resignation—a way of saying "'I wish I had done that' or 'I wish that was mine.'"[173] And yet that is precisely the point—Levine *could not* have done the work of the great male masters precisely because of a woman's subservient role in the art world throughout much of the 20th century. She had said, "[q]uotation . . . offers one of the great advantages of disguise: license to express oneself in terms otherwise impossible."[174] It is that sense of impossibility that drives her art, both in its scandalous act of "taking" and in its deeper, more meaningful sense of re-making.

For her appropriations get to a greater point about the objects (which in turn become subjects) of her infringement—these men, too, were not creator-gods, but instead copied themselves. In perhaps the mostoft-cited example of appropriating from a male artist who was appropriating from *his* predecessors, Levine re-photographed an Edward Weston photo of his son's torso.[175] In this way, Levine captures her own autonomy and injects her own authority into a history devoid of female voices. Art historians have argued that by doing so, Levine reanimates the dead past, both in her critical re-framing of Weston and in the resurrection of the classical torso itself as an image of male aesthetic dominance.[176] Levine has, in effect, picture-ified what Bourdieu would claim to be the "socially constituted" nature of "aesthetic value," which is always "radically contingent on a very complex and constantly changing set of circumstances involving multiple social and institutional factors."[177]

If the power struggle between men and women, black and white,

171. Saltz, *supra* note 164.

172. DOUGLAS EKLUND, THE PICTURES GENERATION, 1974-1984, at 206 (2009).

173. *Id.* at 211.

174. *Id.*

175. *Id.* at 206-10.

176. *See id.* at 211 ("In order for Levine to take them, however, they had to have been 'taken' originally, and Levine is able to stop them from being dead masterpieces, and to reanimate them, by revealing, for example, that Weston himself saw something that was not there in the original, how his son's torso *looked like* a Greek kouros."); *id.* at 210 ("Levine sought to counter the implicitly male gaze that she saw undergirding the dominant language of art.").

177. Randal Johnson, *Introduction* to BOURDIEU, *supra* note 90, at 1, 10.

the culturally dominant and the culturally dominated came to a head in the late 20th and early 21st century, the battle for power and control is far from over. While the role of copyright in maintaining elite culture's dominion has diminished dramatically as more highbrow artists mine archives both low and past for appropriative ends, the future of copyright's power as a cultural weapon remains real. In the remaining Part, I explore ways in which copyright is being deployed in our current day—except this time, the war is being fought on a global scale.

IV. COPYRIGHT AND CULTURE: PAST, PRESENT, FUTURE, AND POWER

The social movement known as "Access to Knowledge" coalesced and militarized in the late 1980s, mostly as a response to expanded IP rights across all fields (patent, copyright, trademark), which Amy Kapczynski refers to as "the institutionalization of the new international IP regime."[178] The counter-movement to such institutionalization seemed to comprise a disparate set of interests, aligning those seeking affordable AIDS medication with those seeking the relaxation of stringent copyright laws governing cultural goods.[179] Some, like free-software icon Richard Stallman, have argued that access to life-saving drugs and access to cultural goods are unrelated[180]: "one issue relating to copyright law is whether music sharing should be allowed," he argues,[181] and that "patent law has nothing to do with this. Patent law raises issues such as whether poor countries should be allowed to produce life-saving drugs and sell them cheaply to save lives."[182] It is hard to pit music downloading against life-saving drugs: the latter intuitively ranks higher on our scale of what seems "important," on our scale of what procuring "justice" means. And when copyright *is* talked about, the Access to Knowledge movement has focused on educational exceptions—access to textbooks, for example—that have nothing to do with the cultural goods I have discussed in this Article.[183] At best, copyleftists (those who want less copyright) call upon the "figure of the parodist or transformative creator" in a strategic plea highlighting the importance of innovation and creation.[184] Little justification beyond the innovative creator has been offered; rote copying—which some scholars like Rebecca Tushnet advocate—perhaps seems impossible

178. Kapczynski, *supra* note 4, at 862.

179. *See id.* at 806-08.

180. Richard M. Stallman, *Did You Say "Intellectual Property"? It's a Seductive Mirage,* GNU PROJECT, http://www.gnu.org/philosophy/not-ipr.xhtml (last updated Apr. 12, 2014).

181. *Id.*

182. *Id.*

183. Kapcyznski, *supra* note 4, at 863-65.

184. *Id.* at 874.

to justify, or at best is justified under the classic "First Amendment" friendly ideals of self-expression.[185]

Yet this Article has shown that the availability of cultural goods—by which I do not mean educational textbooks or even political documentaries, but music, film, art, and literature (which, unlike political speech, do not fall into a classic Meiklejohnian justification of the First Amendment as promoting democratic self-governance)[186]—serves an even more stratifying role than political speech by separating the elite from the middle or lower classes, the ruling bourgeoisie from the tasteless, uncultured uniform masses below. If political speech facilitates democracy, then so does access to cultural goods—in a true vision of equality, there would be no class stratifications made obvious by social taste. Taste, which Bourdieu explores in depth in his work *Distinction*, serves a symbolic function that belies educational capital and social origin, "bring[ing] to light the hidden conditions of the miracle of the unequal class distribution of the capacity for inspired encounters with works of art and high culture in general."[187]

These distinctions are now being waged most obviously in the global arena, in which the hallmark of "Westernization" equals fluency in the cultural lexicon. Yet we can see this battle playing out visibly even within the United States itself, as Asian American scholars have argued that it is precisely the "model minority['s]" lack of cultural integration that denigrates them to a lower social strata.[188] Estranged from mainstream American society, Asian Americans are economically integrated but de facto less than—"[f]rom an academic point of view, the model minority stereotype also delineates Asian American students as academically successful but rarely 'well-rounded.'"[189] Scholar David Eng argues that in order to achieve economic success, Asian Americans must consequently forego cultural voice, resulting in a cultural gap—"the failure of well-roundedness"—in which "the Asian American student is seen as lacking."[190] From Bourdieu's perspective, this lack of ability to differentiate and appreciate the "right" cultural goods, or take part in the dialogue surrounding a work (itself a reference to the works that came before it) necessarily demarcates one as "outside" the dominant

185. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 568-82 (2004).

186. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19-21 (Greenwood Press 1979) (1948).

187. PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 29 (Richard Nice trans., 1996) (1979) [hereinafter DISTINCTION].

188. *See* David L. Eng & Shinhee Han, *A Dialogue on Racial Melancholia*, *in* LOSS: THE POLITICS OF MOURNING 347 (David L. Eng & David Kazanjian eds., 2003).

189. *Id.* at 351.

190. *Id.*

class, for "[n]othing more rigorously distinguishes the different classes than the disposition objectively demanded by the legitimate consumption of legitimate works."[191]

Specifically, the above raises questions of whether one can afford culture: for Asian Americans, that they cannot afford to divert themselves from scaling the economic ladder to preoccupy themselves with the cultural (a true mark of "[e]conomic power is first and foremost a power to keep economic necessity at arm's length");[192] for others across the world, whether they have the disposable income to buy such cultural goods in the first place.[193] Yet what will continue to separate "them" from "us" is precisely the shared language of cultural recognition. Even the American middle-brow culture today can consume culture that contains "references to legitimate culture . . . accessible versions of avant-garde experiments or accessible works which pass for avant-garde experiments."[194] But we are seeing that it is precisely these mass-scale creators of middle-brow culture (i.e., the RIAA and the MPAA, entities that are presently preventing the dissemination of such accessible goods to others around the globe) that are also most interested in harnessing the value of copyright to profit, and hence, limit access. Access to medicines may help one live, but without access to culture, it will not enable him to become a global citizen, a cosmopolitan individual.

CONCLUSION

Much of this Article has focused on the seemingly illogical fact that copyright law, almost always viewed as a facilitator of greed by Hollywood and the recording industries, can also serve a much "loftier" purpose: ensuring the artistic integrity of a work of "high" art. Ironically, then, the profit-via-proliferation model of copyright is unimportant to high artists (if indeed the relationship between profit-making and cultural status is inverse as Bourdieu claimed)—it is the control aspect that they care about.[195] For if having dominion over the right to make copies can result in more profits (which was what the founding fathers contemplated when they drafted the Copyright Clause),[196] it could also allow an author to choose not to

---

191. DISTINCTION, *supra* note 188, at 40.

192. *Id.* at 55 (noting that the bourgeoisie wield this power in the form of a "destruction of riches, conspicuous consumption, squandering, and every form of gratuitous luxury" (emphasis omitted)).

193. *See* SOC. SCI. RESEARCH COUNCIL, MEDIA PIRACY IN EMERGING ECONOMIES, at i (Joe Karaganis ed., 2011), *available at* http://piracy.ssrc.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf ("Relative to local incomes in Brazil, Russia, or South Africa, the price of a CD, DVD, or copy of Microsoft Office is five to ten times higher than in the United States or Europe.").

194. DISTINCTION, *supra* note 187, at 323.

195. *See* discussion *supra* Part II.B.

196. U.S. CONST. art. I, § 8, cl. 8. The Copyright Clause empowers Congress to

make copies at *all*, or to limit them. This certainly is the method that Macdonald would champion—and if the masscults below printed and distributed copies of his beloved *Partisan Review*, he would be incensed not because he was denied the right to profit from those copies—but because those copies would have diluted the sacred highbrow status of the *Partisan*'s small circulation.[197]

The passage of the Visual Artists Rights Act of 1990[198] a few years ago as a subset of American copyright law lends new credence to the idea that Macdonald's vision—a lofty art unmarred by others' uncultured hands—continues to prevail today. VARA, after all, is premised on the belief that the artwork is perfect as the artist intended it, and symbolizes the ultimate form of despotic dominion and control by preventing any modification, alteration, or mutilation of an artwork altogether (leading some scholars to call it "elitist").[199] Yet copyright law today certainly serves a much more ambivalent relationship to the high-art artist: it both protects the purity of an artist's vision as it also antagonizes the new form of appropriation art. But whereas the American highbrow will undoubtedly continue to exist via an entire network of cultural vetting—critics, museums, "highbrow" publications—the American masscult will likely continue to wage its war against developing countries in a game where money for cultural goods represents ransom in return for becoming a fully-formed, global citizen—not just of the purse, but in the deeper sense of the enriched mind.

Bourdieu was unique in recognizing that cultural power "is closely intertwined with—but not reducible to—economic and political power, and thus serves a legitimating function" unique and apart from the economic and political.[200] In many ways, cultural capital presents the greatest barrier to a vision of democracy espousing true equality because it works in less obvious, more invidious ways than political and economic power. As political speech is still the core First Amendment protection and most cultural goods are locked down by copyright (with the blessing of the Court),[201] our

---

"promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* Thus the idea is that in order to create, authors have enough economic incentive to do so—to reap the costs of their initial act of creation via profits in the copies.

197. *See* discussion *supra* Part II.C.

198. 17 U.S.C. § 106A (2012).

199. *See* Stephen L. Carter, *Owning What Doesn't Exist*, 13 HARV. J.L. & PUB. POL'Y 99, 100-01 (1990) (arguing that VARA is an attempt to regulate culture and to address fears of owners committing "uncultured" acts).

200. Johnson, *supra* note 177, at 2.

201. *See* Eldred v. Ashcroft, 537 U.S. 186, 219 ("The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framer's view, copyright's limited monopolies are compatible with free speech principles.

willingness to demote cultural fluency as somehow less important toward the makings of a fully participatory citizen means that methods of gate-keeping in preserving the highbrow or even masscult culture can continue to exist unabated.[202] As emerging economies begin to burgeon with newly-minted wealth and conspicuous consumption, the elite upper-class can rely on other methods of separating the vulgar rich from the truly so: via knowledge itself.

In recent years, there has been a proliferation of defenses of humanism—that is, the pursuit of knowledge for its own sake and not as a means toward attaining more wealth or social status—aided, no doubt, by recession-era concerns about the lack of jobs for liberal-arts graduates.[203] Such defenses, most commonly published in Macdonald's then-favored (and likely what would be his still-favored) publication, *The New Yorker*, evinces a beautiful desire about the will toward human enrichment absent some grotesque economic motive, divorced from even the more democratic ideal of increasing one's share of power in a world where power is unequally distributed. Such humanist pleas are oftentimes compelling, soulful, and beautiful, such as when *New Yorker* staff writer Adam Gopnik wrote:

> What really is lost [in the emphasis on status and power] is the horizon of the good life that is included in what we have called, since the Renaissance, humanism—the belief that, while our lives may be devoted to happiness, they're impoverished without an idea of happiness deeper than mere property-bound prosperity. The special virtue of freedom is not that it makes you richer and more powerful but that it gives you more time to understand what it means to be alive.[204]

We are aptly moved by such beliefs in the beauty of knowledge itself, yet what is missing from such humanist accounts is the idea that many simply cannot *afford* to dwell on such lofty endeavors. Humanism—the belief that in art, literature, music, and film resides

---

Indeed, copyright's purpose is to *promote* the creation and publication of free expression.").

202. *Cf.* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing for a shift in our conception of democratic self-governance, with its focus on political speech, to a democratic culture interested in meaning-making through nonpolitical speech and popular culture).

203. *See, e.g.*, George Packer, *No Death, No Taxes: The Libertarian Futurism of a Silicon Valley Billionaire*, THE NEW YORKER (Nov. 28, 2011), http://www.newyorker.com/reporting/2011/11/28/111128fa_fact_packer?currentPage=all; Adam Gopnik, *Decline, Fall, Rinse, Repeat; Is America Going Down?*, THE NEW YORKER, Sept. 12, 2011, at 40, *available at* http://www.newyorker.com/reporting/2011/09/12/110912fa_fact_gopnik; Louis Menand, *Live and Learn: Why we have College*, THE NEW YORKER (June 6, 2011), http://www.newyorker.com/arts/critics/atlarge/2011/06/06/110606crat_atlarge_menand?currentPage=all.

204. Gopnik, *supra* note 203, at 47.

a certain kind of truth unparalleled in all other economic-bound pursuits[205]—carries with it the Renaissance idea of the bourgeoisie: rich enough to idle in salons, free enough to forsake the vulgarities of money. But not everyone may be so lucky. Capitalism and culture are necessarily intertwined.

205. *See* MICHAEL WERNER, HUMANISM AND BEYOND THE TRUTH 1-2, 6 (1998), *available at* http://mikewerner.files.wordpress.com/2009/08/humanism-and-beyond-the-truth.pdf.