FOUR QUESTIONS ABOUT ART*

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One of the real possibilities facing the comprehensive American copyright scheme, and which is already evidenced within it, is the disaggregation of copyright protections according to the subject matter of the work. Already, the Act treats sound recordings differently from all other works,[1] provides "moral rights" protection only for the visual arts,[2] and offers protection for architectural works that is peculiarly suited to such works and no others.[3] With the impending possibility of increasing disaggregation, the time seems ripe for copyright theorists to reflect seriously upon whether art should receive distinctive treatment under the copyright act.

I propose to do this by posing a short series of questions that ought to be posed to any theory of aesthetics and the law. To be precise, four questions:

1. Why do we treat art in our legal culture like nonart?
2. Where does art come from, and how do we foster optimal conditions under which the artist will be most productive, both qualitatively and quantitatively?
3. Is art a necessity or a luxury?
4. How does art differ from a well-earned nap?

First, if art is so important and so distinctive, why, in our legal culture, do we persist in treating art identically with nonart?[4] Consider the syllabus for an art law course. There is no such thing as true art law; rather, such a syllabus lists cases, the subject of each of which is art but each of which falls under any of a number of familiar legal rubrics, such as torts, privacy, contracts, intellectual property law, etc. Similarly, the table of contents of the ACLU's artists' rights handbook includes the following: The Constitutional Foundation, Copyright, Contracts, Libel, Privacy, Obscenity, and Busi-

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1 *See* 17 U.S.C. § 115 (1988) (providing for compulsory licensing of nondramatic musical works).

2 The Visual Artists Rights Act of 1990, Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128 (1990) (codified at 17 U.S.C. § 106A (1988)).

3 The Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5089, 5133 (1990) (amending 17 U.S.C. § 102(8)(1988)).

4 *See infra* text accompanying note 6.

ness and Tax Matters.[5]

I am not asking here why *historically* we have treated art and nonart alike in our various regimes, which is an interesting, but separate question, but rather, what has driven us to continue to protect art and nonart in the same way? There certainly is no constitutional imperative that directs us to treat art the same as nonart.

Let me give a more concrete elaboration of my question. The Copyright Act treats identically what we would call works of art—novels, paintings, sculpture, music, and choreography—and unartistic, but expressive works, such as compilations of data, textbooks, and nonfiction works.[6] Regardless of the artistic quality of a particular work, its author receives copyright protection on the work for the length of his life plus fifty years.[7] Additionally, the same criteria for damages calculation are applied to artistic and nonartistic works.[8]

There is an exception that proves the rule of equal treatment. Within the Copyright Act, there is protection for some visual works which are created for "exhibition purposes."[9] That sounds like an attempt to protect "art" rather than nonart. But the force of our legal culture's presumption—that art should be treated no differently from nonart—is borne out by the legislative history of this provision.[10] It began as a broad-based attempt to protect a wide array of the visual arts, but was whittled down to the point that it protects virtually nothing. This one attempt to treat art more favorably than nonart in the copyright context turned into not much more than a little window-dressing. I would posit that this was no accident, but rather is evidence of our culture's drive to assimilate art.

5 KENNETH P. NORWICK AND JERRY S. CHASEN, THE RIGHTS OF AUTHORS, ARTISTS, AND OTHER CREATIVE PEOPLE (Southern Illinois University Press ed., 2d ed. 1992).

6 17 U.S.C. § 102 (1988).

7 17 U.S.C. § 302(a) (1988).

8 17 U.S.C. § 504 (1988).

9 17 U.S.C. § 106A (Supp. 1993); 17 U.S.C. § 101 (1988 & Supp. 1993) (defining "work[s] of visual art").

10 *The Visual Artists Rights Act of 1989: Hearings on H.R. 2690 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6919, 6921. The legislative history of V.A.R.A. consistently refers to the definition of art as narrow. Representative Markey is quoted as saying, "I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered . . . . [T]his legislation covers only a very select group of artists . . . ." *Id.* (statement of Rep. Edward Markey).

Senator Kennedy, in reintroducing V.A.R.A. on June 16, 1989, also makes reference to the narrowing of the scope of the legislation stating that, "[f]urther limitations were included to clarify the scope of the legislation to address only the unique circumstances of fine art creative works of painters and sculptors." 135 CONG. REC. S6811-13 (1989) (statement of Sen. Kennedy).

In the First Amendment context, art as a category has not received privileged status. To the contrary, well-known scholars, such as Robert Bork, have argued that art is irrelevant to fundamental First Amendment concerns; only political speech really matters, which could serve as a summary of a good deal of our contemporary First Amendment theories.[11] Others have given art only passing notice.

Finally, in the prolonged debates over the 1976 Copyright Act, there was no suggestion to my knowledge that art be treated any differently from nonart. Why should this be? Is our culture onto something or fundamentally and even tragically misguided?

Second, let us assume for a moment that art is uniquely valuable to the polity. If so, one crucial question arises: Where does art come from, and how do we foster optimal conditions from within which the artist will be most productive, both qualitatively and quantitatively? More specifically, who is the artist and what makes her tick?

Our economic copyright system is positively schizophrenic in its response to this question. It operates to some extent on the presumption that the creation of art is encouraged if artists have the capacity to obtain remuneration for their efforts.[12] So it assigns value (through legal sanctions) to intangible property so that artists may negotiate the value of their works in the marketplace. In other words, artists are rational participants in, and contributors to, an art marketplace. On this account, art is created by rational individuals in the hope of remuneration, and we maximize the probability of its creation by ensuring that artists can sell and profit from their original works of authorship.

11 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971) ("I agree that there is an analogy between criticism of official behavior and the publication of a novel like Ulysses, for the latter may form attitudes that ultimately affect politics. But it is also an analogy, not an identity . . . . If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech."). *But see* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 333 (1990) (claiming that he subsequently modified this position because, "the discovery and spread of what we regard as political truth is assisted by many forms of speech and writing that are not explicitly political"); Lebron v. Washington Metropolitan Area Transit Auth., 749 F.2d 893 (D.C. Cir 1984) (Bork, J.) (upholding an artist's First Amendment right to display a poster that was extremely critical of the Reagan administration; but the holding revolved around the political, not artistic, aspects of the poster).

12 *See, e.g.*, Pierre N. Leval, *Fair Use or Foul?*, 36 J. COPYRIGHT SOC'Y 167, 169 (1989); American Geophysical Union v. Texaco Inc., No. 92-9341, 1994 U.S. App. LEXIS 30437, at *9 (2d Cir. Oct. 28, 1994) (seeking "to motivate the creative activity of authors . . . by the provision of a special reward," . . . copyright law grants certain exclusive rights in original works to authors) (quoting Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984)).

On the other hand, at various points in our history, we have paternalistically precluded artists from negotiating all of their rights. In the 1909 Copyright Act, as originally conceived (though not as treated in the case law), authors could not negotiate away their right to the renewal term in their works.[13] In the 1976 Act, authors cannot negotiate away their rights to termination.[14] For those who are not familiar with the copyright regime, the details are not important; my point is that Congress has seen fit to limit the capacity of artists to fully alienate their rights in their works. These limitations are necessary, supposedly, because we cannot trust artists to fully achieve their market potential. Why? Artists exist in the netherworld of the muse, without recourse to the full panoply of rational market decisionmaking capacities presumably available to the rest of us. On this account, art comes from a mystical activity whereby you get more art by coddling artists. I am afraid my adjectives in the preceding sentence might lead one to the conclusion that I believe that the latter view is necessarily wrong. As I am still wrestling with my own theory on this score, I am not altogether sure. In the end, this question—where does art come from and how do we achieve the conditions for optimal production?—may be a fact question only. If it is, it has been spectacularly underresearched. We have built an entire system of copyright protection on the untested assumption that more remuneration motivates artists to create more and better art. Every aesthetic theory within the legal culture must be careful as it treads across this wide expanse of quicksand.

Third, is art a necessity or a luxury? There are plenty of indications in American culture that we believe it is no more than the latter. The Protestant, Lutheran, Kierkegaardian worldview that animates—wittingly and unwittingly—so much of our discourse places the aesthetic on the bottom rung of the ladder, well below morality and religion.[15] For the founding Puritans, art was not an evil, but rather a frill, enjoyable but unnecessary in the pursuit of a godly life. Our public school system deletes art from the curriculum right after it deletes after-school sports programs. The minute

13 17 U.S.C. § 24 (1909) (providing that it is the author, or his heirs, who is "entitled to a renewal and extension of the copyright."); *cf.* Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960) (holding that even though author previously assigned renewal rights to music publisher, executor succeeded to renewal rights in accordance with § 24 because assignment is merely an expectancy of an interest).

14 "[T]ermination of the grant may be effected notwithstanding any agreement to the contrary." 17 U.S.C. § 203(a)(5) (1988).

15 2 SØREN KIEKEGAARD, EITHER/OR 176-77 (Howard V. Hong & Edna H. Hong eds., & trans., Princeton University Press 1987) (1843).

the economy declines, arts foundations find that they are the first to have their philanthropic donations cut. Indeed, according to a lawyer whom I met recently who has been defending the necessity of the National Endowment for the Arts, the fundamental justification for the NEA is that it is necessary to get opera to Tulsa, or ballet to Takoma. Apparently, such towns could or would never accomplish these ends on their own.

If art is unnecessary, a mere luxury that can be discarded when economic conditions dictate, then imagine life without it. Start stripping it away, layer by layer from your life. Remove the annual trip to a Broadway show, the semi-annual trip to the symphony, or the season tickets to the opera or the ballet. Imagine Barnes and Noble or Borders bookstores (depending on whether you are a city or a suburban dweller) without a fiction section, no paintings or posters on the walls of your office or your home, no graphics in the magazines you read, no short stories in the New Yorker, no music on the radio when you wake up in the morning, no mysteries to read on the beach, no museums, no literature or art departments in the universities. What is left? In our logocentric Enlightenment mode of thinking, rationality, work, and the subject are left. I would suggest that we would all go mad in such a world. Take any one category of art away, and survival could be sustained. But, take them all away and who would we be? Or more important, *how* would we be?

Fourth, my final question may seem a bit unorthodox, but I am of the impression that it may be the most momentous that I will pose. Here it is: What is the difference between the *experience* of art and a well-earned nap?

They are both restorative, pleasurable, refreshing, revitalizing. They each assist the individual in gaining much-needed perspective. So, what does art do for me that fifteen minutes of sleep will not? My experience of my dreams is not so far removed from my experience of a novel or a painting. Is it perhaps the same experience, drawing upon the same faculty?

Think about this: we cannot live without sleep. Short-term deprivation produces irritability (as we all know too well) and a sense that we cannot think through the challenges posed to us on a daily basis; we get that foggy-headed feeling that can only be cured by more sleep. Long-term deprivation produces illness, irrationality, madness, and even death. As I suggested obliquely above, long-term art deprivation may well produce the same symptoms: a marked distortion in the so-called rational functions. Could this be the irony of all ironies: a society founded on the Jeffersonian En-

lightenment faith in reason has ignored the single faculty—the imagination—necessary to vital rationality. Rather than a trivial adjunct to real life, art may be a prerequisite to reason and science.

To take another, and more irreverent, tack on the same theme, is there some hidden mystery lurking in the fact that many of the great art centers of Europe close around midday so that everyone can rest? Perhaps more art breeds the need for more naps. Or the capacity for one increases the capacity for the other. This conjecture is only half humorous.

To return to the domestic treatment of art; as dollars for public education become scarce in a time of rising deficits, and a well-rounded arts education has fallen by the wayside in many but the most affluent school districts; could nap education, surely much less expensive, fill the void? If not, why not? In a culture that idolizes equally the round-the-clock partying movie star and the round-the-clock working law firm partner, the need for sleep is a sign of weakness. Could there be a connection between our worship of the three-hour a night sleeper and our culture's general impatience with the fine arts? Or, to state the matter slightly differently, could the incredible vitality of our pop culture have something to do with the fact that we, with our Puritan work ethic, have failed to honor the deep value of sleep, or dreams, or art?

Should we be contemplating a legal regime for art distinct from the rest of copyright treatment? It depends on the answers to these four questions.

JURIMETRIC COPYRIGHT: FUTURE SHOCK FOR THE VISUAL ARTS

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I. INTRODUCTION

This paper addresses two seemingly disparate topics: computer law and visual arts law. In many respects the two domains could not be more different. Computers are the cutting edge. The visual arts are as old as the Lascaux caves. Computers operate at, literally, the speed of light. Most visual art is static. Computer programs derive their value chiefly from their ability to be copied in an instant and distributed to millions. Visual art achieves its primary value from its uniqueness. Both computer software and the visual arts rely on copyright law for their principal means of legal protection.[1] This paper asks: Does that common bond assist or hinder the visual artist?

Let me begin by stating my conclusion. I do not think that computer copyright decisions offer tremendous benefits for visual artists. This conclusion makes me a little nervous because I generally consider myself a copyright purist, holding fast to the theory that copyright doctrine ought to be stable, and neither relativistic nor changeable depending upon subject matter. My analysis of cases in this paper, however, leads me to recommend that the judiciary take special care to draft decisions narrowly when construing copyright in a computer context, and that judges be cautious and conservative when applying a rule developed for software copyright to cases involving the visual arts. Copyright concepts such as the idea/expression dichotomy, fixation, and originality must be considered malleable and be applied flexibly when these two different kinds of works of authorship are involved. In sum, a strict adher-

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[1] The 1976 Copyright Act defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." 17 U.S.C. § 101 (1988). The Act also provides that one of the expressly recognized categories of works of authorship is "pictorial, graphic, and sculptural works." 17 U.S.C. § 102(a)(1988).