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Remixing, Reposting, and Reblogging: Digital Media, Theories of the Image, and Copyright Law

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Remixing, Reposting, and Reblogging: Digital Media, Theories of the Image, and Copyright Law

Victoria Smith Ekstrand and Derigan Silver

Social media have changed the way we create, share, and experience visual media. Such collaborative exchanges defy traditional notions of ownership and do not conform to copyright's view of the image as a singularly "fixed" construct. In mobile contexts especially, images are dialogic, conveying far more complicated messages than ever before. This article relies on an examination of theories of the image to inform discussions about copyright reform in the digital age. It briefly explores visual culture theory and the status of visual media in copyright law, and it offers suggestions for how copyright law might adapt to encourage online visual expression, creativity, and economic gain.

The rise of social media such as Instagram, Facebook, Twitter, Flickr, Pinterest, YouTube, Vine, Snapchat, Tumblr, and other mobile video applications that allow users to post, copy, edit, and remix visual media content has changed the way we create, share, and experience visual media. These social media have also challenged copyright law because the collaborative nature of social media defy traditional notions of ownership and because digital images frequently do not conform to copyright's view of the image as a singularly "fixed" construct ensconced in a tangible medium. While copyright law primarily views the image as a singular construct, the image, particularly the digital image, is not unique in nature. In mobile contexts especially, images are dialogic, conveying far more complicated messages than ever before. They are increasingly ephemeral and polysemous, problematizing legal constructs like ownership and reproduction as we have traditionally understood and applied them.

In addition, by design, copyright law focuses almost exclusively on the rights of an owner to control her fixed creation. It generally does not consider the subject of the image, the message conveyed by the image, the receiver's perception of the image, or the image's meaning to society in or across time. Only when a user attempts to assert her "rights" under the fair use section of copyright law might these considerations arise. But even then, such analyses sometimes only skim the surface of the copyrighted object's cultural significance and dialogic nature. In short, copyright considers the "thing" it protects more than it contemplates the cultural processes and effects created by the "thing." Copyright does not recognize that we exist in what Stuart Hall might describe as an "infinite multiplicity of codings" in which we have become "fantastically codable encoding agents" (Morley & Chen, 1996, p. 137). Hall argued that:

> There is no such thing as "photography"; only a diversity of practices and historical situations in which the photographic text is produced, circulated and deployed. . . . And of course, the search for an "essential, true original" meaning is an illusion. No such previously natural moment of true meaning, untouched by the codes and social relations of production and reading, exists. (Morley & Chen, 1996, p. 157)

Perhaps more than any other existing digital medium, the mobile visual paradigm represents the importance of the *process* as much as it does the *thing*—and the importance of considering both process and thing in assessing their value to society and ultimately, their remuneration and its regulation. As Stuart Hall commented, "The meaning of a cultural symbol is given in part by the social field into which it is incorporated, the practices with which it articulates and is made to resonate. What matters is not the intrinsic or historically fixed objects of culture, but the state of play in cultural relations" (Morley & Chen, 1996, p. 157). However, the plurality of meanings created by digital visual media has not been historically valued or even recognized by the copyright structures designed to regulate it. In addition, traditionally, the roles of "producer" and "audience" were much more clear-cut. Today, increased collaboration and dissemination, particularly in social media, have blurred these distinctions, creating an advanced "state of play" that copyright law also does not recognize.

However, while copyright law does not routinely take these concepts into account, theories related to visual and critical communication do. This article suggests that while copyright obviously does not always reflect these differing theories of the image, these theories should at least inform copyright law, particularly as courts and legislators continue to struggle with how to apply copyright law to social media. While copyright law has long struggled with the visual image, this battle has been brought into sharper relief by the movement toward a more participatory model of culture where audiences no longer simply consume preconstructed visual messages. Today, digital media allow people to shape, share, reframe, and remix media content in ways never previously imagined. Like others, we do not suggest that new media platforms should automatically liberate visual images from current copyright regimes (Lessig, 2008, p. xiv). Rather, we contend that the affordances of digital media provide an excellent catalyst for reconceptualizing and reconfiguring existing legal theories (Boyle, 2008; Lessig, 2008; Litman, 2001). As one author noted, while copyright law generally applies to content on social media as it does to all other contexts, "digital technology and the rise of social media have challenged the ability of existing legal rules to manage intellectual property online" (Olson, 2013, p. 75). Thus, this article briefly explores the history of the visual image and copyright law, explains the current status of copyright law as it applies to digital and social media and visual works, and offers suggestions for how copyright law might be reformed to encourage expression, creativity, and economic gain on social media sites.

First, the article explains the basics of copyright law and the history of copyright and visual works. Next, it explores how the law governs the use of visual content on social media platforms, discussing current case law and legislative proposals. This section focuses on fair use, the ability to use photos and videos found on social media, and linking and embedding videos. It briefly examines how websites' and Internet Service Providers' terms of service and technological architecture can control content and restrict the rights of users. Next, the article reviews theories of the image that might be used to inform copyright law's application to future legal problems created by social media. Finally, the article concludes with observations regarding how copyright might adapt to deal with visual content on social media platforms.

Copyright Law and Visual Images

Copyright, which is governed by federal statutory law, gives ownership rights to those who create original works of authorship fixed in a tangible medium from which the work can be reproduced. Copyright protects video and photographs, in addition to written works, music, software, works of art, and other creative works. It is designed to give creators of original works a limited monopoly to help "promote the progress of science and the useful arts." Creators of original works receive these exclusive rights under the Copyright Act of 1976. Copyright does not protect facts or ideas, but it does protect the way those facts and ideas are expressed. In visual images, for instance, copyright protects the particular creative aspects of the visual image but not the subject or underlying event of the photo. Copyright holders have the right to reproduce and distribute copies of the work, the right to create derivative works, and the right to perform or display the work. Under the Act, copyright protection begins "at birth" or as soon as the work is "fixed in a tangible medium of expression," including the Internet. Copyright protects both published and unpublished works.

Although copyright protection must be "for limited times," in 1998, the Sonny Bono Copyright Term Extension Act extended copyright terms significantly. Copyright terms for a work by of individual authorship is the life of the author plus 70 years. For a work with a corporate author it is 120 years from its date of creation or 95 years after its first publication, whichever is shorter. After this, works become part of the public domain and are available for

future authors to use for additional creative works.

In 1884, the U.S. Supreme Court first applied copyright to pictures when it affirmed that photographs were subject to copyright protection as "original intellectual conceptions of the author" (*Burrow-Giles Lithographic Co. v. Sarony*, 1884). The Court ruled that because the photographer posed the subject of the picture—author Oscar Wilde—selected the costume, draperies, and other accessories in the photograph, and arranged the lighting, the photograph was an original work created by the photographer. Since that time, courts have found almost all photographs may claim the necessary originality to support a copyright (Nimmer, 2011). However, the level of copyright protection photographs receive has been the subject of some debate.

One of the key questions since *Burrow-Giles v. Sarony* has centered on the degree of creativity evident in photos of common subjects. In some cases, the originality inherent in the visual may often be what copyright observers describe as "thin" or undeserving of copyright protection at all. In *Oriental Art Printing Inc. v. Goldstar Printing Corp.* the district court evaluated the copyright in photos of common Chinese food dishes. There, the court held that photos of common Chinese food dishes, which were arranged on a plain white background, were not copyrightable. In *Mannion v. Coors Brewing*, the district court considered whether a photo of NBA basketball star Kevin Garnett taken against a blue sky and white clouds—which was used and manipulated without permission by Coors Brewing in an ad—was sufficiently original for copyright protection. The court established several new benchmarks for originality in photography, including rendition, timing, and creation of the subject. Citing scholarship from the United Kingdom, Judge Lewis A. Kaplan wrote that rendition described "not what is depicted, but how it is depicted" (Mannion, v. Coors Brewing Co., 2006, p. 452) and that is what should receive protection. A photo may also receive protection, he wrote, because the photographer is in the right place at the right time, or what he termed "originality in timing." Finally, a photo may be original if the photographer created the scene or subject to be photographed. Judge Kaplan found that the Garnett photo was original because the photographer created the scene and made choices about the depiction of Garnett.

In addition, some have questioned the level of copyright protection photographs of famous newsworthy events receive. Under the "merger doctrine," if there are only a limited number of ways an idea can be expressed, the idea and the way it is expressed can be "merged," and the expression will not receive copyright protection. Melville Nimmer, the well-known author of an authoritative treatise on copyright, questioned whether in some situations an idea or fact and the way it is visually expressed might become inseparable and thus it would be almost impossible to protect the expression of the idea without preventing the dissemination of the idea or fact (Nimmer, 1981). According to Nimmer the almost unique nature of photographs of the Mai Lai Massacre or the Zapruder film of the assassination of John F. Kennedy might be among rare circumstances in which the visual impact of a graphic work would make such a unique contribution to democratic dialogue that the photograph or visual work would become essential to understanding an event and thus would not be eligible for copyright protection. While this approach has never been formally adopted by a court, the U.S. Court of Appeals for the Second Circuit acknowledged it was conceivable that in some rare or unique circumstances, such as those surrounding the Zapruder film, the information value of a film or photograph could not be separated from the photographer's expression, thereby indicating both should be in the public domain (*Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.,* 1980).

To win a copyright infringement suit, the plaintiff must show ownership of copyright in the original work and unauthorized use of the work. If there is no direct proof of infringement, the plaintiff must prove circumstantial evidence of the infringement—that the plaintiff had access to the original work and substantial similarity between the two works. Substantial similarity means an average observer would consider the two works similar enough to recognize that the infringing work was copied from the original. Although copyright infringement can be prosecuted as a criminal offense, typically cases involve civil claims for damages. Plaintiffs in copyright infringement cases can seek actual damages, profits generated from the infringing work, as well as statutory damages. Statutory damages can be as high as $30,000 for innocent infringement and $150,000 for willful infringement.

The fair use doctrine limits the exclusive rights of copyright owners. Outlined in Section 107 of the 1976 Copyright Act, this doctrine allows for the use of copyrighted works for criticism, comment, news reporting, teaching, scholarship, and research. The fair use doctrine is designed to balance an individual's property rights with the

social benefits that come with the free flow of information. Fair use allows for the dissemination of copyrighted material for certain purposes that are in the public interest. To determine if a use is protected under the fair use doctrine, courts examine four different factors:

1. The purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole.
4. The effect of the use upon the potential market for or value of the copyrighted work.

The first factor examines the purpose of the allegedly infringing work. The Copyright Act of 1976 specifically lists news reporting, comment, criticism, research, scholarship, and teaching as protected uses, although this is not an exclusive list. Additionally, even the listed uses may not be fair use if the secondary work serves the same purpose as the original work. While not-for-profit uses are more likely to be considered fair use, a commercial use can be a fair use, and simply because a use does not make a profit does not mean it is automatically a fair use. Particularly important to this factor is whether a use is "transformative." A work is transformative if it "adds something new, with a further purpose or different character, altering the [original work] with new expression, meaning, or message" (*Campbell v. Acuff-Rose Music, Inc.*, 1994, p. 579). The concept of transformativeness has been increasingly important in the discussion of copyright, visual works and social media.

The second factor examines the original work. Under this factor, courts consider if the work is highly creative or largely comprised of factual information, with largely factual works receiving less protection. The third factor examines how much of the original work was taken, both quantitatively and qualitatively. This factor considers the proportion of the original that was taken and favors uses that take only as much of the original as is needed for the purpose of the use. However, in some situations—such as commenting on a photograph or a visual work—using the entire work might be necessary and will not prevent a finding of fair use.

The final factor courts consider is the effect of the use on the potential market of the original work. Historically, this has been viewed as the most important of the four factors, though in *Campbell v. Acuff-Rose Music* and since, that is arguably shifting. This factor measures economic harms that may be caused by the new use and frequently takes into consideration the purpose of the secondary use. If a second use serves a new or different function than the original work, the audience of the two works will most likely not be similar, and this will weigh in favor of fair use. If, however, the secondary use is largely a replacement for the original work, courts are unlikely to find the secondary use a fair use. As discussed later in this article, this is why the concept of "transformativeness" has come to have such weight in fair use analyses. In theory, a transformative use is unlikely to harm the market of the original work, although a precise definition of transformativeness has been somewhat elusive.

Copyright Law and Social Media

Visual images do not become public domain simply because they are available via social media or other Internet sites. They retain their copyright when uploaded to a social media or photo-sharing site. In addition, terms of service for social networking sites typically do not make images public domain. For example, the policy for Twitpic, the photo-sharing application for Twitter, states:

> All content uploaded is copyright of the respective owners. The owners retain full rights to distribute their own work without prior consent from Twitpic. It is not acceptable to copy or save another user's content from Twitpic and upload to other sites for redistribution and dissemination. (Twitpic, 2013).

In 2011, a federal judge in the Southern District of New York applied these terms when French wire service Agence France Press, Getty Images, CBS, and CNN used photos of the Haitian earthquake uploaded to Twitter and Twitpic by a professional photographer without his permission. The judge refused to dismiss the infringement suit, noting that any license agreement extended only to Twitter and its partners, not the third parties involved in the lawsuit (*Agence France v. Morel*, 2011). The photographer was eventually awarded $1.2 million in damages after a jury determined the news organizations willfully infringed his copyrights by distributing eight of his images.

Linking to visual images or embedding video content on a webpage are not considered to be infringement. Today, the most common method for displaying a visual image or video on a site is "inline linking." Inline linking allows a video to be played or an image to be viewed on a website

without actually copying the video or image to the new website. The actual file remains on the original server, such as Youtube. Since no "copying" is involved, only linking, there is no liability for copyright infringement. For example, this approach was adopted by the U.S. Court of Appeals for the Ninth Circuit in 2007 in *Perfect 10 v. Amazon.com*. In the case, Google was sued for copyright infringement over its image search engine, which displayed images matching with a search term entered by a user. Google, however, used inline links so the actual images returned by the search query remained on their original servers. The Ninth Circuit adopted the so-called "server test," which held that because Google's server did not house an actual copy of the images and merely linked to the content on the original site, there was no infringement of the copyright owner's rights. Although it might appear to the user that Google was hosting the material, it was only hosting a link to the material that the user's browser interpreted should appear in a certain way.

In addition, the Ninth Circuit found in both *Kelly v. Arriba Soft Corp.* and *Perfect 10, Inc. v. Amazon.com, Inc*. that the secondary use of thumbnail digital images was a transformative fair use. The court held that even exact copies of photos could be "highly transformative" if they were used for a different purpose. Even though the photos were completely unaltered, they were made into something completely new because they were used for something completely different—indexing the Web rather than for aesthetic, artistic, or entertainment purposes—because the new use was beneficial to the public. This analysis has been noted as quite extraordinary, with one copyright scholar writing that in calling a "productive use" transformational the Ninth Circuit had to torture the transformative use doctrine established by the U.S. Supreme Court (Olson, 2009). These cases are quite important to copyright law and digital visual images because they affirm the premise that even using exact copies of images without adding any new content can be transformative if the purpose of the use is different enough from the original use. In addition, when discussing sharing via social media it is also important to remember that many critics of the fair use doctrine contend that it is difficult to predict how judges will rule in fair use claims and that the "rules" are unclear, inaccessible, and unpredictable to the vast majority of those who instantaneously reuse and reshare content. This article thus contends that visual theory might be one way to inform fair use analysis when considering the reposting, remixing, and resharing of digital content.

Culture and Control of the Image

If the story of copyright in the visual image has been one of finding some measure of originality and fixation in images to protect, the evolving story of visual culture has been quite the opposite. As society came to view images as more directly, continuously, and authentically representing the world, such images came to represent more than artistic representation or creativity. They came to represent time and space never again to be claimed but to which we can all relate, what Susan Sontag might label memento mori: To take a photograph is to participate in another person (or thing's) mortality, vulnerability, mutability. Precisely by slicing this moment and freezing it, all photographs testify to time's "relentless melt" (Sontag, 1977, p. 15).

In other words, the visual culture of photography is paradoxically shared and ephemeral. The ongoing evolution of the photographic image and its value has made finding one legal definition to cover static notions of single ownership in it increasingly difficult.

The digital photographic image has refused to be the two things copyright demands most. It struggles against being truly "fixed in a tangible medium" because the inherent power of some images—what Walter Benjamin might describe as the image's "aura"—works against their being "fixed." Even Benjamin saw the aura destroyed by the rise of "montage" and fragmented media—and this was before the advent of collaborative social visual media (Sturken & Cartwright, 2001, p. 123). Many images also rebel against "originality" in the strictest legal sense. On their own, images don't always display the creativity and uniqueness required by copyright as much as they show their value through their social and cultural worth, which makes them reliant on distribution, sharing, and discussion for their value. They reflect the struggle between copyright's dual purpose to serve the author *and* to serve the public. Does the culture of digital media sharing specifically determine a photo's worth and contribution toward "progress of science and the useful arts," or is the creator's genius and creativity in the labor to produce the image the sole determinant of its value and hence its legal protection?

To understand the tensions between copyright and digital images in particular, it's useful to consider how visual culture, as a field of study, would view those tensions—particularly if the aim is to critique and reconsider the copyright regime in our infinitely reproducible mobile digital environment. In May 2013, Maria

Pallante, the U.S. Register of Copyrights, indicated to members of Congress an urgent need to revisit the copyright statute. Pallante said she has been especially motivated to encourage reform in light of the impact of mobile technologies and an environment that is increasingly less "fixed": "People around the world increasingly are accessing content on mobile devices and fewer and fewer of them will need or desire the physical copies that were so central to the 19th and 20th century copyright laws" (Pallante, 2013).

Visual Culture Studies

The study of visual culture "compares the means by which cultures visualize themselves in forms ranging from the imagination to the counters between people and visualized media" (Mirzoeff, 2009). It aims for the "visual construction of the social field," meaning it is less interested in media forms than it is in thinking about images and visuals as critical parts of social experience and conflict (Mitchell, 2005). As such, it is a comparative field of inquiry, and it considers the impact and exchange of images regarding war, economics, religions, environments, and social relations across class, race, gender, and geographic lines more broadly. Furthermore, it considers the distribution and consumption of images as a "practice of looking." As Marita Sturken and Lisa Cartwright (2001) write, "we engage in practices of looking to communicate, to influence and be influenced" (p. 10). In short, the study of visual culture questions the politics of vision and how "visualizing" exerts considerable discursive power over those who are exposed to such imagery, making the "processes of History visible to power"(Mirzoeff, 2009). In one sense, the image describes reality; but such a "real" moment also comes embedded with the visualizing influence of the photographer and the subsequent interpretation by and effect on the looker, also easily subject to multiple interpretations. The taking and viewing of a photographic image is far from the simple exercise most of us perceive it to be. The simplistic fixation and originality requirements of copyright belie the complexity of such an exercise.

The field of visual culture studies reflects several key principles potentially instructive to thinking about image copyright and reform. First, visual culture scholars emphasize that visual culture appears and strives to be inherently democratic in its orientation. They argue that images represent our individual and collective realities and in doing so help us "understand, describe, and define the world as we see it" (Sturken & Cartwright, 2001, p. 12). Images want to roam and beg to be seen, digested, and redigested. In attempting to represent and describe our world, visual culture has what we might describe as built-in biases: We may be seeing something, but we are seeing it through the particular medium and lens of the creator of the visual object. In this way, scholars in the field have separated visual culture from what might be thought of as "real vision" or what these scholars call "visuality." The distinction is between what we see through the particular medium provided and what is truly going on in, around, and behind the visual object presented by the creator of the object.

As a result, such interpretations are a reflection of the structures that disseminate, police, and control those images, such as the statutory provisions of copyright or the social media platforms and their terms of service in which such images are shared and distributed. In the digital mobile environment, this suggests thinking about images as a form of symbolic speech that rely on often indescribable, hidden systems of meaning, interpretation, purpose, and control. The technical and legal systems through which images are shared establish but also reflect cultural norms. Implicit in visual representation is the exchange of diverse and differing viewpoints, accomplished by systems of representation—Instagram, as one example—in which there are formal and informal rules about how to express or consider such imagery. Such norms may be a function of the people who gather there, the images themselves, the technology used to support such systems, and/or the terms or conditions imposed by the distributors. The main point is that visual culture scholars encourage systems that support what might be thought of as a "right to look" in which observers can freely glean meanings from the images.

Scholars of visual culture also recognize the power implicit in the "gaze"—in which our own social actions are challenged and constrained by the sense that we are being looked at, by the sense that our worlds are remixed and reshared by others for comment and judgment. To the extent that we create, share, and interpret images, particularly in new mobile contexts, we engage also with the sense that we are being watched. That sense has a direct effect on how we ultimately represent our visual selves and others.

Finally, visual culture scholars, by recognizing the social power wielded by the image, focus on how image commodification and sharing can change or complicate what such images mean. Some, like Walter Benjamin, have pointed out the

effects of reproduction and how the meaning of an image can change with rampant reproduction and create significant (and often deleterious) political effects and propaganda. Again, visual culture scholars recognize that the value of images "lies not in their uniqueness but in their aesthetic, cultural and social worth" (Sturken & Cartwright, 2001, p. 124). Much of that social worth is a product of the different eras of image technology. Today we live with the multiple effects of such developments:

> The premechnical image, such as the painting that was situated within a specific place, gained its cultural value from being unique. It had a role in ritual and a cult value precisely because it was one of a kind. The mechanically reproduced image gains its value through its reproducibility, potential distribution, and role in the mass media. It can disseminate ideas, persuade viewers, and circulate political ideas. The digital and virtual image gains its value from its accessibility, malleability, and information status. All of these images with their different meanings coexist in our societies today. (Sturken & Cartwright, 2001, p. 139)

Contrary to this conceptualization of the "value" of a visual work, copyright law tends to rely on notions of ownership attached to the premechanical age. Copyright has largely protected the commodification process by rewarding creativity and uniqueness in image creation. But as Jaszi (2014), Netanel (2011), and Samuelson (2009) have pointed out in their more recent discussions on the transformativeness test in fair use case law, that standard in copyright has seen a rather recent shift. Samuelson's study organized recent fair use decisions into "policy-relevant clusters" and emphasized that we would do well to think of fair use in terms of a multiplicity of fair uses rather than relying on a singular doctrine such as transformativeness. She identified five clusters, including: (1) free speech and expression fair uses; (2) authorship-promoting fair uses; (3) uses that promote learning; (4) "foreseeable uses of copyright works beyond the six statutorily favored purposes," including personal uses, uses in litigation and for other government purposes, and uses in advertising; and (5) "unforeseen uses," including technologies that provide information location tools, facilitate personal uses and spur competition in the software industry (Samuelson, 2009). Like the court's decision in *Perfect 10 v. Amazon.com*, Samuelson's analysis moves closer to recognizing the multiple determinations involved in evaluating the social capital of copyrighted content that visual culture studies scholars would recognize. Visual culture scholars might say that such a dialogic resists being pinned down into such silos, but unless we are to throw out copyright altogether—something we reject—looking at categories of reuse is a helpful place to begin thinking about when the value in reuse comes from society rather than solely from the individual.

Netanel's study (2011) of fair use cases and the rise of the transformativeness test since 2005 suggests a similar shift away from thinking of copyright as rights that singularly adhere to the author and her economic benefit and leans more toward the view of copyright as critical to promoting advancement of progress and the useful arts. This, he suggests, may be due in part to changes in the means of production—the rise of digital tools, mobile tools, etc.:

> The data suggests that courts have, in fact, embraced the transformative use doctrine as they have largely abandoned the commercial use presumptions, not that courts perceive it necessary to find transformativeness in order to avoid the presumption that the commercial uses cause market harm. Indeed, judicial abandonment of the commercial presumptions appears to be a part of courts' dramatic shift from the market paradigm to the transformative use paradigm. (p. 742)

In his study, Netanel concludes that since 2005 the transformative use paradigm has emerged as a sea change in the evaluation of fair uses. The key question, he writes, has shifted away from whether the copyright holder would have consented to the use to whether "the defendant used the copyrighted work for a different expressive purpose from that for which the work was created" (Netanel, 2011, p. 768). But he also points out that we have yet to apply transformativeness (or other more expansive notions of fair use) across "the entire spectrum of defendant uses" (p. 769). Here, it seems instructive to build on Netanel's and Samuelson's work in thinking about such uses, and especially within the mobile visual contexts.

The Mobile Visual Image and Adapting Copyright

Following Samuelson and Netanel, we briefly consider a taxonomy of uses in the digital visual space. As Samuelson points out, unbundling such uses will not cure all of copyright's ills in digital spaces, but unbundling may provide some

assistance to courts, policy makers, and thinkers as these groups try to reconceptualize a copyright regime that is vastly different than it was even 10 years ago. We have broken down social media images into four broad categories that fit within Samuelson's taxonomy. These are by no means mutually exclusive or exhaustive, but they do, we feel, begin to give observers a basis upon which to consider the unique nature of the mobile visual environment. These four categories include: (1) the Selfie, (2) the Meme, (3) the Moment, and (4) the Picture. We define these oft-recurring categories in social media in this section, along with an analysis of their copyright status and potential transformative qualities. In doing so, our goal is add to the discussion on transformativeness in copyright law and copyright reform more generally.

The Selfie

The term *selfie* refers to a photo taken of oneself by oneself, typically taken with a smartphone. Such photos are usually posted to social media for comment, and the goal of the selfie is usually approval and validation. Scholars studying selfies talk about their role in self-image and the potential to strengthen self-image (Erickson, 2013). Psychology researchers at the University of Buffalo found that those whose "self esteem is based on public-based contingencies (that is, other's approval, physical appearance and outdoing others in competition) were more involved in photo sharing" and selfie practices (Donovan, 2011). The selfie practice and such research suggest that the intentions of the creator are to gain social capital through online sharing practices.

In terms of copyright, the selfie's actions might suggest that the copyright, though owned by the creator and subject of the photo, is more like an implied license, in which the creator's actions suggest that the copyrighted content is intended for sharing and reuse. Implied licenses arise when the conduct of the parties indicates that some license is to be extended between the copyright owner and the licensee, but the parties themselves did not bother to create a license (Garner, 2009, p. 823). Implied licenses are a source of some debate because, of course, they are not explicit and because their use in Internet contexts is still fairly new. In terms of Samuelson's clusters, the selfie would most likely fall within free speech and expression fair uses but would also qualify as a personal use. The selfie, by definition, is self-expressive, designed especially for resharing. This, in our view, lowers the barriers for exclusive ownership.

The Meme

A meme is "an idea, behavior, or style that spreads from person to person within a culture" (*Merriam-Webster Dictionary*). The term is often credited to evolutionary biologist Richard Dawkins, who describes how cultural information spreads in his 1976 book *The Selfish Gene*. Dawkins has distinguished an Internet meme from his original term, describing an Internet meme as one that is deliberately altered by human creativity (Solon, 2013). Today, we recognize the *Internet* meme in such online visual favorites as "Grumpy Cat" (a well-known picture of a grumpy-looking cat with changing taglines that reflect his mood); "Condesending Wonka" (an iconic photo clip of Gene Wilder as Willy Wonka in the 1971 film *Willy Wonka and the Chocolate Factory* showing his frustration with stupid humans); and "Texts from Hillary" (a photo of the former Secretary of State sitting on board an aircraft with sunglasses, texting, with a dour expression). The original images in these memes are undoubtedly copyrighted, but their viral reuse—along with changes in accompanying taglines to offer new social commentary as they are reshared—suggests a kind of transformative fair use nearly impossible to control by the original copyright owner of the images used. While the original owners of the images might attempt to sue for infringement in these cases—the owner of Grumpy Cat has retained an agent and lawyer—the overwhelming viral use of images such as "Grumpy Cat" or "Condescending Wonka" make such cases difficult to pursue. The kind of ubiquity or general theme common to a wide variety of memes—what copyright law might term *scènes à faire*—usurps the original creativity in the image, making it difficult to claim a copyright. Within Samuelson's taxonomy, the meme is simply a free speech and expression use or unforeseen use that facilitates new personal uses.

The Moment

Much of what we encounter in social media spaces is implicit in the term "status," which suggests that we publicly offer a moment-to-moment, play-by-play rendering of our lives. Many of these visual offerings on social media include vistas in our daily travels, photos of food we are about to eat, children and animals doing cute things, gatherings we are attending, pictures of products we are about to buy, or news we just witnessed. Like the selfie, what we are terming the "moment" gains its value in the sharing of personal experience with others and the desire to have the social media viewer participate in an asynchronous and absent fashion. Such visuals

seem to cry, "Wish you were here to experience this with me!" Like the selfie, such postings suggest an implied license to social media friends and followers and a personal use as described by Samuelson.

The Picture

Finally, social media often feature more formal visual content with links posted to articles and traditional media content, what we call "the picture." Such traditional "pictures" might include news or feature photos and visuals with accompanying stories. Such "pictures" might also include artistic photos or illustrations created in a traditional media context or show publicity shots and illustrations. These sorts of images align with more traditional visual forms and traditional copyright principles, necessitating a more traditional fair use analysis when such images are reused. The reuse of such visuals might have more of an impact on the fourth factor in the fair use test—whether the use might supplant the market demand for the original work. Here, too, transformativeness is likely to be minimal, thus favoring the creator in any copyright dispute.

Conclusion

Designed to promote progress and the useful arts, copyright law has historically focused on the rights of the creator to control and benefit from a work by granting a limited monopoly to distribute the work. But as visual culture scholars would likely suggest, copyright is very much a function of the premechanical age in which works were singular, and reproductions were few and far between. The social value of such work was often in its status as a unique object and its lack of circulation, rather than in its rampant redistribution. In the digital age, and particularly within social media contexts, that has changed dramatically. The value of digital works often lies in their redistribution, making them reliant on such distribution for their worth but also subject to debates over who should benefit from their value and at what price.

Digital images, particularly within mobile and social media contexts, present especially difficult challenges for copyright. With the ease of publishing smartphone images and many more images circulating than ever before, the challenges are especially daunting. Is it possible to claim ownership of a moment in time shared purposefully with millions? What is owed to those who engage in professional image creation and whose livelihood depends on such work? Does there exist some confusing continuum between the two ends of the visual spectrum? Such questions suggest the importance of new conversations about copyright revision now occurring within the U.S. Congress over the statute and within the courts over the growing importance of the transformativeness test in fair use evaluations. We believe that a healthy market for the creation, sharing, and remuneration of digital images involves a more in-depth discussion about what visual culture studies scholars would call the visual construction of the social field—that is, acknowledging that image making and distribution is a complex exercise in social relations and that the complexity of that exercise should be reflected in the rules regarding who should benefit from image creation and distribution.

In briefly building on the work of Samuelson and Netanel, we suggest that focus on the uses of digital images is an important site for such a discussion. We identified four categories of digital images in social media (with arguably more categories to create): the "selfie," the "meme," the "moment," and the "picture." With each, we briefly addressed how their unique attributes reflected differences in communicative value and purpose: the "selfie" and the "moment" reflecting expressive qualities and personal uses with more fair use potential, the "meme" often reflecting transformative qualities with more fair use potential, and the "picture" usually reflecting more traditional copyright values and less fair use potential. Rather than conceptualizing the copyright of images as only a basketful of rights in image creation and distribution, this suggests viewing copyright as a complex social practice negotiated by the image creator and the image receiver. Copyright's role—and the task of legislators and courts—must be in mediating that relationship and understanding the varied but ubiquitous role of the visual in our lives.

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