ART FORGERY AND COPYRIGHT LAW: MODIFYING THE ORIGINALITY REQUIREMENT TO PREVENT THE FORGING OF ARTWORKS

I. INTRODUCTION

Art is not easily defined because its meaning differs from person to person.[1] *Artwork*, however, is the original product which results from an artist's effort to create statements of reality.[2] Susanne Langer ("Langer"), a philosopher known for her involvement in the field of aesthetics,[3] states that individuals communicate their views of the world through symbols.[4] Paintings are creatively represented symbols on canvas.[5] According to Langer, the idea inspiring an artist to create a painting is a compelling, personal conception which releases his[6] unconscious wishes and thereby accounts for the "significance" or uniqueness

---

[1] "Art" has been defined as: "application of skill and taste to production according to aesthetic principles: the conscious use of skill, taste, and creative imagination in the practical definition or production of beauty." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 122 (unabr.) (1971). Likewise, Title 17 of the United States Code (the "1976 Act") defines "[P]ictorial, graphic, and sculptural works" as:

> includ[ing] two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

17 U.S.C. § 101 (1988).

Art, as used in this Note, is fine art and more specifically, paintings, unless otherwise noted. *See infra* notes 32 and 142 and accompanying text.

[2] Artwork, as referred to in this Note, includes the creative end products of fine artists' original endeavors in the mediums of painting, drawing, and sculpting, unless otherwise specified.

[3] "Aesthetics" is the study of beauty and art, their meaning, and relation. Aesthetics attempts to explain how people perceive the artistic quality of objects of art. It seeks to determine whether art is objective or a subjective interpretation of impressions. THE THAMES & HUDSON DICTIONARY OF ART AND ARTISTS, 10, 333-34 (H. Read ed. 1989) [hereinafter DICTIONARY OF ART].

[4] LANGER, PHILOSOPHY IN A NEW KEY 70, 206-08 (1942) [hereinafter LANGER]. Langer argues that adequate conceptions of the same object can be shown on a canvas by two different artists sharing the same concept, although the images may be quite different. *Id.*

[5] *Id.* Paintings can also be produced on a variety of other mediums, such as paper, wood, or plaster, as in the case of frescoes.

[6] For purposes of stylistic brevity the masculine pronoun is employed to indicate the individual in the abstract.

of each artwork.[7] Langer asserts that the underlying problem in defining art is founded upon understanding the perfection of the form or expression because an artist's particular use of form in a painting, through the combination of color, shape, distance, and depth, is what makes a work "significant."[8] An artist's unique "artistic meaning," which he attributes to his work, contributes to its beauty.[9] Thus, Langer's philosophy ultimately defines art as the sensuous construct of form representing visual structures which alone makes a work beautiful.

Although each individual views the world through his own eyes and presumably is able to portray his unique interpretation, the art and legal communities distinguish between original[10] and derivative[11] works. An entirely original artwork or an authorized derivative[12] is not a forged or fake work[13] as long as it is created and distributed with artistic integrity, which equates with a lack of intent to defraud.[14] "The true artist produces art for the sake of art[,]"[15] not to deceive viewers. Conversely, *art forgery*[16] is pro-

---

7 LANGER, *supra* note 4, at 206-08.

8 *Id.*

9 *Id.* at 208. Similarly, Professor Sedgewick states, "[N]o art is good because it has beauty: it has beauty because it is good." SEDGEWICK, ART APPRECIATION MADE SIMPLE 6 (1959) [hereinafter SEDGEWICK].

10 The seminal case defining the requisite "originality" of a copyrighted work is Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951). All works, whether originals or derivatives, must originate with the author seeking to obtain copyright. *Id. See infra* notes 135-88 and accompanying text (discussing originality and its applications).

11 "A 'derivative work' is a work *based upon* one or more preexisting works, such as . . . art reproduction, . . . or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1988) (emphasis added). Copyright protection for a derivative work extends only to the newly contributed portion of the work and not to the preexisting work. *Id.* at § 103(b).

12 Section 106 grants the owner of a copyright an exclusive right in derivative works. 17 U.S.C. § 106. For purposes of discussion, authorized derivatives include derivative works based on works in the public domain. *See infra* notes 138-41 and 166-77 and accompanying text (discussing derivative works).

13 The New York Penal Law defines a criminal art simulator (referred to in this Note as art "forger") as one who, "[w]ith intent to defraud, . . . makes or alters any object in such [a] manner that it appears to have an antiquity, rarity, source or authorship which it *does not in fact possess; or . . . [w]ith knowledge of its true character . . . utters or* possesses an object so simulated." N.Y. PENAL LAW § 170.45 (McKinney 1989).

14 *See id.* Intent is a required element of criminal simulation, or forgery, in New York State. *Id.* The majority of art experts consider art forgery a species of fraud. Van Bemmelen, *Foreward* to ASPECTS OF ART FORGERY at v (1962) (symposium by Institute of Criminal Law and Criminology, University of Leiden) [hereinafter Van Bemmelen]. *"[A]n artists' experience must be purely personal lest it lack integrity or the 'ring of truth.'"* SEDGEWICK, *supra* note 9, at 15. Professor Sedgewick argues that recognizing the intuitive truth of an artwork is necessary to appreciating both the artwork itself and the artistic process behind it. *Id.* at 21.

15 Van Bemmelen, *supra* note 14, at ix.

16 *See* N.Y. PENAL LAW § 170.45.

duced or distributed with the intent[17] to deceive others, creating the belief that the work is from a different period of art or by a different artist.[18]

Copyright law protects an artist's original[19] and unique contribution through his work with property rights.[20] Both original and derivative works are subject to the copyright laws of Title 17 of the United States Code (the "1976 Act").[21] Art reproductions[22] are considered derivative works and thus, are also subject to the statutory standards of the 1976 Act.[23] The copyrightability of a reproduction[24] is based on its "originality."[25] This Note addresses the distinction between reproduction and forgery in copyright law and discusses the extent to which one can reproduce an artwork before copyright law deems it forgery.

While forged works can be reproductions of originals,[26] not

---

[17] *Id.* The New York Penal provisions require proof of intent to defraud for a forger to be found guilty of a class A misdemeanor. *Id.*

[18] *See generally* 2 LAW, ETHICS, AND THE VISUAL ARTS (J.H. Merryman & A. Elsen 2d ed. 1987) [hereinafter Merryman] (discussing many of the problems associated with forged works); Tietze, *What Is an Art Forgery?, extracted from* H. TIETZE, GENUINE AND FALSE, 9-17 (1948), *reprinted in* Merryman *supra* at 552 (describing motives and features of forgery) [hereinafter Tietze].

[19] Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951) (work owes origin to author). *See infra* notes 135-88 and accompanying text (discussing originality and its application).

[20] The Copyright Clause of the Constitution authorizes Congress to enact copyright law. U.S. CONST. art. I, § 8, cl. 8. As a result of this grant of authority, Congress passed the 1976 Act which grants copyright owners five property rights. A copyright owner is exclusively entitled to do or authorize the following:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1988).

[21] 17 U.S.C. §§ 101-914 (1988). In derogation of the copyright owner's exclusive rights, however, he cannot recover damages for "fair use" of his work. *Id.* at § 107.

[22] Section 101 of the 1976 Act includes "art reproduction" in the definition of "derivative work." *Id.* at § 101. This Note refers to copies that were either made by the original artist or were authorized by the copyright owner as "reproductions." Reproductions are not automatically considered infringements. *See infra* notes 24-27, 47-48, and 61-71 and accompanying text (discussing reproductions). Infringing or otherwise unauthorized copies are referred to as "forgeries."

[23] 17 U.S.C. §§ 101-914.

[24] *Id.* at §§ 106-118.

[25] Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). *See infra* notes 139-40 and 166-79 and accompanying text (discussing originality as it relates to copyrightability of reproductions).

[26] The College Art Association, *Standards for Sculptural Reproduction and Preventive*

all reproductions are forgeries.[27] Due to the entirely subjective nature of art, it is not easy to determine where creativity begins and bare copying ends.[28] Therefore, copyright law must provide the artist with a standard of originality that enables his contribution to be more easily distinguished and consequently better protected from another person's copy of his work.[29] Copyright law must account for the creative element.[30] A creative element is both present in reproductions and absent from forgeries. Like-

---

Measures Against Unethical Casting, in Merryman, *supra* note 18, at 549-51 [hereinafter The College Art Association]. The standards set forth by the College Art Association purport to establish workable guidelines for the reproduction of three-dimensional works. These standards recognize both the need to preserve artistic integrity and the desirability of continuing to allow reproductionists to make reproductions. The College Art Association attempts to satisfy these goals by advising reproductionists to take precautions necessary to avoid confusion. *Id.* at 549-51.

27 For this reason, Elsen and Merryman have suggested that all exact reproductions should not be made illegal. Elsen & Merryman, *The Harm of Exact Reproductions of Art*, in Merryman, *supra* note 18, at 547 [hereinafter *The Harm*]. Elsen and Merryman recognize that, unless prevented by copyright or agreement, reproductionists have the right to copy works, however, reproductionists should take measures to avoid causing confusion between the original and reproduced works. *Id.*

28 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). This case involved the copyright of a circus poster which some observers would not consider art, but rather merely a form of advertising. *Bleistein* is most famous for Justice Holmes' declaration of the inherent danger of courts determining whether a particular piece is truly art, since the experts themselves often encounter difficulty in making such a determination. *Id.* at 251-52. *See* Pellegrini v. Allegrini, 2 F.2d 610 (E.D. Pa. 1924) (court stated that it is difficult to pronounce upon the presence of artistic merit). *See also infra* notes 159-63 and accompanying text (discussing *Bleistein*) and 251-55 and accompanying text (discussing *Pellegrini*).

29 [T]here is a vast distance between forgers and the original creativity of a true artist. Forgers and swindlers . . . take pleasure in lies and dissimulation [as opposed] to the conscientious attitude and ethical approach of the truly creative artist. The artist's constant struggle to create the picture arising out of his own self always allies itself with the striving for truth in the forms given to the work.

Würtenberger, *Criminological and Criminal-law Problems of the Forging of Paintings*, in ASPECTS OF ART FORGERY 15, 37-38 (1962) (symposium by Institute of Criminal Law and Criminology, University of Leiden) [hereinafter Würtenberger].

30 Some courts have grouped the concepts of "originality" and "creativity" together, supporting the view that they are closely related and that the imposition of a requirement of creativity would not result in a dramatic departure from the current analyses of original works. "To be the original work of an author, a work must be the product of some 'creative intellectual or aesthetic labor.' " West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1223 (8th Cir. 1986) (quoting Goldstein v. California, 412 U.S. 546, 561 (1973)), *cert. denied*, 479 U.S. 1070 (1987). The Eighth Circuit granted West Publishing a preliminary injunction which prevented the copying of its arrangement of common law decisions contained in a series of legal reporters. The court found sufficient originality in West's particular arrangement of decisions because they had been prepared with "a modicum of intellectual labor." *Id.* at 1227.

Professor Nimmer has generally grouped originality and creativity together, while recognizing a distinction between them. *See* M. NIMMER, 1 NIMMER ON COPYRIGHT, § 2.01[B], at 2-13 to 2-16 (1989) [hereinafter NIMMER]. Both creativity and originality are required for copyright although only within the "narrowest and most obvious limits. . . beyond individual effort." *Id.* at 2-13 to 2-14 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903)).

wise, copyright law should not afford protection to the forger who insignificantly alters an original work.[31] Although copyright law can prevent forgery in some cases, it fails to adequately protect against much fine art forgery,[32] a matter worthy of legislative attention given the prevalence of art forgery today.[33] Indeed, copyright law may actually provide some forgers with copyright protection.[34] To avoid such a problem, copyright law should require an element of creativity,[35] in addition to the originality standard already imposed, which would simultaneously secure the issuance of copyright protection to artists and prevent forgers from protecting work which is not their own.

Part II of this Note examines the background of art forgery, its various forms and effects, forgers' motives, and the victims of forgery. Part III discusses the identification and prevention of art forgery by examining authentication practices and copyright law and its applicability to the problem of protecting the artist. Part IV recommends modifying copyright law to remedy forgery problems facing fine artists and offers suggestions for avoiding the existent problems and pernicious effects of forged artworks.

II. Art Forgery: History and Impact

A. *Types of Forgery*

Art forgery may take the form of exact replication which is newly and wholly created by the forger or alteration of a work already in existence.[36] Other types of forgery include works by

---

31 Under the standard set forth in Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951), insubstantial alterations of original works contain requisite originality. This Note suggests modifying the *Catalda* standard to avoid such an outcome.

32 The 1976 Act indicates that "[c]opyright protection subsists . . . in original works . . . fixed in any tangible medium of expression, . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a) (1988). The 1976 Act includes in the category of fine art, all "pictorial, graphic, and sculptural works." *Id.* at § 102(a)(5).

33 *See generally* Merryman, *supra* note 18 (essays addressing a variety of issues of artists' legal rights and art forgery). *See infra* notes 36-120 and accompanying text (discussing the meaning and implications of art forgery and its effects on society).

34 This could occur where, due to the minimal originality requirement set forth in *Catalda*, someone who copies another's work while creating a secondary work which differs slightly from the original, may obtain a copyright for the secondary work before the original artist is aware that the copy exists. 191 F.2d at 102. *See* 17 U.S.C. § 102.

35 This Note suggests that an element of creativity be imposed, in conjunction with the originality requirement already used, to remedy the problems inherent in the current standard. *See infra* notes 137-45 and 189-236 and accompanying text (discussing the inadequacy of the *Catalda* standard).

36 Exact replication and the creation of other derivative works are exclusive rights under copyright. 17 U.S.C. § 106. This includes art reproductions "or any other form in which a work may be recast, transformed, or adapted." *Id.* at §§ 101, 106. In the case of

unknown or little-known artists which are "touched-up" by adding the personal marks of better known artists.[37] This procedure artificially transforms such works into art the viewing public mistakenly attributes to the well-known artists.[38]

Those accused of producing fraudulent art often defend their work by arguing that the piece was created in good faith and that someone else misrepresented the true artist of the work.[39] For example, a young Parisian artist accused of forging paintings he had created in good faith and which were subsequently forged by someone else so as to appear as the work of Othon Friesz,[40] a well-known Post-Impressionist, successfully employed such a defense.[41]

Because artists invest great skill and talent to create paintings which merit critical acclaim and economic success, successful forgers have won both praise and blame for their efforts.[42] Although forgers of the world could become great artists and in a distorted way are, they actually are art frauds, using a master's original style and form insights without revealing that that is their

---

a derivative work, the copyright extends only to the newly contributed material, not the preexisting work. *Id.* at § 103(b).

Altering a work already completed by the artist is not always considered forgery and is therefore not illegal *per se*. However, morally, unauthorized alteration of a preexisting work is as reprehensible as the creation of a forged work which is wholly produced by a forger. CONSTABLE, FORGERS AND FORGERIES 14-15 (1954) (containing thorough historical perspective of forgery) [hereinafter CONSTABLE]. Some forgers have been inspired by the belief that their act of removing or covering up portions of paintings will serve to eliminate indecent or inappropriate representations. *Id.* *See* Tietze, *supra* note 18, at 555.

37 For example, "[t]he signature of a master may be added to a school piece, or to anything that bears some superficial resemblances to his work . . . ." CONSTABLE, *supra* note 36, at 14. The transformation of a mediocre work by a little-known artist into a work attributed to a renowned artist may be the most common method of forgery. Tietze, *supra* note 18, at 554-55.

38 CONSTABLE, *supra* note 36, at 14. *See also* LINDEY, PLAGIARISM AND ORIGINALITY 228-29 (1952) [hereinafter LINDEY] (although the author focuses on plagiarism and originality, he diverges here to discuss hoaxes and forgeries in the world of art).

39 Tietze, *supra* note 18, at 553-54. Giovanni Bastiannini employed the defense of good faith and lack of fraudulent intent when he learned that a bust he had sculpted was installed in the Louvre in 1866 and had been attributed to the period of the Italian Quattrocento. Bastiannini claimed that his work, done in traditional style, "had been misused by dishonest dealers." *Id.* at 554.

40 Othon Friesz (1879-1949) was a member of the Fauves, an informal group of artists who believed that "exactitude is not truth." H. READ, A CONCISE HISTORY OF MODERN PAINTING, 44 (1959) [hereinafter READ]. Henri Matisse has been described as the leader of the Fauves because he originated their philosophy. *Id.* at 34, 48; DICTIONARY OF ART, *supra* note 3, at 122. Georges Braque and Pablo Picasso were also associated with the Fauves, at least for a short period of time. READ, *supra* at 48-49 (1959).

41 Tietze, *supra* note 18, at 553.

42 *Id.* at 554. Tietze maintains that the majority of art imitations were created not to deceive, but rather out of deference for a great model, educational purposes, or commercial use. *Id.* Some argue that the artist who paints after studying the work of another contributes something of value to society by refining previously tested techniques.

intention.[43] Art can consist of honest or dishonest expression. The main difference between an artwork and a forged work is the genuineness of idea, labor, and presentation.[44]

B. *A Brief Historical Perspective of Art Forgery*

Art forgery has been recognized for as long as there have been artists producing works and collectors purchasing them.[45] In response, courts have long recognized the need to balance an artist's exclusive rewards of his own ingenuity against the public's right to use and reproduce the artist's unique creation.[46] Thus, courts treat forgers and reproductionists,[47] although both attempting to create copies as much like the originals as possible,[48] differently due to their respective motive and intent.[49] This reasoning holds true today as much as ever because artists in the marketplace may incur opportunity costs as a result of pursuing art rather than working in other fields, such as law or medicine, or as a result of concentrating on one art form rather than another.[50] For example, where an artist opts to expend his energies

---

[43] *Id.* at 552-53. "The essential feature of art forgery is . . . the intention to deceive . . . ." *Id.* at 552.

[44] *Id.* at 552; Würtenbeger, *supra* note 29, at 37-38.

[45] *See* Würtenberger, *supra* note 29, at 16-18. As far back as the fifteenth century, forged works presented as those of Albrecht Dürer were conveyed under false pretenses, while Dürer himself is said to have copied work by Leonardo da Vinci. LINDEY, *supra* note 38, at 169-70. *See also* Tietze, *supra* note 18, at 555.

[46] As Lord Mansfield observed,

> We must take care to guard against two extremes equally prejudicial; [that] men of ability, who have employed their time for the service of the community may not be deprived of their just merits and reward for their ingenuity and labor; the other that the world may not be deprived of improvements nor the progress of the arts be retarded.

3 NIMMER, *supra* note 30, at § 13.03[B], 13-55 n.151 (quoting Sayre v. Moore, 102 Eng. Rep. 139, 140 (1785)). James Madison once noted that in the balance, the utility of copyright power will "scarcely be questioned." THE FEDERALIST No. 43, at 271-72 (J. Madison) (C. Rossiter ed. 1961).

[47] A "reproductionist" copies other artists' works after having first obtained the artist's permission to do so or by obtaining the work from the public domain. *See infra* notes 48-49 and 53-71 and accompanying text (discussing distinction between reproductionists and forgers).

[48] *See generally* DUBOFF, THE DESKBOOK OF ART LAW 384-475 (1977) [hereinafter DUBOFF, DESKBOOK] (thorough presentation of legal problems fine artists face). Fabrications created specifically for sale as other artists' works and exact replications of preexisting works are among the types of forgery which forgers strive to make as much like the originals as they can. *Id.* at 388.

[49] *See infra* notes 72-96 and accompanying text (discussing intent of forgery). *See also* N.Y. PENAL LAW § 170.45 (Mckinney 1989).

[50] *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-98 (1972) [hereinafter Calabresi & Melamed] (discussing optimal economic efficiency, transaction costs, and setting priorities on different property rights). Using the same reasoning as Calabresi and Melamed, it becomes apparent that any decision to pursue or forego a career involves opportunity and transaction costs.

developing new, purely creative works for no purpose other than enhancing the aesthetics available to society, rather than involving himself in commercial art projects where the monetary reward may be greater, he gives up potential profits he could have earned working for someone else with a particular commercial goal in mind.[51] According to Adam Smith, the father of free market economics, even if an artist's motives for creating original art are entirely selfish, "an individual who 'intends only his own gain' is led by an invisible hand to promote an end which was no part of his intention . . . . By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it."[52]

There have been many famous forgeries throughout history.[53] Van Meegeren's forged Vermeers[54] and "The Fortune Teller"[55] are among the most well-known.[56] Hans van Meegeren was a relatively obscure artist from Holland who sold many paintings under the pretense of being original Vermeers.[57] He did not actually imitate specific works by Vermeer, rather, he copied Vermeer's style.[58] The forged Vermeers were so convincing, however, that it was not until van Meegeren painted a "Vermeer" in the presence of an observer while in prison that he

---

[51] *See id.*

[52] M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE xvi (1981) (quoting and referring to A. SMITH, THE WEALTH OF NATIONS (1776) (E. Canaan ed. 1930)).

[53] S. HODES, WHAT EVERY ARTIST AND COLLECTOR SHOULD KNOW ABOUT THE LAW 108 (1974) [hereinafter WHAT EVERY ARTIST]. *See also* S. HODES, LEGAL RIGHTS IN THE ART AND COLLECTOR'S WORLD 27 (1986) [hereinafter LEGAL RIGHTS] (discussing history of art forgery and current legal precautions and remedies available to artists).

[54] Jan Vermeer (1632-1675) was a Dutch painter and art dealer. Vermeer portrayed domestic life as poetry, striving to accurately represent reality. Vermeer employed various mechanical and pictorial means including *camera obscura* and mirrors. He is known for innovative insight into the use of space and depth in visual representations on canvas. DICTIONARY OF ART, *supra* note 3, at 333-34.

[55] "The Fortune Teller" is attributed to Georges de La Tour (1593-1652), a French artist of the seventeenth century. *See* Note, *Art Forgery: The Art Market and Legal Considerations*, 7 NOVA L.J. 315 (1983) [hereinafter *Art Forgery*]. De La Tour was known for his original use of color, particularly reds, yellows, and browns. DICTIONARY OF ART, *supra* note 3, at 190. "The Fortune Teller" was purchased by New York's Metropolitan Museum of Art in 1960, two years after it had been declared a forged work. N.Y. Times, Apr. 22, 1990, § 2 (Arts & Leisure), at 3, col. 1 (letter from Morley Safer discussing the murky history of "The Fortune Teller").

[56] *See Art Forgery*, *supra* note 55, at 316. *See also* Merryman, *supra*, note 18, at 561 (discussing van Meegeren's arrest and subsequent imprisonment for forging Vermeers).

[57] Henricus Anthonius van Meegeren (1889-1947) was a "renowned forger of Vermeers and de Hooghs." DICTIONARY OF ART, *supra* note 3, at 219. *See infra* note 59 (discussing van Meegeren's imprisonment).

[58] *See* WHAT EVERY ARTIST, *supra* note 53, at 108; Merryman, *supra* note 18, at 561. Van Meegeren painted new "Vermeers" rather than acquiring real works by Vermeer and altering them.

was believed to have been the painter of the fakes.[59] "The Fortune Teller" has hung in the Metropolitan Museum of Art in New York City since 1968 and continues to be the focus of an ongoing debate amongst experts as to whether it is actually a fake.[60]

Fraudulent works need not always be recreations of another's work.[61] For example, Giorgio de Chirico[62] was an artist convicted of forging his own work when he copied his earlier style and then falsified the dates to reflect that earlier time.[63] Further examples come from the time of Rubens,[64] during the latter part of the sixteenth century through the early part of the seventeenth century, when the teacher-pupil tradition of painting in the same style was encouraged and profitable for all concerned. Forgery is not the only source of confusion regarding the authenticity of artworks, misattribution also wrongly identifies artists' names with artworks.[65] During Rubens' era the pupil

---

59 Merryman, *supra* note 18, at 561. Van Meegeren was imprisoned for treason as an enemy collaborator for selling one of his fake "Vermeers" to the Nazi Hermann Göering . . . ." *Id. See* DICTIONARY OF ART, *supra* note 3, at 219 (the authors refer to van Meegeren's purchaser of this ruinous sale as "Göering"). The radioactive technique of analyzing the "Vermeers" created by van Meegeren has further confirmed that they are fakes. L. Duboff & J. Frantz, *What Is Real: Authenticity or Aesthetics in Art*, in ART LAW DOMESTIC AND INTERNATIONAL 477, 490 (L. Duboff ed. 1975) [hereinafter Duboff, *What Is Real*], *reprinted in* LAW AND THE VISUAL ARTS 303 (L. Duboff ed. 1974) (conference sponsored by Northwestern School of Law of Lewis and Clark College).

60 *Art Forgery*, *supra* note 55, at 315. The author examines art forgery in light of the Uniform Commercial Code, New York Penal Law, and New York General Business Law remedies. The New York General Business Law provisions relevant to the topic have since been repealed and replaced by the Art and Cultural Affairs Laws. N.Y. ARTS & CULT. AFF. § 13.19 (McKinney 1984). For example, whereas some critics and commentators claim that "The Fortune Teller" is of dubious origin, perhaps no more than a fragment of a "restored" de La Tour original, others dispute that it is entirely fake. N.Y. Times, Apr. 22, 1990, § 2 (Arts & Leisure), at 3, col. 1 (letter from Morley Safer discussing the authenticity of "The Fortune Teller" and a 1982 segment of the CBS Television program "60 Minutes," in which this topic was addressed).

61 Merryman, *supra* note 18, at 562 n.4 (distinguishing misattributions from forgeries).

62 De Chirico (1888-1974) was part of the Dada movement and was known for his "meta-physical" style and pictures of strange pseudo-classical buildings. Many of his works are considered surrealist because they contain mannequin-like figures and mechanical drawing instruments. Later in de Chirico's career, his work moved away from surrealism and developed into more naturalistic portrayals. After 1933, de Chirico repudiated the modern movement entirely. DICTIONARY OF ART, *supra* note 3, at 77.

63 Merryman, *supra* note 18, at 561. De Chirico also denied having painted other works attributed to him. The de Chirico case exemplifies what can happen if a court weighs experts' opinions more heavily than the artist's own. *Id.*

64 Peter Paul Rubens was a Flemish master who lived from 1577 to 1640. Rubens' influence on Flemish, French, and English painting was enormous. "Artists eager to learn the secrets of [Rubens'] art flocked to his studio, which produced many copies and variations; Rubens often retouched and sold them as originals." DICTIONARY OF ART, *supra* note 3, at 291-92.

65 S. HODES, THE LAW OF ART & ANTIQUES 54 (1966) [hereinafter ARTS & ANTIQUES]; Merryman, *supra* note 18, at 562 n.4. Copying was a method by which young artists learned to paint. ART & ANTIQUES, *supra*, at 54.

worked under the authority of the master, both copying his work and later contributing to it.[66] Leonardo da Vinci was one such pupil who incorporated his instructor's drawings into his own compositions.[67] Michelangelo is also said to have been an inveterate copyist.[68] Art historians claim that Michelangelo's copies were so good as to be indistinguishable from the originals.[69] Other copyists include Dürer, Cézanne, Manet, and Vincent Van Gogh, to name a few.[70] The difference between the above-named artists and today's forgers is clear: modern forgers are deceptive in creating fake art, whereas the historical copyists acted not only with good intent, but with the original artist's approval as well.[71]

C. *Economic and Other Motivations of the Forger*

An artwork's originality has become integrally tied to its economic value. This was not true, however, in the Middle Ages.[72]

---

66 ART & ANTIQUES, *supra* note 65, at 54; LINDEY, *supra* note 38, at 169. Copying is not necessarily equated with forgery. At this time a student's individual creativity was considered a detriment in the early phase of learning. This attitude encouraged frequent copying. "When the novice was not grinding the pigment or cleaning the brushes, he copied his teacher's pictures." *Id.* Today, some copyists reproduce works with no malicious intent, seeking only to learn or to reproduce art for educational purposes. *Id.*

67 LINDEY, *supra* note 38, at 169. Leonardo da Vinci (1459-1519) was a Florentine painter, sculptor, architect, inventor, writer, and musician. Da Vinci left relatively few original paintings and no known original sculpture. His notebooks contained many scientific observations and inventions such as flying machines and tanks. Da Vinci profoundly influenced his contemporaries with his compositions and use of light. DICTIONARY OF ART, *supra* note 3, at 195-96. Da Vinci's own students copied him when he later wore the master's shoes. LINDEY, *supra* note 38, at 169.

68 LINDEY, *supra* note 38, at 169. Michelangelo (1475-1564) is best known for his work on the Sistine Chapel and the sculpture of David. He did much work for the famed de Medici family. One critic has said of him: "Probably no artist has ever exerted a greater influence [on art] than M[ichelangelo]." DICTIONARY OF ART, *supra* note 3, at 223.

69 LINDEY, *supra* note 38, at 169.

70 *Id.* Albrecht Dürer (1471-1528) was a German artist known for painting, woodcuts, and engravings. DICTIONARY OF ART, *supra* note 3, at 112-13. Paul Cézanne (1839-1906) was one of the early impressionist painters to receive recognition after participating in the first impressionist exhibition in 1874. *Id.* at 72-73. For a more detailed description of Cézanne and his work see READ, *supra* note 40, at 13-21 (1988). Edouard Manet (1832-1883) was associated with the Impressionists, and in some respects was considered a founder of the movement, although he refused to exhibit with them. P. POOL & S. ORIENTI, THE COMPLETE PAINTINGS OF MANET 5-14 (1985). Vincent Van Gogh (1853-1890) was a self-taught Dutch painter who conceived of the idea of bringing artists together as a working community. His style changed radically throughout his life. Late in life, he introduced brilliantly colored works with thick, frenzied brush strokes. *See generally* I. WALTHER, VINCENT VAN GOGH (1987) (biography of Vincent Van Gogh).

71 LINDEY, *supra* note 38, at 169.

72 The Middle Ages was a period in Western European history that followed the collapse of the Roman Empire and ran from the third century through the fifteenth century Renaissance. THE NEW COLUMBIA ENCYCLOPEDIA 1771 (W.M. Harris & J.S. Levey eds. 1975).

At that time, individual artistic creativity was de-emphasized under a shield of anonymity because art "was religious in function" and consequently, one gained nothing by copying another's work. During the Renaissance, however, with the recognition of the artist's value as an individual and the identification of originality with genius, a great motivational source arose for the forger: increased respect and economic compensation commensurate with a work's originality.[73] Increased sales activity in the art world has further led to equating the financial value of a painting with its artistic value, as measured by its creative and original aesthetic worth.[74] The value of art has also become tied to the social recognition of the artist himself.[75] Thus, the concept of originality has been extremely important in the practice of forging art in modern times because with the recognition of originality and the enhanced value of original work, forgers have much to gain by injecting fake works into the art market under the pretense that they are originals.[76]

The most compelling motive to forge art is an expectation of financial reward.[77] Since original works draw higher prices on the market than unoriginal works, there is a great incentive for unscrupulous people to engage in fraudulent acts to acquire pieces they can represent as "original" works. In recent years, the lucrative and expanding art market has become more of a free trading international marketplace.[78] In 1970, an estimated one to ten percent of all art transactions involved forgeries.[79] In 1990 the art market exploded with sales of individual works for as much as $82.5 million, the purchase price of Vincent Van Gogh's "Portrait of Dr. Gachet."[80] As a result, there are a signifi-

---

[73] Würtenberger, *supra* note 29, at 16-18 and 31-32. The Renaissance began in the fourteenth century and ended in the sixteenth century.

[74] I. HAYWOOD, FAKING IT, ART AND THE POLITICS OF FORGERY 105 (1987) [hereinafter HAYWOOD] (describing possible consequences of forged works in the art market).

[75] Museums are depositories for creative works that simultaneously reflect and influence society's perception of reality. *See generally* Note, *The Implications of Changing the Current Law On Charitable Deductions - Maintaining Incentives for Donating Art to Museums*, 47 OHIO ST. L.J. 773 (1986) [hereinafter *Charitable Deductions*].

[76] *Id.* Great amounts of money are exchanged due to the buying and selling of artworks. In 1972 "it was stated that total sales in the art market annually reach $300 to $400 million." DUBOFF, DESKBOOK, *supra* note 48, at 385.

[77] Tietze, *supra* note 18, at 552; Duboff, *What Is Real*, *supra* note 59, at 477-78.

[78] *See* HAYWOOD, *supra* note 74, at 105 (as public buys and sells more artworks, forgers have increased opportunities to inject forged works into market); LEGAL RIGHTS, *supra* note 53, at 28 (expansion of art market has "given ingenious forgers and ordinary confidence men plenty of opportunity for swindling the art buying public"). *Id.*

[79] Duboff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L.J. 973, 973 (1976) [hereinafter *The Artful Con*] (discussing authentication of artworks); DUBOFF, DESKBOOK, *supra* note 48, at 385.

[80] Watson, *Sotheby's vs. Chrstie's: Uncivil War*, N.Y. Times, May 27, 1990, § 2 (Arts &

cant number of art transactions and dollars which are subject to the illicit greed of those involved in forgery. Thus, such an expansive art market has provided forgers and their co-conspirators with great opportunities for swindling the art appreciating and investing public.[81]

Art has generally been a less risky commodity than investment securities.[82] In recognition of this economic reality, during the late 1960s, investment portfolio managers urged clients to diversify by investing in art.[83] Financial experts have said that art investment is profitable because the investor can avoid the unwanted affects of inflation.[84] By 1975, while one of the leading economic securities markets, the Dow Jones, averaged a 38% gain, French Impressionist paintings rose in value 230%.[85] Therefore, persons seeking profits through the production of art forgery are likely to earn attractive gains. In addition to the profit an investor can earn by selling an artwork for more than its initial purchase price and any incidental costs involved therein, one can also reap the benefits of favorable tax gains if they retain the artwork until the "holding period" has expired.[86] For example, if an investor waits six months after purchasing an object of fine art, he may benefit more by donating it to certain charities and taking a tax deduction than he would by exchanging it for fair value on the market because he could avoid paying capital

---

Leisure), at 1, col.3. The sale of the Van Gogh piece, by Christie's auction house in New York City, was followed two days later by the sale of Renoir's "Au Moulin de la Galette," for $78.1 million by Sotheby's auction house in New York City.

81 *The Artful Con, supra* note 79, at 974.

82 Merryman, *supra* note 18, at 482. However, mutual funds for investors of art are considered "high-risk" investments. *See* DUBOFF, DESKBOOK, *supra* note 48, at 361-64.

In 1975, the press, in response to the apparent value of Picasso's estate, said, "[h]ere is staggeringly vulgar proof of what sophisticated businessmen have known for years: The best capital investment is not South African gold or Canadian wheat or Bolivian tin but art." DUBOFF, DESKBOOK, *supra* note 48, at 364 (quoting The Christian Science Monitor, Dec. 22, 1975, at 26, col. 3). Not everyone shares in this opinion. The painter Pissaro once said, "The collector today regards a painting only as a share of stock, it is disgusting to be part of such a degenerate business." Duboff, *What Is Real, supra* note 59, at 443 (quoting GIMPEL, THE CULT OF ART 84 (1969)).

83 Merryman, *supra* note 18, at 481. *See* DUBOFF, DESKBOOK, *supra* note 48, at 361-64.

84 DUBOFF, DESKBOOK, *supra* note 48, at 361-64.

85 *Id.* at 361, 363-64. Thus, an investment of $100,000 in works by Monet would have increased in value to $230,000, while investments of the same amount in companies listed on the Dow Jones would have risen to only $138,000. *See id.*

86 *See id.* at 361. The "holding period" is a period of time during which a taxpayer must wait to be eligible for a tax break. I.R.C. § 170 (1989). "In some cases, a collector who buys a painting that significantly increases in value can receive a charitable deduction for [federal] income tax purposes in excess of the amount he originally paid for it." *See also Art Forgery, supra* note 55, at 326-27. I.R.C. § 170 (1989) (charitable deduction provision).

gains taxes on the transfer.[87] Finally, investors of art receive perhaps the most significant gain of all, the pleasure of looking at beautiful objects which are making money for them.[88]

There are, however, other incentives to forge great works of art.[89] Forgers may be motivated by the desire to create period pieces of either a specific art period or movement of which there are few remaining relics or artifacts.[90] Other forgers may seek to meet the challenge provided by the standards of a particular school of art and to test the experts.[91] In the middle of the nineteenth century, for example, Giovanni Bastianini, an Italian sculptor, apparently seeking to meet the challenge of past talent, produced imitations of early Renaissance works and passed them off as originals with the assistance of an art dealer.[92] Similarly, Rouchomovski, a goldsmith during the same era, created forgeries.[93] One of Rouchomovski's best known forged works was the famed tiara of Saitaphernes, purchased by the Louvre Museum as a third century B.C. Greco-Scythian work.[94] Although both Bastianini and Rouchomovski possessed sufficient talent to earn reputations in their own rights, they succumbed to the excitement of competing with past talent by copying old works rather than

---

87 *See Charitable Deductions*, *supra* note 75, at 779 (discussing legal implications of donating artworks to charities). "The amount of a charitable deduction also depends upon the type of property donated, the applicable percentage limitation, and the nature of the donee." *Id.*

88 *See, e.g.*, Duboff, *What Is Real*, *supra* note 59, at 477-78 ("The interest in acquisition . . . may arise from an appreciation for and familiarity with art . . . ."). *Id.* at 478.

89 Some temptations may include prestige, a sense of accomplishment, satisfying a competitive desire, revenge, moral satisfaction, immoral satisfaction, intellectual, and creative curiosity, among others. *See* Würtenberger, *supra* note 29, at 33-37.

90 Tietze, *supra* note 18, at 553. Some forgers have been inspired to create evidence of a culture of dubious historical existence to prove that such ancient society actually existed. Such forgeries are abundant in literature, such as Thomas Chatterton's and James Macpherson's counterfeit Anglo-Saxon and Gaelic poems. Thomas Chatterton (1752-70) was an English poet who composed the "Rowley Poems" at the age of 12, claiming they were copies of 15th century manuscripts at the Church of St. Mary Redcliffe, Bristol. He poisoned himself and died at the age of 17 after moving to London with hopes of selling his poems and achieving small success at it. THE NEW COLUMBIA ENCYCLOPEDIA 517 (4th ed. 1975). Some have said that Chatterton died at age 18. LINDEY, *supra* note 38, at 228. James Macpherson (1736-96) was an English author and poet. After his death a committee of scholars investigated his works and agreed that he had composed most of his poetry himself, but had also used some ancient Gaelic poems. The committee also concluded that Macpherson's discoveries of ancient manuscripts were forgeries. THE NEW COLUMBIA ENCYCLOPEDIA 1653 (4th ed. 1975). *See* HAYWOOD, *supra* note 74, at 56-57.

91 CONSTABLE, *supra* note 36, at 6. Both forgers and reproductionists copying a master's work may experience a competitive drive to match or surpass the work before them in skill and talent. The truer the copy, the closer to the master the person copying the master's work may feel.

92 *Id.*

93 *Id.*

94 *Id.*

originating their own.[95] Although reproductionists may share these and similar motivations, they would not attempt to present copies as authentic works, as would forgers because they differ in their intent: the former values honesty and integrity while the latter does not.[96]

D. *Victims of Art Forgery*

1. Effects on the Private Sector

As the buying and selling of art becomes more profitable, the number of people affected by the injection of fakes into the art market increases dramatically.[97] At present, the injuries caused by art forgery affect private collectors, galleries, museums, insurance companies, and artists.[98] Purchasers of art pay for at least three aspects of an artwork: the quality of the piece, the artist's reputation, and the guaranty that the named artist actually created the work himself.[99] Forgeries harm purchasers by causing them to lose the presumed value of the piece and the opportunity cost of an alternative investment.[100] Although the circulation of fake art in the marketplace presents all purchasers and collectors with the same threat, an equal threat to all does not lessen the harmful results of forgeries.[101] Like other consumers, purchasers of art, whether collectors or not, have the

---

95 As a young man, Michelangelo sculpted a marble statue of Cupid, entitled *Sleeping Cupid*, in imitation of the ancients' style and which he buried in the ground. After its discovery, a dealer sold it as an antique. Michelangelo's apparent goal was to challenge the work and style of the past. Early biographers documented his achievement of this goal, praising his success at rivaling sculptors of Greece and Rome. Thus, even great masters have copied their predecessors in secret, simply to see whether they could attain the calibre of their ancient rivals. *Id.* at 5-6.

96 Elsen and Merryman and the College Art Association suggest clearly labelling the dates of new reproductive works to curtail their sale as original works. *See* The College Art Association, *supra* note 26, at 549-51.

97 *See The Harm*, *supra* note 27, at 547.

98 An artist's intentions are violated by forgery in that "his standards of quality, the influence of his time and place, and ultimately his reputation . . ." are damaged. Elsen & Merryman, *Counterfeiting of Art in the United States*, *reprinted in* Merryman, *supra* note 18, at 559. Forgeries also falsify the aesthetic experience of the admirer. *Id.* at 560.

99 LEGAL RIGHTS, *supra* note 53, at 27-34.

100 *Id.* *See* Calabresi & Melamed, *supra* note 50 (discussing costs of creating property rights). Although "[t]he valuation of paintings and other objects of art has been, in the past, for the most part, a problem occurring in the federal estate and gift tax areas, this problem is now critical to insurance companies as well." *Appellate Conference Valuation Training Program*, in REPRESENTING ARTISTS, COLLECTORS, AND DEALERS 491, 624, 626-28 (1985). *See also Annual Summary*, *infra* note 117, at 624-28. When a collector is defrauded by the purchase of a fake, the insurance company who insures the work as an original is also defrauded. *Id.* at 628.

101 *See The Harm*, *supra* note 27, at 547. The price of artwork has increased greatly as consumer demand has risen while the number of authentic works has remained relatively constant. LEGAL RIGHTS, *supra* note 53, at 28.

right to enjoy the security of knowing that they are acquiring authentic goods. Additionally, forged works may lower the price of genuine originals because purchasers will mistakenly believe works by particular artists are less rare than they actually are.

Failure to expose incidents of art forgery increases the likelihood of forgeries affecting more people. Art experts are often reluctant to reveal their suspicions of fake art.[102] Similarly, galleries and other collectors may not disclose their beliefs that works may be fake.[103] The reluctance to disclose such suspicions stems from the fear of embarrassment, the possible loss of credibility, and even the fear of being sued for slander.[104] Disclosure of art fraud, however, can help circumvent the proliferation of forgery by informing the public, who will likely forego purchasing fakes. Additionally, once notified, law enforcement officials will attempt to arrest or otherwise stop those responsible for the injection of fakes into the marketplace. The failure of those with suspicions to reveal either who the suspected forgers are or the sources from which forged works appear to be entering the market may result in an increased impact of forgeries on the art world. Consequently, more and more collectors of all varieties are negatively affected.

Disclosing fakes, however, may subject experts to precarious circumstances. For example, in *Hahn v. Duveen*,[105] a renowned dealer of antique paintings was sued for slander because he revealed his belief that a collector's painting was not the work of Leonardo da Vinci to a reporter of a New York newspaper.[106] Although the dealer failed to base his opinion on first hand ob-

---

102 *See* Hahn v. Duveen, 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929) (art expert sued for slander for publicly opining as to the authenticity of an artwork).

103 *See id.*

104 *Id.* at 871. *See* Travis v. Sotheby Parke Bernet, Index. No. 4290/79 (Sup. Ct. N.Y. 1982) (*reprinted in* Merryman, *supra* note 18, at 571-73). The buyer of a painting believed to be a Reynolds, brought suit against an art expert who worked for an auction house because the expert indicated that the painting was, in her opinion, a lesser-known artist's work and therefore, worth far less than anticipated. The buyer had planned to transfer the work to the Metropolitan Museum of Art and claim a tax deduction for donating it to charity. The court found for the defendant art expert on the grounds that the buyer had failed to make out a *prima facie* case. The court specified that the expert appraiser did not act negligently because she had conducted in-depth research in reliance on commonly accepted authorities and had conferred with a recognized authority on Reynolds. *Id.* In the typical buying situation, the expert opinion needed for authenticating an artwork may be difficult to obtain due to experts' well-founded fears of being confronted with a suit for defamation as a result of admitting beliefs that certain works may be forged, much to the owner's dissatisfaction. The *Travis* case, however, provides some refuge for the art expert who meets the standards of his profession and acts without malice. T. CRAWFORD, LEGAL GUIDE FOR THE VISUAL ARTIST 196 (1977) [hereinafter CRAWFORD].

105 133 Misc. 871, 234 N.Y.S. 185 (Sup. Ct. 1929).

106 *Id.* at 872-73.

servation of the work, the collector allegedly lost an opportunity to sell the painting to the Kansas City Art Museum as a result of the expert's stated opinion.[107] The *Hahn* court held that there was sufficient evidence, consisting primarily of expert testimony and results of X-rays taken of the paintings in question, for the case to go before a jury.[108]

Although everyone is affected differently by individual forgers' crimes, all share certain interests worth protecting. The problems relating to art forgery will not solve themselves and its effects are ever-increasing their grips on society.[109]

2. Public Sector Concerns: Tax Consequences

In addition to losses incurred by private individuals, the federal government also loses money as a result of art forgery. The Internal Revenue Code enables taxpayers to deduct losses suffered due to the destruction or loss of original artwork not covered by insurance.[110] To qualify for this special deduction, taxpayers must provide the Internal Revenue Service ("IRS") with evidence of the amount lost, *i.e.*, the value of the artwork.[111] If the work claimed as the basis of such a deduction is actually a forgery, then the government is granting a deduction for something which is not an original artwork and is losing the value of the tax it would have received on the unoriginal work.[112]

---

107 *Id.* at 873.

108 *Id.* at 872, 880. *See* CRAWFORD, *supra* note 104, at 196 (discussing *Hahn*); Duboff, *What Is Real*, *supra* note 59, at 484 n.25 (citing N.Y. Times, Oct. 1, 1969, at 36, col. 1 and N.Y. Times, May 31, 1973, at B1, col. 2).

The Bass Museum of Miami, Florida was closed when the majority of its collection was found to be fake. Duboff, *What Is Real*, *supra* note 59, at 484 n.25 (citing N.Y. Times, Oct. 1, 1969, at 36, col. 1 and N.Y. Times, May 31, 1973, at B1, col. 2). Another example of a disincentive to revealing doubts as to whether a work is real or fake occurred when the Metropolitan Museum of Art in New York City found approximately 300 previously unknown forgeries in its collection and, as a result, suffered embarrassment and bad public relations.

109 *See supra* notes 97-108 and *infra* 110-120 and accompanying text (discussing the far reaching affects of forgery).

110 I.R.C. § 165(a) (1989). Section 165(a) states that "[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise." *Id.*

111 LEGAL RIGHTS, *supra* note 53, at 95-96. *See also* Note, *Legal Control of the Fabrication and Marketing of Fake Paintings*, 24 STAN. L. REV. 930, 937-38 (1972) [hereinafter *Legal Control*] (discussing alternative contract remedies available to collectors).

112 If a taxpayer believes that he has lost an original painting attributed to Albrecht Dürer and claims it as a deduction under the relevant provisions of the Internal Revenue Code because it was not insured, then the value attributed to that work will reflect the worth of Dürer's work. If, however, the painting was actually a forgery and not an original work, then the offset allotted to reflect the value of the original will be incorrect and the United States Treasury will lose that amount of tax dollars. There are no deductions available to taxpayers for the uninsured loss of unoriginal works. DUBOFF, DESKBOOK, *supra* note 48, at 38. *See generally id.* at 15-38.

The United States Treasury also loses money for tax deductions claimed for fraudulent works donated to charities, sometimes unbeknownst to the claimant, and when forged artwork enters the country duty-free.[113] If a work is not original then neither the donation deduction nor the duty-free status applies because these tax savings are intended to encourage the production of *original* artworks.[114] The charity donation tax loss may be compounded by the over-valuation of artworks.[115] This may be caused by either forgery or negligent valuation of works donated to charity.[116]

As a precautionary measure, the IRS has an Art Advisory Panel for review of the valuation of pieces claimed as deductions.[117] The twenty-five member panel includes museum directors, curators, scholars, and five full time appraisers. Panel members discuss each work claimed to be valued at more than $20,000 and specific pieces brought to their attention.[118] Overvaluation of artworks for the purpose of tax deductions is on the rise. From 1980 through 1982, the average overvaluation was 560% and in 1983, it was up to 671%.[119]

The IRS recommends a thorough examination of the following: (1) the bill of sale; (2) a photograph of the claimed artwork; (3) copies of prior appraisals; (4) copies of certificates of authentication; (5) a pedigree of the piece, including all its known history; and (6) a list of exhibits determining the status of the artist.[120] Attention to such proofs of authentication may keep forged works from entering the legitimate tax avoidance schemes and may therefore save the Federal Treasury from suffering the types of losses described above.

---

113 Section 170(e)(1) of the Tax Code provides that the amount of any charitable contribution of property shall be reduced by the fair market value of the property determined at the time of the contribution. I.R.C. § 170(e)(1) (1989).

114 *Charitable Deductions*, *supra* note 75, at 781-83.

115 *Id.*

116 *Id.*

117 Carolan, *Documenting Art Appraisals For Tax Purposes — Estates, Gifts, and Income Tax and the New Tax Changes of the Tax Reform Act of 1984*, in REPRESENTING ARTISTS, COLLECTORS, AND DEALERS 491, 508-12 (1985) [hereinafter Carolan]. *See* Commissioner of IRS, *Annual Summary Report* on Art Advisory Panel Closed Meetings (1984), in Practicing Law Institute 515, 516 [hereinafter *Annual Summary*].

118 The Art Advisory Panel makes collective judgments as to the fair market value of each piece on the date it was purchased. Carolan, *supra* note 117, at 491, 508-12 (discussing tax implications of forgery). *See Annual Summary*, *supra* note 117, at 516 (discussing governmental strategy to reduce negative affects of art forgery transfers).

119 Carolan, *supra* note 117, at 508-12. *See Annual Summary*, *supra* note 117, at 516.

120 Carolan, *supra* note 117, at 508-12. *See Annual Summary*, *supra* note 117, at 516.

III. Identification and Prevention of Art Forgery

A. *Measures Employed to Identify Forgeries*

To avoid injury caused by forged artworks, collectors may take various preventive measures, including authentication[121] and prevention of the circulation of forgeries.[122] The most reliable method of authenticating a work is to observe its production. This can rarely be done because most artists create their works in privacy and one cannot witness the production of works already in existence.[123] Collectors can question the alleged artist of a work they are considering buying, however, this is also an impractical means of authentication because artists may be unavailable or deceased. Additionally, potential purchasers can investigate and confront the seller.[124] Studying identifying marks on works, such as fingerprints, is a reasonably certain measure of authenticating a work, however, it is uncommon.[125]

Using experts to analyze artworks by initiating various chemical analyses of pigments, the study of works with ultra violet light, photomicrographs, X-ray photographs, carbon tests, and infra red, among others, is considered a desirable means of learning the objective history of the works.[126] Experts can further study a work's origin by evaluating certificates of authenticity and analyzing markings which are extraneous to the work. Such

---

121 Forgery is not the only cause of authenticity problems. Art & Antiques, *supra* note 65, at 54. Copying was a method by which young artists learned to paint and some works by the students of certain schools of art have wrongly been attributed to their teachers. *Id.*

122 Merryman, *supra* note 18, at 549-51; What Every Artist, *supra* note 53, at 108; Art & Antiques, *supra* note 65, at 10; Duboff, *What Is Real*, *supra* note 59, at 477, 490; Würtenberger, *supra* note 29, at 15, 37-38 (symposium given by the Institute of Criminal Law and Criminology, University of Leiden); D. Goodrich, Art Fakes in America 203-24 (1973) [hereinafter Goodrich]; *Legal Control*, *supra* note 111, at 937-42.

123 *The Artful Con*, *supra* note 79, at 980 (discussing a great variety of authenticating methods available to collectors).

124 *Id.*

125 On August 23, 1988, an engineer in New York City received a patent for a radioactive "fingerprint" for use by artists. The procedure involved mixing a radioactive isotope with resin and placing it on the painting or other artwork. The radioactive fingerprint is a method for rapid identification of art objects or other valuables. Works are coded with radioisotopes and the exact location of the isotope and a measurement of the emitted radiation are recorded for future use to show the art object has been duplicated. U.S. Department of Commerce, Patent and Trademark Office, Report of Patent No. 4,765,655 (Aug. 23, 1988). *See* N.Y. Times, Aug. 27, 1988, at 32, col. 4.

Insurance companies rely on identifying marks and physical evidence such as the artist's signature, style, and materials to determine the authenticity of artworks. Today, physical evidence can be removed and materials can be synthetically duplicated, making accurate identification nearly, if not literally, impossible. As the radioactive fingerprint can be neither removed nor copied, the accuracy of identification is assured. U.S. Department of Commerce, Report of Patent No. 4,765,655 (Aug. 23, 1988).

126 *The Artful Con*, *supra* note 79, at 980-81. *See Legal Control*, *supra* note 111, at 930.

markings are located, for example, on the back, sides, and other parts of the art object, not the primary focus of the work.[127] Finally, collectors can train themselves in these and other means of authentication, and trust their own judgment. This can be a costly and time consuming process, and is usually impractical for the infrequent purchaser or those who do not have the interest in becoming experts themselves.[128]

Means of preventing further transfer of inauthentic works include having forged works impounded[129] and notifying the proper authorities, such as the local District Attorney, of works of dubious authenticity.[130] Once the authorities are notified as to the presence of forged works, they may impose fines on the sellers of the works, bring criminal simulation charges against the sellers,[131] or contact the Better Business Bureau. Additionally, many art forgery experts support the maintenance of a national or regional archive system for artworks, to maintain permanent records of works' authenticity.[132] Others argue that educating the public[133] and exposing fakes[134] are among the better solutions of preventing the continued transference of forged works.

---

127 Warren P. Weitman of the IRS, suggests considering the following ten criteria in valuating artworks: (1) the authenticity of the work; (2) the condition of the work; (3) the rarity of the work; (4) the historic importance of the work; (5) the history of the work's ownership, or its provenance; (6) the size of the work; (7) the medium in which the work lies; (8) the subject matter which the work portrays; (9) the fashion in which the work is presented; and (10) the aesthetic quality of the work. Internal Revenue Service, *Appellate Conferee Valuation Training Program* in REPRESENTING ARTISTS, COLLECTORS, AND DEALERS, 624-28 (1978). *See* Weitman, *The Fine Art of Appraisals*, in Practicing Law Institute, REPRESENTING ARTISTS, COLLECTORS, AND DEALERS 603, 606-10 (1985).

128 *See The Artful Con*, *supra* note 79, at 980.

129 The impounding provisions under the 1976 Act differ from the Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, 1081 ["1909 Act"] in a significant way. Whereas under the 1909 Act, courts were required to destroy the infringing article, today courts are empowered, in their discretion, to either destroy or institute other appropriate action to dispose of the infringing item. 17 U.S.C. § 503 (1988); Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, 1081. *See* NIMMER, *supra* note 30, at 75 § 14.08, at 62-64.

130 GOODRICH, *supra* note 122, at 213. *See generally id.* at 209-24 (discussing public awareness and remedies of forgery).

131 *See* N.Y. PENAL LAW § 170.45 (McKinney 1989).

132 *See* GOODRICH, *supra* note 122, at 209-10.

133 Elsen & Merryman, *Counterfeiting of Art in the United States*, in Merryman, *supra* note 18, at 557; GOODRICH, *supra* note 122, at 209. Shows with fakes hung alongside authentic works have been held at the Fogg Museum of Cambridge, Massachusetts, the Brooklyn Museum, and the National Art Gallery in Washington, D.C., but the public was informed. Exercises like this should, no doubt bring to the public's attention, the forgery situation which is prevalent today. GOODRICH, *supra* note 122, at 209.

134 GOODRICH, *supra* note 122, at 208. New York's Metropolitan Museum of Art conducted a seminar in the aftermath of the David Stein exposure of 1967, to teach the public to recognize fake art or at least keep their eyes open for it. *Id.*

B. *Protecting the Artist with Copyright Law*

Copyright law protects a work from unauthorized copying by giving the artist a monopoly in his originally expressed idea.[135] "Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright."[136] However, for an artwork to be eligible for copyright today, it must be original.[137] Art reproduction is a derivative work and is, therefore, an exclusive right protected by copyright[138] which must be sufficiently original, based on its own merits, to become copyrighted.[139] The *de minimus* standard of originality does not require that an artist add more than an element of skill or judgment to support a copyright.[140] More specifically, "[a]ll that is needed . . . is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' "[141] The element of creativity which is required, as a matter of definition,[142] for a work to be art is distinct from the originality required for a work to be copyrightable.[143] Whereas art is the product of an artist's original labor,[144] a work need only originate with the person acquiring a copyright monopoly to meet the originality requirement.[145]

Generally, to prevail in a copyright infringement action,[146] a plaintiff must prove (1) that he has a valid copyright for the work which has allegedly been copied, and (2) that the defendant has violated at least one of his exclusive rights under the copy-

---

135 17 U.S.C. §§ 102, 106 (1988).

136 *Id.* at § 501(a).

137 *Id.* at § 102(a). "Copyright protection subsists, in accordance with this title, in *original* works . . . fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated . . . ." (emphasis added) *Id.*

138 *Id.* at §§ 101, 106.

139 *Id.* at § 102. *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). *See supra* notes 19-35, 72-76, and 134-38 and accompanying text and *see infra* notes 140-53 and 156-83 and accompanying text (discussing requirements of originality of derivative works).

140 *See Catalda*, 191 F.2d at 102-03.

141 *Id.* at 102-03 (quoting Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945)).

142 *See supra* note 1 (one definition of "art"). "Original" has been defined as "a work composed firsthand: an artist's independent or spontaneous product . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1591 (unabr. 1971). "There is substance to the argument that unless a work is creative it is not a work of art." Duboff, *What Is Real*, *supra* note 59, at 76-77.

143 *Catalda*, 191 F.2d at 102-03.

144 LANGER, *supra* note 4, at 205-06; Würtenberger, *supra* note 29, at 17. *See supra* notes 1-18 and accompanying text (discussing the meaning of art).

145 *Catalda*, 191 F.2d at 102. "[N]othing in the Constitution commands that copyrighted matter be strikingly unique or novel." *Id.*

146 17 U.S.C. § 501 (1988). The 1976 Act defines infringement as the unauthorized use of one or more exclusive rights under copyright, including the production of a derivative or secondary work.

right.[147] Copyright infringement occurs when a copyrighted work is accessed by the infringer,[148] copied by him,[149] and is substantially similar to the already copyrighted piece.[150] Proving access is crucial when the plaintiff cannot prove copying because courts may accept proof of access and substantial similarity, and thereby infer copying.[151] Improper appropriation may also constitute infringement when there is proof of direct access to the original work.[152] Direct access can be established by evidence of

---

147 Professor Nimmer notes that the two essential elements in an infringement action are ownership by the plaintiff and copying by the defendant. 3 NIMMER, *supra* note 30, at § 13.01, at 13-4. *See generally id.* at § 13.03.[A]-[C] (discussing infringement).

148 Access includes all opportunities the alleged infringer has had to study the original work and during which time he may have copied it. This includes instances where the work is on display in a visible public forum, analogous to the "general publication" described in Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n of Chicago, 320 F. Supp. 1303, 1309-11 (N.D. Ill. 1970). In that case, the court held that a Picasso sculpture was in the public domain because it was publicly exhibited without restrictions on copying or the requisite copyright notice needed prior to the implementation of the Berne Convention in the United States. The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised Paris, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 828 U.N.T.S. 221, the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified at 17 U.S.C. §§ 101, 104, 116, 301, 401-02, 404-08, 801 (1988)). Consequently, it was not considered infringement when pictures of the work were published prior to copyright notice. *Letter Edged*, 320 F. Supp. at 1312-13.

149 To prove copyright infringement, copying must be identical if the idea and expression are indistinguishable. Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1168 (9th Cir. 1977). In *Krofft*, the court stated that the scope of protection extended against infringement of exclusive rights under copyright is *not*, in all cases, coextensive with the scope of the secured copyright. The court employed such reasoning because where idea and expression are the same, copyright protection must be extended only to an exact replication of the protected work to protect the freedom of idea copying. In *Krofft*, a children's television show was substantially copied by a maker of children's television commercials and the court held that since access was established, employment of the substantial similarity standard, rather than exact copying, was both justified and satisfied. *Id.* In Herbert Rosenthal Jewelery Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971), the court considered a copyrighted piece of jewelry both the idea and the expression of a bumble bee and therefore, not protected by exclusive rights under copyright because the standard imposed was exact copying. However, if an idea and the expression are distinguishable, the standard is substantial similarity. *Id.* at 742.

150 Substantial similarity has been found when as little as 20% of the copyrighted work was copied. Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947)(action for infringement of motion picture photoplay). "Copying is not confined to a literal representation but includes various modes in which the matter of any publication may be adopted, imitated, or transferred with more or less colorable alteration." *Id.* at 361 (quoting Nutt v. National Inst., Inc. for the Improvement of Memory, 31 F.2d 236, 238, (2d Cir. 1929)). *See generally* NIMMER, *supra* note 30, at § 13.03.[A]-[B] (discussing the elements a plaintiff must establish to prove infringement ownership and copying) and § 8.01 (discussing copying).

151 Courts recognize that direct evidence of copying is rarely available and allow plaintiffs to produce "circumstantial evidence of . . . access to the copyrighted work prior to the creation of defendant's work, and . . . substantial similarity of both general ideas and expression between the copyrighted work and the defendant's work." Baxter v. MCA, Inc., 812 F.2d 421, 423 (9th Cir.) (songwriter/copyright owner claimed that theme from the film *E.T.* was copied from one of his compositions), *cert. denied*, 484 U.S. 954 (1987).

152 Courts have used the terms "improper appropriation" and "infringement" inter-

either the work's presence in a public arena or the defendant's opportunity to observe or study the plaintiff's artwork prior to creating his own.[153]

One defense to infringement is "fair use," which when successfully employed, enables an unauthorized copyist to reproduce and make derivative works.[154] Conversely, *forgery* is made, acquired, or distributed with the intent of "direct or indirect commercial advantage."[155] Therefore, proving that a defendant forged a copyrighted work would simultaneously prove copyright infringement of the same work by automatically rebutting the defense of "fair use."

Congress has indicated that the phrase "original works of authorship" found in section 102 of the 1976 Act, describing subject matter that is actually copyrightable, is purposely left undefined to incorporate the standard of originality first used in the Copyright Act of 1909 into the current use.[156] In doing so, Congress appears to have chosen to avoid focusing on the ambiguous and inadequate originality standard currently used to protect fine artists. The originality required under current copyright law does not require that the work contain anything singular or rare, merely that it contain a modicum of "newness" more than trivially varied from the primary work.[157] Courts, however, have alluded to the importance of expanding the originality requirement to include the concept of creativity.[158]

---

changeably. They apparently share a common meaning: copying to the extent of at least substantial similarity in derogation of exclusive rights under copyright. *See* Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir.) (owners of copyright of "PAC-MAN" audio-visual game established substantial similarity by showing "substantial appropriation" of the game's characters), *cert. denied*, 459 U.S. 880 (1982). *See also* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (appropriation of musical compositions need not be addressed until after copying established).

153 *See, e.g.*, Letter Edged in Black Press, Inc. v. Public Bldg. Comm'n, 320 F. Supp. 1303 (N.D. Ill. 1970) (a work, once in the public domain, due to publication without proper copyright notice, cannot later be copyrighted).

154 "Fair use" consists of using a reproduction or derivative work for purposes such as "criticism, comment, . . . teaching[,] . . . research," or other similarly motivated uses. 17 U.S.C. §§ 107 (1988). The "fair use" defense is automatically rebutted by a showing of "money making" intent. *Id.* at § 107.

155 Upon making a determination of whether a particular use falls within the ambit of "fair use," a court considers the purpose and character of the use, including whether or not the party claiming fair use sought pecuniary gain. *Id.* at § 107. *See supra* notes 77-87 and accompanying text (discussing financial expectations of forgers).

156 H.R. REP. No. 1476, 94th Cong., 2d Sess. 51-52, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5664-65 [hereinafter HOUSE REPORT 1476].

157 Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-03 (2d. Cir. 1951).

158 *See* NIMMER, *supra* note 30, at § 2.01 [B], at 2-13 to 2-14. Professor Nimmer observes that "a greater clarity of expression is perhaps achieved by regarding originality and creativity as separate elements." *Id.* at 2-14. *Cf.* West Publishing Co. v. Mead Data Central, 799 F.2d 1219, 1225 (8th Cir. 1986), *cert. denied*, 429 U.S. 857 (1976) (court will

For example, in *Bleistein v. Donaldson Lithographing Co.*,[159] Justice Holmes, while recognizing that in deciding a case involving art reproduction a court must explore both legal issues and the creative worth of a piece,[160] stated that judges of law ought not be in a position of judging art, for "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [artworks], outside of the narrowest and most obvious limits."[161] Although the *Bleistein* court avoided this issue by concluding that copyright protection is not limited to the fine arts and that courts must not assess the creative merits of artworks,[162] it left open the question of how a court is to distinguish original work from non-original work without making this proscribed judgment of artworks' creativity. Indeed, the *Bleistein* opinion set a trend for avoiding the issue of creativity, which courts have followed since the turn of the century.[163] Creativity is the product of one's personal energy which most lay people think of as originality. Moreover, creativity is that which is new and unique, something which has not been preceded, whether a painting, a new way of expressing an old idea, or a radical interpretation of a movement or school of thought.[164] Unfortunately, developing and incorporating a clearer definition of creativity into the requisite originality of reproductions standard remains unresolved in copyright law.

One could argue that a reproduction, by definition, can never be original because to reproduce is to recreate. Thus, a second work based entirely on an original, occurring first in time and acting as model for the later work, contains no newly produced work, but is rather, a recreation of already existing work. In response, however, the 1976 Act and case law recognize that reproductive works, whether or not in the same medium as the original, are copyrightable.[165]

Alfred Bell & Co. v. Catalda Fine Arts, Inc.[166] is the seminal case

---

consider both originality and "intellectual - creation standards"). In L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976), *cert. denied*, 429 U.S. 857 (1976), the court invoked "at least a minimal requirement of creativity over and above the requirement of independent effort." NIMMER, *supra* note 30, at § 2.01[B], 2-14.

159 188 U.S. 239 (1903).

160 *Id.* at 251.

161 *Id.*

162 *Id.*

163 Nimmer, *Copyright Law*, in ART LAW DOMESTIC AND INTERNATIONAL 75, 76-77 (L. Duboff ed. 1975).

164 "Creative" has been described as something "expressive of the maker: imagination." WEBSTER'S THIRD NEW INT'L DICTIONARY 532 (unabr. 1971).

165 *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951).

166 191 F.2d 99 (2d Cir. 1951).

setting the standard for the minimum amount of originality a derivative work must contain to be copyrighted. The plaintiff, a producer-dealer of prints, copyrighted eight mezzotint engravings of paintings by old masters.[167] Although the goal of the mezzotint process is to be as true to the original as possible, thereby making a truer replication the result of more skilled work, both the district and circuit courts held that the mezzotints were sufficiently original to warrant valid copyrights as art reproductions of public domain originals.[168]

After considering the mezzotint process itself and the fact that the process resulted in works of a different medium than the original works[169] after which they were modeled, the trial court found requisite originality in the mezzotint process, as needed to comply with the 1909 Act, in effect at the time of the *Catalda* decision.[170] The Second Circuit reaffirmed this, saying "[a] copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations."[171] The defendants, a color lithographer, a lithograph dealer, and one of the dealer's corporate officers, were found guilty of copyright infringement because they relied upon proofs from the plaintiff's mezzotint plates carrying copyright notice when making colored photoengravings of the same original works, rather than the public domain works.[172] The Second Cir-

---

167 The mezzotint method is a complicated process whereby one produces reproductions of oil paintings. It involves:

> rocking a copper plate, . . . [by] drawing across the plate, under pressure[,] a hand tool having many fine and closely spaced teeth. The tool is drawn across the plate many times in various directions so that the plate is roughened by the process. The outlines of the engraving are then placed upon the plate either by tracing with carbon paper from a photograph of the original work . . . or by a tracing taken from such a photograph on gelatine sheets transferred to the copper plate by rubbing carbon black or some similar substance . . . in the lines of the tracing on the gelatine sheet and transferring of them by pressing the sheet upon the copper plate . . . [and ultimately] color [is] applied to the plate by the artist . . . .

Catalda, 74 F. Supp. 973, 975 (S.D.N.Y. 1947). As with other reproductive works, the goal of the person making a mezzotint is to make a copy of the original work as much like the first as possible. *Id.*

168 *Id.*; *Catalda*, 191 F.2d 99. Another court said of *Catalda*, "It had to do only with whether an honest copy made in a new medium by a laborious process could be protected . . . . The court held that it was . . . ." Kuddle Toy, Inc. v. Pussycat-Toy Co., 183 U.S.P.Q. 642, 658 (E.D.N.Y. 1974).

169 Although the original paintings by old masters were in the public domain, the court found that the defendants had infringed the plaintiff's works because the plaintiff's works were copyrighted reproductions of the original public domain works, and therefore protected by copyright law. *Catalda*, 191 F.2d at 104-05.

170 *Catalda*, 74 F. Supp. at 975-76.

171 *Catalda*, 191 F.2d at 105 (citation omitted).

172 *Catalda*, 74 F. Supp. at 976-77.

cuit found that no large measure of novelty was required for a work to be original, but rather, a solely uncreative and inadvertent difference between the secondary and original works was sufficient to warrant copyright protection.[173] Thus, according to the *Catalda* court, an accidental bump experienced while making a copy would result in enough originality to warrant copyright protection to the secondary artist. Although the minimal originality requirement currently imposed by the judiciary requires only that a "particular work 'owes its origin' to the 'author' " seeking the copyright,[174] the existence of a different medium alone, however, is not a sufficient variation.[175] "This standard does not include requirements of novelty, ingenuity, or [a]esthetic merit,"[176] and if the idea and the expression are easily distinguishable, the forger need only show a minute change in the copy. However, if the idea and expression are the same, then unless the original and copy are identical, the forger will not be liable for copyright infringement.[177]

A tension exists among those courts espousing dogmatic approval of *Catalda* originality[178] and those demanding a greater degree of creative effort or labor. Although *Bleistein*[179] technically made an analysis of "creativity" unnecessary, some courts have suggested that the additional requirement of creativity should be imposed in conjunction with originality,[180] while others have

---

173 *Catalda*, 191 F.2d at 102-03, 105.

174 *Id.* at 102 (citations omitted).

175 L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976). The court held that making an Uncle Sam bank in plastic rather than metal was not sufficient to meet the originality requirement. The court in so holding, expressed concern regarding the originality standard currently employed by the courts. "[T]he articles should be judged on their own merits . . . . [T]here are lines that must be drawn even though reasonable men may differ where." *Id.* at 492.

The *ad hoc* approach to judging creativity, implicitly suggested in the *Batlin* decision, supports the proposition that copyright law needs a better, more focused approach to the *de minimus* requirement of originality. *See infra* notes 237-56 and accompanying text (discussing proposed modification of current standard of originality).

176 HOUSE REPORT 1476, *supra* note 156, at 51-53.

177 Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 616 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1168 (9th Cir. 1977); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 741-42 (9th Cir. 1971).

178 *See, e.g.*, Franklin Mint Corp. v. National Wildlife Art Exchange, 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978). An example of such dogmatic approval occurred in *Franklin Mint*, where the court cited the *Catalda* standard with approval and used *Catalda* as precedent to support the likening of "theme" to "idea." *Id.* at 64. *See infra* notes 215-21 and accompanying text (discussing *Franklin Mint*).

179 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).

180 *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir.), *cert. denied*, 429 U.S. 857 (1976). The *Batlin* court implicitly suggested a requirement of creativity. *Id.* at 492. "The requirement of substantial as opposed to trivial variation . . . [is] inherent in and subsumed by the concept of originality . . . [t]here is implicit in that concept a 'minimal

used the phrases "originality" and "creativity" interchangeably.[181] In general, however, courts have expressed reluctance to examine aesthetic value when making a determination of originality.[182] "When idea and expression coincide, there will be protection against nothing other than identical copying of the work."[183]

It is difficult to draw the line of requisite originality where idea and expression coincide because limitations and protections extended to the artist's *expression* necessarily apply equally to his idea. Under the 1976 Act, copyright protection does not extend to idea.[184] Courts have maintained a loosely defined formula whereby a plaintiff establishes infringement by showing that the defendant has copied "the expression of the idea" as well as the idea itself.[185] This has led to the development of the "idea-expression dichotomy."[186] Applying the idea-expression dichotomy does not precisely define what copyright law protects, rather it compares the idea behind the expression to the expressed idea which is the work in question.[187] When a work is a pure expression of its underlying idea, current standards offer the owner of a valid copyright no protection.[188] A court only determines unity

---

element of creativity over and above the requirement of independent effort.' " *Id.* at 490 (quoting NIMMER, *supra* note 30, at § 10.2, at 36). Similarly, Justice Douglas, in his dissent from a denial of *certiorari* in Lee v. Runge, 404 U.S. 887, 891-92 (1971), argued that courts ought to impose a requirement of novelty in conjunction with originality. In County of Ventura v. Blackburn, 362 F.2d 515 (9th Cir. 1966), the court found that because a map maker's work contained "sufficient original and creative work," in compiling and creating a map from public domain material, it was copyrightable. *Id.* at 518. *See* West Publishing Co. v. Mead Data Central, 799 F.2d 1219, 1223 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) (court referred to an additional requirement of labor *beyond* "originality"); Goldstein v. California, 412 U.S. 546, 561, *reh'g denied*, 414 U.S. 883 (1973) (court said that author's writing may be result of *creative*, intellectual, or aesthetic labor).

181 *See, e.g.*, Kieselstein-Cord v. Accessories By Pearl, Inc., 632 F.2d 989 (2d Cir. 1980). The *Kieselstein-Cord* court said that elements of originality *or* creativity are necessary for copyrighting a work of art. *Id.* at 991. This case examined the copyrightability of belt buckles which were arguably both useful items and objects of art in their own right. *Id.*

182 *See, e.g.*, *Bleistein*, 188 U.S. at 251 (Justice Holmes said it is not a judge's role to evaluate creativity). *See also* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102-03 (2d Cir. 1951) (courts do not assume the functions of critics).

183 Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1168 (9th Cir. 1977) (court referring to jeweled bee pin in Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971)).

184 "In no case does copyright protection for an original work of authorship extend to *any idea*, . . . regardless of the form in which it is described, explained, illustrated, or embodied in [a] work." 17 U.S.C. § 102(b) (1988) (emphasis added).

185 17 U.S.C. § 102(b). *See Krofft*, 562 F.2d at 1163. *See also* NIMMER, *supra* note 30, at § 2.03[D], at 2-34.

186 *Krofft*, 562 F.2d at 1163 n.6.

187 *Id.* at 1163-64.

188 *Rosenthal*, 446 F.2d at 742.

of idea and expression after a work is presumed protected under a valid copyright and the copyright owner sues another for infringement. Therefore, copyright law does not protect all copyrighted works from unauthorized copying.

IV. Copyright Law Inadequately Prevents Art Forgery

The crux of an infringement action is the determination of whether there has been copying of an idea or the unique expression of that idea.[189] Because copyright law only protects expression, only expression may be legally infringed.[190] An idea, no matter how unique or revolutionary, cannot be copyrighted.[191] "The difficulty comes in attempting to distill the unprotected idea from the protected expression."[192] Although some commentators have described the idea-expression dichotomy as obsolete,[193] it accurately labels the basic components of just what it is that copyright law purportedly protects.[194]

Cases in which a forger makes a nearly exact copy of an original work are not sufficiently addressed by copyright law because a court finds, as it often does, that a work of fine art is *both* the idea and the expression, then unless the alleged infringing piece is an exact duplicate, the original artist will receive no protection for his work.[195] When the court finds the artist's expression distinct from the idea itself, however, then the standard applied is one of "substantial similarity."[196] Substantial similarity is defined by the degree of quality, not quantity,[197] and is met when the labors of the original artist are appropriated to the extent that financial injury or reputational harm results from the unauthorized copying because the protected expression itself has

189 *See, e.g., Krofft*, 562 F.2d at 1163.

190 Mazer v. Stein, 347 U.S. 201, 217-18 (1954) (original works of sculpture representing dancing figures that were used as bases for electric lamps considered works of art or reproductions thereof); Baker v. Selden, 101 U.S. 99, 102-03 (1879) (although blank account books cannot themselves be subjects of copyright, particular arrangements of contents of account books are copyrightable).

191 *Mazer*, 347 U.S. at 217-18; *Baker*, 101 U.S. at 102-03.

192 *Krofft*, 562 F.2d at 1163.

193 *See, e.g., id.* at 1163 n.6 (criticism of the dichotomy has primarily been of its application not of the logical soundness of the conceptual distinction).

194 *Id.* at 1163-64.

195 Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 616 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); *Krofft*, 562 F.2d at 1167; Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971).

196 *Atari*, 672 F.2d at 614; *Krofft*, 562 F.2d at 1164; *Rosenthal*, 446 F.2d at 741-42.

197 *See* Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354, 360 (9th Cir. 1947) (using 20% of a copyrighted work constituted infringement because the portion in question was intimately tied to the remainder of the original work).

been appropriated.[198] It becomes even more apparent that the originality standard is inadequate when a forged work very closely resembles the original, sometimes to the point of "observer confusion,"[199] and yet the original artist still cannot recover for copyright damages.[200]

In *Herbert Rosenthal Jewelry Corp. v. Kalpakian*,[201] the Ninth Circuit held that where the idea and expression of a jeweled bee pin were inseparable there could be no exclusive property right in the copyrighted pin because the protected expression was actually the idea, and ideas are not copyrightable.[202] The court, although holding that the original jeweler had a valid copyright, refused to grant him a property right in the expression of the copyrighted work, a pin which was "a bee formed of gold encrusted with jewels."[203] The original jeweler sought to prevent anyone else from manufacturing and selling jeweled bees on the ground that he alone had the exclusive right to do so. The original jeweler, however, sought not only to protect his unique and original work, but all subsequent attempts at producing such pins.[204] Concededly, this was an overly far reaching copyright goal, however, the court, rather than denying the overbroad protection demanded by plaintiff, went further and denied the original jeweler any protection whatsoever for his valid copyright. Subsequent to the *Rosenthal* case, other courts have followed the lead of denying the property rights guaranteed under copyright law where the idea and expression were inseparable.

In *Sid & Marty Krofft Television v. McDonald's Corp.* [205] the court stated that where idea and expression of idea occur simultaneously the standard changes to one of identical copying,

---

198 *Krofft*, 562 F.2d at 1172-73.

199 Although the *Krofft* court agreed that where there is no distinction between idea and expression, the standard is exact replication, rather than substantial similarity, the court held: "To suggest [that the distinction between 'things' and 'dramatic works' means] that such works must be identically copied to be infringed shows the spuriousness of the distinction." *Krofft*, 562 F.2d at 1168 n.11. Thus, it appears that although the *Krofft* court conceded the current standard set by law, the court would not support the requirement that where idea and expression are merged in a work of fine art, that the idea-expression dichotomy should lead to a heightened standard of similarity, *i.e.*, exact replication. *See id.* at 1168.

200 Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1977).

201 446 F.2d 738 (9th Cir. 1977).

202 *Id.* at 742.

203 *Id.* at 739.

204 "For example, while a photograph of the copyrighted bee pin . . . depict[ed] a bee with nineteen small white jewels on its back, plaintiff argue[d] that its copyright [was] infringed by defendants' . . . jeweled bees in three sizes decorated with from nine to thirty jewels of various sizes, kinds, and colors." *Id.* at 740.

205 562 F.2d 1157, 1168 (9th Cir. 1977).

rather than substantial similarity. The court reasoned that the scope of copyright protection does not extend to the idea and therefore, an artist who expresses his idea wholly in his expression cannot prevent others from use of that idea because it would constitute monopoly beyond that intended by the 1976 Act.[206] The *Krofft* court, however, exhibited dissatisfaction with the proposition that this would hold for works of fine art.[207]

Distinguishing idea from the protected expression was also addressed in *Nichols v. Universal Pictures Corp.*[208] Judge Learned Hand noted that distinguishing idea from expression is essential because there comes a point in the abstraction of an idea when the idea can no longer be protected. If this were not the case, the artist could conceivably monopolize his idea forever[209] which is not the case with regard to a work of fine art. The duration of an artist's monopoly extends only as far as his lifetime plus fifty years.[210] Beyond the duration of copyright, the work exists in the public domain and the right to reproduce it consequently belongs to the public.[211]

The idea-expression distinction is particularly vexing when applied to fine art because art, as an aesthetic product and experience, cannot be examined without considering its creative elements.[212] Fine art can be the culmination of idea and expression, and therefore, the expression is not necessarily distinct from the artist's idea. If a painting is simultaneously the idea and the ex-

---

206 *Id.* at 1168.

207 *Id.* at 1168 n.11. The court also said that "[t]he complexity and artistry of the expression of an idea will separate it from even the most banal idea" in the case of fine art. *Id.* at 1168. This Note suggests otherwise. In works of fine art the idea may be inseparable from the artist's expression, particularly in abstract works, where the artist's *goal* is to convey his idea through the medium in which he is expressing himself. This observation further supports the need for a modified standard of originality, to insure that secondary works contain sufficient creativity to distinguish them from original works both before the secondary artist faces an infringement suit, and before the original artist is placed in a position of losing his promised protection under a valid copyright. *See, e.g.*, *Rosenthal*, 446 F.2d at 742.

208 45 F.2d 119, 121 (2d Cir. 1930) ("abstractions" test applied in context of idea-expression dichotomy), *cert. denied*, 282 U.S. 902-03 (1931).

209 *See Nichols*, 45 F.2d at 121. In regard to the idea-expression distinction, the court stated that "[n]obody has ever been able to fix that boundary, and nobody ever can." *Id.*

210 17 U.S.C. § 302 (1988).

211 *Id.*

212 This was suggested in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903). Courts make value-judgments regarding art work in every infringement case. In such cases, courts must make a threshold determination of whether there is a separate expression worthy of protection or an expression co-existent with the idea behind it. Thus, they are prevented from granting validity to the copyright without first adjudicating, to some degree, the originality involved. Knowles & Palmieri, *Dissecting Krofft: An Expression of New Ideas In Copyright?*, 8 SAN FERN. V. L. REV. 109, 128-29 (1980) (discussing idea-expression dichotomy in *Krofft*).

pression, then, according to the current standard, protection extends only to prevent exact copying of the work.[213] In addition to copyright law's failure to sufficiently protect fine artists' interests where idea and expression merge, a similar gap can be found where the court equates idea with theme.[214]

In *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*,[215] a wildlife artist was accused of infringing a copyright he had once owned in one of his paintings by creating a later work relying on many of the same sources used for the earlier, copyrighted work. The Third Circuit equated the "theme" of cardinals with the "idea" of cardinals and thereby reasoned that, like ideas, themes could not be monopolized by copyright.[216] The court ultimately found no copyright infringement, based on the artist's testimony "and other evidence of creativity."[217] Expert testimony was introduced to determine (1) whether there was substantial similarity; (2) the parameters of the conventions employed in ornithological art; and (3) the practice of a painter returning to basic themes periodically throughout his career.[218] The court reaffirmed the trial court's finding that there was no infringement because, although the ideas and inspirational materials were the same, the expressions differed.[219]

It is disturbing that courts tend to ignore the value of an expression when there is commingling of idea and expression. This leaves many works open to substantial copying because the dual presence of idea and expression deprives them of copyright protection.[220] Today, a forger like van Meegeren would not be subject to an examination of substantial similarity because he did not make copies of specific works by Vermeer, rather he painted

---

213 Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738 (9th Cir. 1971).

214 The Third Circuit in *Franklin Mint* broadens the implications of the idea-expression construct by extending it to theme-expression. Franklin Mint Corp. v. National Wildlife Art Exchange, 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

215 575 F.2d 62 (3d Cir.), *cert. denied*, 439 U.S. 880 (1978).

216 *Franklin Mint*, 575 F.2d at 66. The *Franklin Mint* court did not explain the reason it chose to equate "theme" with "idea." However, this equation was not significant because the court found that the artist, in making the later work, had created a "variation on [the] theme" of cardinals, and therefore did not copy the copyrighted piece. *Id.*

217 *Id.*

218 *Id.*

219 *Id.* at 67.

220 *See, e.g.*, Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977); Mazer v. Stein, 347 U.S. 201, 217-18 (1954). Conversely, copyright protection increases commensurate with the extent to which an idea differs from its expression. *Krofft*, 562 F.2d at 1168. *See also* Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 615, 617 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

in Vermeer's style. Like idea, style cannot be copyrighted.[221] Under the *Franklin Mint* court's reasoning, one could argue that van Meegeren's forged Vermeers were not infringements because they were simply variations on a theme, rather than forgeries. Therefore, the disturbing effects of courts' treatment of works in which idea and expression are one applies equally where style and expression co-exist.

Courts sometimes refer to substantial similarity as "infringing similarity" because when an allegedly infringing work is similar enough to a validly copyrighted work and there is no "fair use," there is infringement.[222] "[I]nfringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations."[223] Substantial similarity lies somewhere between exact duplication and no resemblance. There are two types of similarity, where the work shares the "fundamental essence" of another work, and where essential fragments of one work are shared by another.[224]

Courts have approached the determination of how similar allegedly infringing works are to original works with some degree of disparity. A few variations of basically the same test, however, have been developed to determine whether there has been copying to the point of substantial similarity, thereby constituting copyright infringement. In 1977, the Ninth Circuit distinguished the "extrinsic test" to establish the similarity of "ideas" from the "intrinsic test" to determine whether there has been copying and therefore an appropriation or infringement of the "expression" of those ideas.[225] In doing so, the court warned that "it is the *combination* of many different elements which may command copyright protection because of its particular subjective qual-

---

221 David Stein, an art forger, created at least sixty-eight paintings in the styles of Picasso, Chagall, Miro, and other artists and sold them as original works. State v. Wright Hepurn Webster Gallery, 64 Misc. 2d 423, 314 N.Y.S.2d 661 (Sup. Ct. 1970). In an action for public nuisance, the Attorney General of New York brought suit against Stein, arguing that Stein's name could be easily replaced by forged signatures of the masters after which the works were modeled. In a case of first impression, the court found that although he had used the same style as the original artists, Stein's own signature on the works exonerated his liability for forgery, "even if a painting could be considered as within the condemnation of [PENAL LAW, Article 170]." *Id.* at 668. The *Wright* court found that Stein's paintings were not forgeries under the purview of the statute because they were painted by Stein and contained his signatures. *Id.*

222 *See supra* note 154 and accompanying text (discussing fair use).

223 NIMMER, *supra* note 30, at § 13.03 [A], 13-23.

224 *Id.*

225 Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977); Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947) (one of the first courts to espouse a bifurcated test for infringement).

ity."[226] Although any one similarity may appear meaningless, all similarities considered together as a whole, given the circumstances of a case, may result in an entirely different judgment concerning artistic endeavors.

The first prong of the bifurcated test for substantial similarity, known as the "dissection" or "extrinsic test," requires the fact finder to inspect the two works and determine whether the alleged infringer relied on the copyrighted work in creating his own.[227] The fact finder then examines the underlying idea of the work by making an objective examination of the ideas behind the tangible expression that the artist presents. This includes looking at the type of art work, subject matter, materials comprising the work, and setting in which the subject is found.[228] Although expert testimony may play an important role in this examination, the extrinsic test does not depend on the idiosyncrasies of the trier of fact and therefore, can be decided as a matter of law.[229] If the fact finder concludes that the alleged infringer did not rely on the original work, then there has been no infringement. However, if the opposite conclusion is reached, then the fact finder applies the second prong of the test, referred to as either the "ordinary observer test" or the "intrinsic test."[230] In contrast to the extrinsic test, the intrinsic test is subjective in nature. It requires the fact finder to compare the expressions of the copyrighted work and the allegedly infringing work, relying on his personal opinion of their similarity or dissimilarity.[231] The intrinsic test has been likened to the ordinary or reasonable man's opinion.[232]

Using the two tests in tandem would result, according to supporters of such a bifurcated test, in a better-informed and consequently, fairer judgment of whether there has been in-

---

226 *Krofft*, 562 F.2d at 1169 (emphasis in original).

227 *See Id.* at 1164-65.

228 *Id.*

229 *Id.* at 1164. Many courts refer to this type of test as "dissection" because the trier of fact may examine smaller parts of the whole work in a piecemeal fashion, to more thoroughly and objectively analyze the work. *Id.* at 1169.

230 *Id.* at 1166; Whelan Assoc., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1232 (3d Cir. 1986) (copyright of computer program for dental laboratory record keeping), *cert. denied*, 479 U.S. 1031 (1987).

231 *Whelan*, 797 F.2d at 1245.

232 *Krofft*, 562 F.2d at 1164-69. This test, formulated by Judge Learned Hand, deems two works substantially similar if "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

fringement than would either test alone.[233] Some courts, however, have criticized the use of both parts of the bifurcated test because presumably, where the fact finder is exposed to expert testimony prior to the lay observer examination, he cannot avoid being biased by the professional's opinion.[234] Where the work under examination is more abstract than not or where it is otherwise complicated, such bias is more likely to result.

Regardless of which test courts apply, no clear parameters define what constitutes substantial similarity. The extent of copying which equals "substantial copying" is unclear. The amount of originality required beyond an arbitrary level may be null because "[t]here is no litmus paper [sic] test by which to apply the idea-expression distinction; the determination is necessarily subjective."[235] While it does not seem likely that one could devise an *entirely* objective method to examine the amount of creativity in a work, due to the many subjective considerations involved, it is nonetheless necessary to more fastidiously review the works which are protected with copyright to better carry out the legislative intent of the 1976 Act.[236]

A. *Modifying the Originality Requirement to Prevent the Forging of Artworks*

Current copyright law fails original artists because forgers can easily copy their work and obtain copyright protection for the unoriginal work. The present standard insults artistic integrity by rewarding incompetent reproductions and foreclosing protection for better copies by means of "originality" alone. This Note suggests that when forgers seek copyrights for unauthorized copies, Congress and the courts should impose a tougher standard of originality to prevent forgers from securing copyrights for illegally reproduced works. More specifically, Congress should mandate that the Register of Copyrights require a showing of creativity as well as originality *before* a copyright is granted to foreclose secondary artists and forgers from receiving protection

---

233 *Krofft*, 562 F.2d at 1164-69.

234 The *Whelan* court, for example, adopted a single substantial similarity inquiry addressing both expert and lay opinion. *Whelan*, 797 F.2d at 1223 ("[w]e are concerned with the overall similarities between the [computer] programs . . . ."). *Id.* at 1246.

235 Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 615 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982)(owners of exclusive rights in audiovisual game brought action alleging copyright infringement and unfair competition).

236 The ultimate intent of the 1976 Act is "[t]o promote the progress of . . . useful arts, by securing for limited times to [artists] . . . the exclusive right to their [works]. . . ." U.S. CONST. art. I, § 8, cl. 8.

unless they can prove that their work is sufficiently different from the original work.

This Note recommends a middle ground whereby valid copyright holders receive but do not overstep the protection intended by the 1976 Act. The use of an expert panel would better equip the courts or Copyright Office to make determinations of whether works are actually original under the new standard. Adding a requirement of creativity would also help protect a fine artist's rights when the idea behind the work is also the expression of the work. In such cases, under the present standards, courts would not apply the standard of substantial similarity, but rather, exact replication, which is almost impossible to prove. Consequently, in virtually every case, an artist's original work ends up without protection, although it has been properly copyrighted. The same is currently true where an artist's theme is one and the same as his expression, because courts equate theme to idea under the idea-expression dichotomy.

Incidents of art forgery could be dramatically reduced if all artists regularly used copyrights to legally protect their works. Congress could foster this result by passing legislation requiring all artworks entering the market to be copyrighted. A siphoning effect would necessarily result because *only those* works with a sufficient amount of original creative labor would be copyrightable. Unauthorized works would therefore be precluded from the realm of works protectable under copyright and collectors would be alerted as to whether their works were forged rather than original. All works would be separated into three distinct categories: (1) copyrightable, and therefore authentic works; (2) uncopyrightable, and therefore either inauthentic or forged works; and (3) works in the public domain which owners should advisably have authenticated for their own protection. Finally, such legislation would catch copyright infringers before they successfully completed their fraudulent acts of forgery because once it became known that they were unable to secure copyright protection, the public would learn either prior to or concurrent with the marketing stage that the works were fake.

To make the fairest judgment of a particular piece of allegedly original art, a court cannot overlook whether there exists an element of creativity in the piece. Courts can better address the problem of creativity with the assistance of expert witnesses.[237]

---

237 "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . expert . . . opinion [may be

While expert testimony is not meant to replace the fact finder's determination regarding the originality of the artwork in question or the degree of similarity it has to the artist's original work, such testimony is admitted to assist a judge or jury in making this determination.[238] As with medical malpractice cases, courts in art forgery trials should utilize experts, preferably by appointing a board of art experts, similar to the IRS Art Advisory Panel,[239] to evaluate the artwork in question. The combined expertise of museum directors, curators, scholars, art historians, and expert valuators would provide a well-rounded pool of professional judgment for making the determination as to whether the person seeking copyright protection contributed sufficient creative input to a derivative work.[240] A court-appointed panel could also eliminate the problem of out-spending the opponent in paying experts to testify if non-panel experts were given less credibility by fact finders.

Experts define the authenticity of an artwork based on tests of observation, historical verification, experience, and the subjective overall feeling the piece evokes in viewers.[241] Experts determine an artwork's "art value"[242] after considering such objective qualities as the scientific results of pigment and canvas analysis.[243] Experts' determinations also address undefinable characteristics such as the emotional character of a work, subtleties in color and form definition, and the degree of unity an artist portrays in his conception and handling of translation of idea into expression.[244] Emotional considerations are therefore meshed with the objective qualitative factors. Although much of art experts' testimony will consist of subjective interpretation, their sensibility and knowledge combine to give them "an almost supra-rational instinct . . . as to what is genuine or false."[245]

The utility of the suggested panel of art experts would be enhanced if it were established and policed by the fine art industry itself. This would ensure that the people involved would have the most to lose, and therefore, the greatest interest in arriving at

---

admitted] . . . ." FED. R. EVID. 702. Hearsay problems are avoided if experts' opinions or inferences are reasonably relied on by other art experts. *Id. See* FED. R. EVID. 703.

238 *Id.* at 704 (advisory committee's note).

239 *See supra* notes 117-20 and accompanying text (discussing the IRS Advisory Panel).

240 *Id.*

241 CONSTABLE, *supra* note 36, at 16-18.

242 "Art value" refers to viewers' aesthetic appreciation evoked by a particular work of art. *See supra* notes 3-9 and accompanying text (discussing aesthetic experience).

243 CONSTABLE, *supra* note 36, at 20-22.

244 *Id.* at 16-18.

245 *Id.* at 18.

efficient solutions.[246] The art industry could elect experts to serve pre-determined terms on the panel and they could receive small compensatory fees, paid by the industry or perhaps the local, state, or federal government, depending upon which government has jurisdiction over the court. Alternatively, experts could be chosen randomly by means similar to those employed in the system currently used to summon jurors, except that those in the pool would be qualified art professionals rather than all citizens. Like jurors, they could receive small compensatory payments from the government. Placement in the pool would be indicative of expertise in the fine arts, therefore selection for the panel would be considered prestigious. Professionals would thus be encouraged to participate in return for the public attention they would receive.

The logistics of the panel could be determined by the legislature to ensure objectivity, to avoid antitrust violations,[247] and to prevent self-interested individuals from gaining too much power over the fate of the art industry.[248] Experts would likely be more objective if they were not subjected to the monetary and persuasive pressure of plaintiffs' or defendants' attorneys. Experts could testify as to the art value or creative value of a piece in question, providing the judge or other factfinder with the background necessary to determine its authenticity as a reproduction or other type of work worthy of copyright protection.

Experts are needed to help solve many evidentiary problems present in copyright infringement cases. In the overwhelming majority of instances there are no records describing how a forger obtained his ideas or how, or to what extent, the original piece was used in making the derivative work.[249] Although two

---

246 *See generally* A. SMITH, WEALTH OF NATIONS (1776) (E. Canaan, ed. 1930) (stating that left to their own devises, individuals will act efficiently to effect their own interests, and in doing so, achieve results which are best for society).

247 *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1988); Clayton Act, 15 U.S.C. §§ 12-13, 14-19, 20, 21, 22-27, 44; 18 U.S.C. §§ 402, 660, 3285, 3691; 29 U.S.C. §§ 52-53 (1988).

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." Sherman Act, 15 U.S.C. § 2 (1988).

248 Although Adam Smith may argue otherwise, this line of reasoning is prevalent among many antitrust theorists. *See generally* R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed. 1981).

249 Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982). Although the plaintiff in this case failed to prove direct copying and there were some differences between the defendant's video game and the plaintiff's copyrighted video game, the court inferred substantial similarity because the plaintiff successfully proved access. The court said that the infringing game cap-

people may share similar ideas, it is highly unlikely, if not impossible, that they would produce virtually identical works.[250] Difficulties arise not only when the court must determine the artistic merit of a given piece, but also when it must conclude whether there exists any artistic element at all.[251]

This was the problem in *Pellegrini v. Allegrini*.[252] The court there deemed the question of whether there was great artistic merit irrelevant, finding the important determination to be "whether a work of art is what another has copyrighted."[253] The court stated that, although there can be a strong likeness between the original and the copy, the second work could not be "a copy more or less servile of the first," such as when the later copyrighted statuette of religious figures was "one and the same" as the earlier copyrighted work by plaintiff.[254] The court determined that although the secondary artist had obtained a copyright for his piece, it nonetheless infringed on the previously copyrighted work.[255] Had the standard for copyrighting a reproductive work included "creativity" as well as "originality," there would have been no need for a legal dispute at the trial level because the secondary artist would never have been able to obtain his copyright in the first place. The unknowing secondary artist would have learned of his lack of creativity before entering the market with his work and potential purchasers would also have learned of the work's failure to qualify for copyright protection. Thus, the requirement of creativity would, in effect, notify those seeking copyright for a work too closely resembling an already existing work of the work's lack of originality. Under such a system of art law, secondary artists willing to further develop their derivative work could still obtain a copyright by altering and modifying to the extent that their work is *more* than just a little

---

tured the "total concept and feel" of the copyrighted game. *Id.* at 620. *See* Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600 (1st Cir. 1988). The *Classic Lawn* court relied on proof of substantial similarity of lawn ornaments because proof of direct copying was unavailable and the ornaments were mainly "realistic-looking concrete deer." *Id.* at 607. Since many artists can reproduce the features of real deer, the court focused on the aspects of the ornaments which were subject to original interpretation, such as the positioning, posture, and facial expression of the deer to make the determination of similarity. *Id.*

250 *See* Nimmer, *Copyright Law*, in ART LAW DOMESTIC AND INTERNATIONAL 475, 476 (L. Duboff ed. 1975).

251 Pellegrini v. Allegrini, 2 F.2d 610, 611 (E.D. Pa. 1924).

252 2 F.2d 610 (E.D. Pa. 1924).

253 *Id.* at 612.

254 *Id.* at 611-12. *See* Alva Studios, Inc. v. Winninger, 177 F. Supp. 265, 267 (S.D.N.Y. 1959) (finding copyright infringement for actual copying of plaintiff's work despite two inch height difference in sculptures).

255 *Pellegrini*, 2 F.2d 611.

different from the original work from which it is derived.[256] The requirement of creativity would prevent artists who intend to forge artworks from receiving copyright protection for infringing works.

V. CONCLUSION

Art forgery remains a destructive undercurrent affecting the art world. Congress and courts should not ignore these problems. Copyright law, used effectively, could become an increasingly viable means of preventing forgery and reducing the number of infringement actions by becoming more of a preventive legal measure rather than remaining merely a means of *post facto* recovery.

Original artists deserve protection and forgers ought not receive protection for work which is not their own. The requirement of creativity, in addition to the standard of originality already imposed in copyright law, would accomplish this end. By also requiring that owners of authentic artworks obtain copyrights for their works, most, if not all, forged works created in contemporary times would become apparent and many infringement suits would be resolved before they arise.

Judith M. Nelson

256 *See* Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). *See supra* notes 135-88 and accompanying text (discussing originality).