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## Images of Public Places: Extending the Copyright Exemption for Pictorial Representations of Architectural Works to Other Copyrighted Works

Andrew Inesi  
*Mattel Overseas Operations Ltd.*

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# IMAGES OF PUBLIC PLACES: EXTENDING THE COPYRIGHT EXEMPTION FOR PICTORIAL REPRESENTATIONS OF ARCHITECTURAL WORKS TO OTHER COPYRIGHTED WORKS

*Andrew Inesi\**

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\* J.D., Harvard Law School; LL.M. U.C. Berkeley (Boalt Hall) School of Law. Mr. Inesi is currently Managing Director of Mattel Overseas Operations Ltd.

I. INTRODUCTION<sup>1</sup>

Imagine you are standing in Times Square with a digital camera. Creative works surround you: advertisements, buildings, and public art are visible on all sides. You plan to snap a few photos, but are not sure how you might use them. Perhaps you will delete them immediately. If you like them, you might post them to your website. If they are really great, maybe you will sell some prints, enter a photo contest, or even sell photos to an advertiser, stock photo agency, or magazine. With digital technologies, the possibilities are endless.

Copyright law, however, may not allow you to take advantage of all of these possibilities. The creative works that surround you are almost certainly protected by copyright, and using photographs that incorporate those works may be a *prima facie* copyright violation.<sup>2</sup> Although the legal defenses of *de minimis* and fair use probably protect some uses of these photographs—including, for example, the capture of the image or showing a print to a few friends—they do not apply to others. Most notably, they may not apply to many of the uses brought within the reach of consumers by new technologies, such as posting photographs to a website or selling high-quality prints. Even in cases where *de minimis* or fair use might apply, the *ad hoc* nature of these tests makes it difficult to rely on them.

There is, however, an exception to this copyright conundrum. Pursuant to 17 U.S.C. § 120(a), all uses are privileged if the only copyrighted items the relevant image includes are architectural works. This Article argues that this rule—the absolute privilege to capture and use images of architectural works visible from public places—should be extended, in modified form, to all copyrightable works. Such an extension would permit consumers to take full advantage of the photographic opportunities made possible by new technologies, and, in so doing, has the potential to create great social value at little cost.

This Article has four Parts. Part I is this introduction. Part II describes the problem, showing how technology is empowering amateurs to make new uses of images containing copyrighted materials, and how copyright law is ill-equipped to handle this change. Part III proposes a solution to this problem—an extension of 17 U.S.C. § 120(a) to cover photographic representations of all copyrighted works—and explains why this solution makes sense. Part IV is a brief conclusion.

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<sup>1</sup> The author would like to thank Professor Peter Menell, Professor Robert Merges, and especially Professor Pamela Samuelson for comments on earlier drafts.

<sup>2</sup> 17 U.S.C. § 106 (2000). For a fuller discussion of this point, see *infra* notes 14-19 and accompanying text.

## II. THE PROBLEM: COPYRIGHT CONSTRAINTS ON PUBLIC PHOTOGRAPHY

New technologies are having a revolutionary impact on imaging. In just a few years, technological advances including digital imaging, gallery-quality home printing, Internet publishing, and desktop editing software have radically reduced costs and expanded possibilities for photographers and filmmakers (a group collectively referred to herein as “photographers”).<sup>3</sup> These changes are having two important effects on the imaging market. First, the line between amateur and professional photography is blurring. Second, many more people are taking and using many more images, thereby increasing the importance of imaging as a communications tool.

Copyright must be updated to account for these changes. Rules that may have made sense when image uses were highly stratified do not adequately address new imaging possibilities. This is particularly true for a class of images referred to herein as “public photographs”: images that (i) incorporate only items visible from public places,<sup>4</sup> and (ii) incorporate the copyrighted work(s) of third parties. Images captured in Times Square are paradigmatic examples of public photographs.

Public photographs have a copyright problem because they are both unavoidable for photographers depicting public places and facial violations of copyright. Further, the two principal defenses that photographers might rely upon to avoid liability for their uses of public photography—*de minimis* and fair use—are of limited applicability.<sup>5</sup> *De minimis* clearly applies only in cases where the copyrightable work is either shown only in part or cannot be seen clearly. Fair use clearly applies only to uses of public photography that were commonplace before technology increased the photographic possibilities of amateur photographers (a group collectively referred to herein as “consumers”).

This Part describes these issues in detail. Section A describes the potential for copyright infringement, beginning with an explanation of the practical considerations that have immunized consumers from copyright liability for their public photography, and then showing how technology changes this calculus. Section B explores several copyright defenses—*de minimis*, fair use, and a special exception for images of architectural works—and concludes that none of them

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<sup>3</sup> Similarly, the terms “photography” and “imaging” as used herein are intended to include filmmaking as well as still photography. Although there are some important differences between the two activities—differences that are pointed out when applicable—the problem described in this Article, and the suggested solution to that problem, apply to both.

<sup>4</sup> “Public places” are places that: (i) are owned by the state, and (ii) are open to the general public. For a full discussion of this definition, see *infra* notes 134–37 and accompanying text.

<sup>5</sup> For a detailed discussion of the *de minimis* and fair use defenses in the public photography context, see *infra* Parts II.B.1 and II.B.2.

adequately shields consumers from liability for public photography uses made possible by new technologies. Finally, Section C shows why the market does not provide a solution to this problem, thereby demonstrating the need for a new legal defense.

To help frame and clarify the discussion, listed below are five factual examples that are referred to periodically throughout this Article:

*Example 1:* A photographer shoots a photograph in Times Square that includes a copyrighted sculpture in one corner. The photograph is subsequently sold as a print.

*Example 2:* Same facts as example 1, but the sculpture is prominently displayed in the photograph, and the photograph is not sold, but only shown to family and friends.

*Example 3:* Same facts as example 2, but the photograph is also posted to a website.

*Example 4:* Same facts as example 2, but the photograph is also printed on a political poster that is distributed throughout the city.

*Example 5:* Same facts as example 2, but the photograph is also entered in a photo contest.

#### A. THE POTENTIAL FOR INFRINGEMENT

1. *Copyright Ubiquity and Prima Facie Infringement.* Copyrightable works are unavoidable in many of our public places, especially in urban areas. Advertisements are placed on every conceivable surface, from bus benches to shop windows to billboards. Newspapers, magazines, and posters are displayed prominently at newsstands on every street corner. Murals, sculptures, and other pieces of public art are widespread. Even buildings,<sup>6</sup> clothing fabric designs,<sup>7</sup> and jewelry<sup>8</sup> are copyrightable, at least in part. This list is not exhaustive;<sup>9</sup> almost any work exhibiting even a modicum of original creativity is copyrightable.<sup>10</sup> Each

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<sup>6</sup> 17 U.S.C. § 102(a)(8) (2000).

<sup>7</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[H][2] (2000).

<sup>8</sup> See generally *Davis v. The Gap, Inc.*, 246 F.3d 152, 173, 58 U.S.P.Q.2d (BNA) 1481, 1486 (2d Cir. 2001).

<sup>9</sup> See 17 U.S.C. § 102(a) (noting that works of authorship “include” the listed works); *id.* § 101 (noting that the word “including” as used in Title 17 is “illustrative but not limitative”).

<sup>10</sup> *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 18 U.S.P.Q.2d (BNA) 1275, 1278 (1991) (noting that the amount of original creativity necessary for copyright “is extremely low; even a slight amount will suffice”); LAWRENCE LESSIG, *FREE CULTURE* 136 (2004) (noting that copyright covers “practically any creative work that is reduced to tangible form”).

such work is automatically protected from the moment of its first fixation in a tangible form<sup>11</sup>—no registration or other formalities are required.<sup>12</sup>

Given this ubiquity of creative works, photographs of public places often necessarily incorporate copyrighted items. As the author of a legal guide for photographers puts it: “[I]t is impossible to avoid including copyrighted elements in many photographs.”<sup>13</sup> Indeed, copyrighted works are so inextricably linked in the public’s view, both literal and figurative, of many public places, that a photograph that fails to incorporate any of these works may not effectively represent the place depicted. For example, try to imagine a photograph of Times Square without any copyrightable items—no advertisements, buildings, public art, jewelry, or newspapers. Would such a photograph even be recognizable as Times Square?

Despite their inevitability, all public photographs are potential copyright violations. Copyright law grants a number of exclusive rights to copyright holders, including the rights to reproduce,<sup>14</sup> display,<sup>15</sup> distribute,<sup>16</sup> and prepare derivative works<sup>17</sup> of their copyrighted works.<sup>18</sup> Although some debate exists about whether a photograph depicting a copyrighted item is a derivative work or a copy,<sup>19</sup> the result for the photographer without a license is the same: merely pressing the shutter on his camera is a facial violation of the copyright holder’s exclusive rights. Further, even if the photographer avoids liability for capture of a public photograph, most uses he might make of that photograph are *prima facie* copyright violations: making and selling prints violates the duplication right and

<sup>11</sup> 17 U.S.C. § 102(a).

<sup>12</sup> Of course, not all copyrightable works are in fact protected by copyright—there are limits to copyright’s protections, most notably the limited term of copyright. However, it is unlikely that many of the copyrightable items encountered in public places (other than perhaps architectural works) would have exceeded that term, which is at least seventy years for a work created after 1977. 17 U.S.C. § 302 (2000).

<sup>13</sup> BERT P. KRAGES, *LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES* 64 (Michelle Perkins ed., Amherst Media, Inc. 2002).

<sup>14</sup> 17 U.S.C. § 106(1) (2000).

<sup>15</sup> *Id.* § 106(5).

<sup>16</sup> *Id.* § 106(3).

<sup>17</sup> *Id.* § 106(2).

<sup>18</sup> Any third party contravention of these rights, regardless of size or importance, is punishable by damages (actual or statutory, including up to \$150,000 per infraction for willful infringement), an injunction, and seizure of the offending items. *Id.* §§ 502-505.

<sup>19</sup> For example, the 9th Circuit in *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1077-78, 55 U.S.P.Q.2d (BNA) 1769, 1775 (9th Cir. 2000), suggested (but did not hold) that a photograph of a vodka bottle would have been a derivative work had the bottle itself been copyrightable. This analysis was criticized in *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 305-06, 56 U.S.P.Q.2d (BNA) 1813, 1816 (S.D.N.Y. 2000), which held photographs of copyrighted frames to be copies, not derivative works.

the distribution right; publishing the photograph on a website violates the display right and the duplication right; selling the photograph for use in a magazine violates the duplication and distribution rights.

Fortunately, the reality of public photography has not been as grim as the previous paragraph suggests. Photographers routinely capture and use images of public places without adverse copyright consequences. How is this possible? The reasons differ for professionals and consumers. Professionals often license image uses that would otherwise violate third-party copyrights. Thus, for example, a car manufacturer that features Times Square in its advertisement might license the use of any copyrighted works that appear in the ad. Alternatively, professionals can sometimes rely upon the fair use or *de minimis* doctrines, each of which privileges certain uses of third-party copyrighted works.<sup>20</sup> The main drawback of these doctrines—their inherent uncertainty—is not generally an insurmountable problem for professionals, many of whom have both the sophistication and the resources to litigate any gray areas.<sup>21</sup>

Consumers have been protected from copyright liability by their limitations. With rare exceptions, resource constraints have limited consumers to capturing low-quality images and sharing the resulting prints or home movies with family and friends. As will be described in detail below,<sup>22</sup> these traditional activities may be protected by the fair use and/or *de minimis* doctrines. Regardless, however, of the applicability of fair use and *de minimis*, consumers' limitations have protected them in a more fundamental way: consumers were unable to use their public photographs in ways that threatened copyright owners.<sup>23</sup> Even if sharing a photograph of Times Square with a few friends is a technical violation of copyright, it almost certainly has no significant effect on the copyright owner. Thus, it makes little sense to take legal action: the chances of winning are not great, and even if the copyright holder wins, the costs associated with legal action (both in terms of actual money spent and the potential for bad publicity) almost always outweigh the benefits.

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<sup>20</sup> For a detailed discussion of each of these doctrines, see *infra* Parts II.B.1 and II.B.2.

<sup>21</sup> For an example of professional willingness to litigate fair use, see *Video-Cinema Films, Inc. v. CNN, Inc.*, No. 98 Civ. 7128, 2001 U.S. Dist. LEXIS 15937, 60 U.S.P.Q.2d (BNA) 1415 (S.D.N.Y. 2001) (numerous media companies preferred litigating fair use to paying \$5,000–\$10,000 licensing fees for use of certain film clips).

<sup>22</sup> See *infra* Parts II.B.1 and II.B.2.

<sup>23</sup> See Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1538 (2005) (noting that “people without independent wealth or financial backing traditionally have had little capacity to implicate the Copyright Act in ways that would justify enforcement actions against them”); Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 417 (2003) (noting that “because the costs of enforcement likely outweigh any economic harm, such cases will rarely if ever be prosecuted or even the subject of a cease-and-desist letter”).

2. *Technology Makes Legal Action Against Consumers More Likely.* New technologies change the balance described above. By reducing costs and expanding photographic possibilities for consumers, new technologies permit consumers to use public photographs in ways that affect copyright holders, thereby increasing the risk of copyright conflict between the two groups. This subsection describes these new technologies, and their effects, in detail.

At the forefront of recent changes to imaging technologies is a shift from film to digital.<sup>24</sup> Digital technology holds a number of advantages for consumers. First, digital cameras are both easier and less expensive to use: consumers do not have to purchase film or pay for development, and can see their photographs immediately after shooting them. Second, the switch to digital technology allows consumers to take advantage of a number of other powerful tools, including high-quality photo printers<sup>25</sup> and editing software such as Adobe Photoshop and Apple's iFilm.<sup>26</sup> Finally, amateur image-makers with digital images can use the Internet to publish<sup>27</sup> and distribute the photographs to a much broader audience than was previously possible.<sup>28</sup>

New technologies are also leading to an increase in the quality of the photographs produced by consumers. In the past, high-quality images often required professional equipment and expertise, but new technologies eliminate some of this need. Film and development lab quality are irrelevant to digital photography, automated cameras and camcorders are getting smarter regarding

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<sup>24</sup> As one mark of this change, between 1996 and 2003 consumer sales of digital cameras in the United States increased from less than one million units to 12.5 million units, and have now surpassed yearly sales of film cameras. This trend is expected to continue. PHOTO MKTG. ASS'N INT'L, PMA MKTG. RESEARCH, PHOTO INDUS. 2004: REVIEW AND FORECAST 4 (2004). Further, half of all photographs now taken are digital photographs. Katie Hafner, *Digital Memories, Piling Up, May Prove Fleeting*, N.Y. TIMES, Nov. 10, 2004, at A1.

<sup>25</sup> It is now possible to buy an inkjet printer for less than \$1000 that is capable of producing gallery-quality, archival prints. The Epson 2200, which generally sells for about \$700, is one such model.

<sup>26</sup> The power of this software is remarkable: it gives users more control over their images than even the most advanced labs using traditional techniques.

<sup>27</sup> A photographer needs only the most rudimentary technological skills to publish on the Internet: a number of services have arisen that permit dragging and dropping photos from your computer's hard drive directly to a personal webpage created for you. Examples include Ofoto ([www.ofoto.com](http://www.ofoto.com)), Snapfish ([www.snapfish.com](http://www.snapfish.com)), and Shutterfly ([www.shutterfly.com](http://www.shutterfly.com)). More professional uses, such as creation of a customized personal website or distribution of video over the Internet, require a bit more skill but are within the reach of most consumers.

<sup>28</sup> The importance and implications of the Internet as an inexpensive content distribution tool have been noted by a number of scholars. See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 120-41 (Random House, Inc. 2001); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951 (2004).



scene exposure,<sup>29</sup> and the cost of high-quality equipment has dropped precipitously.<sup>30</sup> Indeed, consumer equipment is already so good that some digicams are suitable for professional work,<sup>31</sup> award-winning films have been made with consumer equipment,<sup>32</sup> and some high-end prosumer digital cameras rival the quality of medium-format film cameras.<sup>33</sup> Moreover, the Internet makes it easy for consumers to learn the tricks of the trade: they can now choose from a number of high-quality websites<sup>34</sup> for information on shooting techniques, color management, aesthetic considerations, and any other topic relevant to imaging.<sup>35</sup>

These technological changes are having several important effects on the production of photography. First, new technologies enable consumers to capture and use images in ways once reserved to professionals.<sup>36</sup> Amateur photographers that a few years ago were able to do little more than share their photographs with

<sup>29</sup> Cameras are also becoming smaller: new technologies such as the camera phone, shirt-pocket digicams, and disposable cameras allow consumers to bring cameras with them everywhere.

<sup>30</sup> This is especially true of video. See LESSIG, *supra* note 28, at 124 ("We are soon to enter a time when filmmakers will be able to produce high-quality film for digital devices at 1 percent of the cost of the same production with traditional tools.").

<sup>31</sup> Alex Majoli, a photojournalist with the prestigious Magnum agency, and winner of numerous awards, including Magazine Photographer of the Year at the Best of Photojournalism 2004 awards, uses an Olympus digicam for much of his professional work. See also Michael Reichmann, *Digicams v. DSLRs: The New Battle Royale*, The Luminous Landscape, at <http://www.luminous-landscape.com/essays/digicams-vs-dslrs.shtml> (last visited Nov. 7, 2005) ("I believe that even serious fine-art photographers and working pros will now find several digicams worth considering—something that I might not have said 12-18 months ago.").

<sup>32</sup> See Van Houweling, *supra* note 23, at 1535 (noting that *Tarnation*, a film made for \$218, was "the surprise hit of the Cannes and Sundance film festivals").

<sup>33</sup> See Michael Reichmann, *The Ultimate Shoot-Out: State-of-the-Art 35mm Digital Vs. Medium Format Film*, The Luminous Landscape, at <http://www.luminous-landscape.com/reviews/shootout.shtml> (last visited Nov. 7, 2005).

<sup>34</sup> Examples include [www.photo.net](http://www.photo.net), [www.luminouslandscape.com](http://www.luminouslandscape.com), [www.steves-digicams.com](http://www.steves-digicams.com), [www.robgalbraith.com](http://www.robgalbraith.com), and [www.filmaker.com](http://www.filmaker.com). Most of these websites do not represent one particular manufacturer or store, and thus may be more reliable than websites with a more overt commercial agenda. Indeed, some photographic writers on the Internet are quite vocal about their independence. See, e.g., Michael Reichmann, *Why Don't They Get It?: A Critique of the Current State of the Photographic Industry*, The Luminous Landscape, at <http://www.luminous-landscape.com/essays/get-it.shtml> (last visited Nov. 7, 2005) ("When was the last time you saw a photography magazine seriously criticize a product? Not often. Unfortunately web sites that accept advertising suffer from the same dilemma. It's really only non-commercial sites like this one that are unafraid to tell the truth.").

<sup>35</sup> To a certain extent this information was available through books and periodicals before the Internet. However, the Internet is a more powerful informational tool for several reasons: it contains more information than any single book or periodical, it is searchable, it is interactive, and, more often than not, it is free.

<sup>36</sup> For general information on how new technologies are enabling amateur creativity, see Hunter & Lastowka, *supra* note 28, at 24-58.

a few friends can now, at low cost, publish those images online to a potential worldwide audience, create high-quality prints for sale or exhibition, and test the market for sales to magazines or film distributors.<sup>37</sup>

The blurring of the line between consumer and professional photography has profound legal implications. As described in the last section, the major reason that third-party copyright owners have not taken action against consumer users of public photography is that such uses had no significant effect on them.<sup>38</sup> Now, with new technologies, consumers can use public photographs in ways that affect underlying copyright holders. For example, consumers can now put photographs on the Internet that portray the copyrighted work in a negative light; make, market and sell multiple prints of photographs incorporating a copyrighted work in a way that plays on the value of the copyrighted work; and distribute high-quality films incorporating the copyrighted work. Thus regardless of motive—money, a moral rights conception of creativity, or control of a carefully-crafted public image—copyright holders have greater incentives to stop consumer use of public photographs incorporating their works.

A second effect of new technologies, more people taking more photographs, further increases the likelihood of copyright conflict. New consumer camera equipment, including camera-phones, disposable cameras, and ever-smaller digicams and camcorders make it easy to always have a camera at the ready. This both attracts new photographers—those who would not carry a camera with them but will carry a cameraphone—and makes it likely that current photographers will shoot more images. Further, the ease of digital photography is attracting new photographers, while the low marginal cost of taking additional digital photos compared to film photos will lead to more images taken. Finally, the new photographic possibilities presented by technology, from making professional quality prints to posting on the Internet, can be expected to increase interest in photography.<sup>39</sup> This increase in the general popularity of photography increases

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<sup>37</sup> *Id.* at 36. New technologies “are increasingly allowing individual, poorly capitalized players to produce works that are competing for attention with the works created by corporate and highly capitalized players.”

<sup>38</sup> See *supra* notes 21-23 and accompanying text.

<sup>39</sup> There is some evidence that this shift is already occurring. One data point demonstrating the increase in the photography market is total camera sales. After holding steady for over ten years, camera sales have increased from approximately sixteen million in 1996 to almost twenty-five million in 2003. PHOTO MARKETING ASS’N INT’L, *supra* note 24, at 4-5. The rise of digital photography explains some of this increase—to some extent consumers may simply be replacing their old equipment. During this same period, however, sales of one-time cameras, which are counted separately, increased from 72 million to 211 million. *Id.*

the likelihood of conflict between consumers and copyright holders for the simple reason that more photographs means more copyright violations.<sup>40</sup>

Finally, the likelihood of copyright enforcement against consumers is increasing because copyright owners are more likely to find out about infringing uses of their works. This too is tied to new technologies. Many of the public photography uses brought within the reach of consumers by new technologies—such as publishing of images on the Internet and submission of high-quality films to film festivals—are more public than were traditional consumer public photograph uses. Moreover, new search technologies make it easier for copyright holders to locate and investigate possible infringements.<sup>41</sup> All else equal, it is clear that copyright owners who know about infringements are more likely to take action than those who do not.

Of course, the fact that copyright owners will, in many cases, have a greater incentive to take legal action does not mean that they will file lawsuits against every use of a public photograph. Traditional consumer uses of public photographs—such as showing a photo album or a home movie to a few friends—are likely to continue to fly below the enforcement radar. Even some new uses, like posting to an uncommonly visited family photo website, may not garner much legal attention. After all, copyright owners only have so much time, money, and goodwill to expend and will likely concentrate on the public photograph uses most damaging to them.

However, the problem should not be understated. Many of the consumer public photograph uses most likely to garner legal attention are exactly those that are most likely to be beneficial to society: new voices trying to communicate with broad audiences using photography.<sup>42</sup> Further, the danger of enforcement may be increasing for reasons other than technological change, as copyright owners try to extract more value from their works<sup>43</sup> and become more aggressive about punishing perceived infringers.<sup>44</sup> Finally, formal legal action may not be necessary

<sup>40</sup> See Hunter & Lastowka, *supra* note 28, at 964 (“[T]he increasingly widespread use of more powerful digital cameras, scanners and camera phones will increase unauthorized copyright aftermarkets for images.”).

<sup>41</sup> It is now possible to limit Internet search results to images. See, e.g., Google Image Search, <http://images.google.com>.

<sup>42</sup> For further discussion of the importance of imaging as a communications tool, see *infra* notes 144-47 and accompanying text.

<sup>43</sup> Jessica Litman has argued that a fundamentally new conception of copyright is arising, one that permits copyright owners to “extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner’s control.” Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 345 (2002). See also JESSICA LITMAN, *DIGITAL COPYRIGHT*, 79-81 (2000) (describing changing conceptions of copyright).

<sup>44</sup> Evidence of this newfound aggressiveness can be found in the lawsuits filed by the Recording

to chill consumer public photography. Cease-and-desist letters cost little to send, pose almost no risk for the copyright owner, and stand a good chance of convincing consumers, most of whom are likely to be risk averse, to change course.

## B. THE INADEQUACY OF COPYRIGHT DEFENSES

The last section showed that technology makes conflict between consumer users of public images and copyright holders more likely. This conflict, however, will not necessarily lead to litigation. There are several legal defenses that may serve as a bulwark against unreasonable enforcement of copyright against consumers. Three of these defenses are considered below. The conclusion: many of the traditional consumer uses of public photography—such as capture alone, or showing prints to a few friends—are probably already privileged, but the same cannot be said for public photography uses brought within the reach of consumers by new technologies.

1. *De Minimis is Not Applicable in Most Cases.* The legal maxim of *de minimis non curat lex* is often translated as “the law does not concern itself with trifles.”<sup>45</sup> As this definition indicates, the basic idea behind *de minimis*, when used as a defense to copyright infringement, is that no liability should attach to infringements of little consequence. The devil, however, is in the details. There are few published decisions analyzing *de minimis* in the copyright context,<sup>46</sup> and those courts that have invoked *de minimis* have done so in at least three different ways: (i) as an element of substantial similarity; (ii) as a separate affirmative defense; and (iii) as an element of fair use. Each of these possibilities is briefly explored below.

Substantial similarity is one of the fundamental elements of copyright infringement—an infringing work must be substantially similar to the original

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Industry Association of America (RIAA) against individual music file-sharers. Over 6000 of these lawsuits have been filed to date, and the Motion Picture Association of America (MPAA) recently announced that it would adopt the same strategy. Frank Ahrens, *MPAA to Sue Over Movie File Sharing: Industry Following Lead Of Music Companies*, WASH. POST, Nov. 5, 2004, at E01.

<sup>45</sup> Sacklunch.net, Latin and Greek Phrases, <http://www.sacklunch.net/Latin/D/deminimisnoncuratlex.html> (Nov. 7, 2005). See also *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74, 44 U.S.P.Q.2d (BNA) 1001, 1004 (2d Cir. 1997); Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1457 (1997).

<sup>46</sup> This is probably due to the fact that *de minimis* has historically protected uses that are unlikely to rise to the level of litigation. See, e.g., *Davis v. The Gap, Inc.*, 246 F.3d 152, 173, 58 U.S.P.Q.2d (BNA) 1481, 1495 (2d Cir. 2001) (“The *de minimis* doctrine is rarely discussed in copyright opinions because suits are rarely brought over trivial instances of copying.”); Leval, *supra* note 45, at 1457-58 (noting that certain questions fall in the category of “[q]uestions that never need to be answered. If [they] did need to be answered, I believe the answer would be provided by the doctrine of *de minimis non curat lex* . . .”).

work for an infringement to be actionable.<sup>47</sup> In the case of literal copying, which is the portion of substantial similarity doctrine that would apply to public photographs, a new work is substantially similar to an original only if more than a de minimis amount of the original is copied.<sup>48</sup> Using this theory, several courts have held that photographs that contain only a small portion of a copyrightable work, or that contain copyrightable elements that are not entirely recognizable, are not copyright violations. Thus, for example, where several artworks visible in a film, “never appear in focus, and except for two of the shots, are seen in the distant background, often obstructed from view by one of the actors,” the Second Circuit ruled the use de minimis for purposes of substantial similarity analysis.<sup>49</sup>

However, the substantial similarity branch of de minimis applies only in limited factual circumstances. The Second Circuit showed just how limited in *Ringgold v. Black Entertainment Television*, a case in which a copyrighted poster appeared in the background of a television show for 26.75 seconds, and, though clearly visible, was slightly out of focus.<sup>50</sup> The court held that “the de minimis threshold for actionable copying of protected expression has been crossed.”<sup>51</sup> More broadly, and despite the *Ringgold* court’s mention of the length of time the copyrighted works appeared, substantial similarity analysis generally focuses on the amount of the original copyrighted work that is taken, not the importance of the use made of that work.<sup>52</sup> Accordingly, even if an individual copyrighted item is a small and unimportant part of the image in question, and even if the image is used in insignificant ways, the photographer is unlikely to escape liability under this version of de minimis if the copyrighted item is both shown in its entirety and clearly visible.

A second approach views de minimis as a separate affirmative defense in cases in which, although all elements of infringement are present, the infringing use is

<sup>47</sup> 1 NIMMER & NIMMER, *supra* note 7, at 13.03[A].

<sup>48</sup> *Id.* at 13.03[A][2].

<sup>49</sup> *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 216-18, 47 U.S.P.Q.2d (BNA) 1215, 1216-17 (2d Cir. 1998). See also *Gordon v. Nextel Commc’ns*, 345 F.3d 922, 925, 68 U.S.P.Q.2d (BNA) 1369, 1371 (6th Cir. 2003) (no substantial similarity when two copyrighted dental posters appeared “fleeting,” and “primarily out of focus” in the background of the defendant’s text messaging commercial); *Ringgold*, 126 F.3d at 77 (noting that “[i]n some circumstances, a visual work . . . might ultimately be filmed at such a distance and so out of focus that a typical program viewer would not discern any decorative effect,” and thus would qualify for de minimis treatment).

<sup>50</sup> *Ringgold*, 126 F.3d at 73.

<sup>51</sup> *Id.* at 77.

<sup>52</sup> 1 NIMMER & NIMMER, *supra* note 7, at 13.03[A][2] (noting that substantial similarity is measured by reference to the plaintiff’s work, not by the importance of the plaintiff’s work in the defendant’s work).

insignificant.<sup>53</sup> The most prominent proponent of this view is Judge Leval of the Second Circuit, whose views are best summarized in *Davis v. The Gap, Inc.*:

Parents in Central Park photograph their children perched on Jose de Creft's Alice in Wonderland sculpture. We record television programs aired while we are out, so as to watch them at a more convenient hour. Waiters at a restaurant sing "Happy Birthday" at a patron's table. When we do such things, it is not that we are breaking the law but unlikely to be sued given the high cost of litigation. Because of the *de minimis* doctrine, in trivial instances of copying, we are in fact not breaking the law.<sup>54</sup>

Despite this eloquent summary, the court in *Davis* ruled that use by a clothing store of copyrighted eyeglasses in an advertisement did not qualify as *de minimis*,<sup>55</sup> resting its decision on the fact that the eyeglasses were "highly noticeable."<sup>56</sup> However, the same court came to a different conclusion in *Knickerbocker Toy Co. v. Azrak-Hamway International*.<sup>57</sup> In that case the defendant created a brochure prominently featuring the plaintiff's product.<sup>58</sup> The court ruled the infringement *de minimis* because the brochure was never used.<sup>59</sup>

As these cases suggest, the principal focus of this second branch of *de minimis* is the importance of the use made of the copyrighted item. This can be viewed in two ways. First, the *Davis* ruling suggests that if use of the incorporated work is something less than "highly noticeable" it may be *de minimis* even if the work incorporating it is used for commercial purposes. Though it is not clear how minor the use must be, this view of *de minimis* could provide some protection for uses that would not qualify under the substantial similarity branch of *de minimis*.<sup>60</sup> For example, a photograph of Times Square incorporating a number of

<sup>53</sup> *Ringgold*, 126 F.3d at 74.

<sup>54</sup> *Davis v. The Gap, Inc.*, 246 F.3d 152, 173, 58 U.S.P.Q.2d (BNA) 1481, 1495 (2d Cir. 2001). For another summary of Judge Leval's view of *de minimis*, see Leval, *supra* note 45, at 1457-58.

<sup>55</sup> *Davis*, 246 F.3d at 173.

<sup>56</sup> *Id.*

<sup>57</sup> *Knickerbocker Toy Co. v. Azrak-Hamway Int'l, Inc.*, 668 F.2d 699, 702, 214 U.S.P.Q. (BNA) 175, 177 (2d Cir. 1982).

<sup>58</sup> *Id.* at 701.

<sup>59</sup> *Id.* at 703.

<sup>60</sup> It is possible that the difference between substantial similarity *de minimis* and *Davis de minimis* is greater in theory than in practice. Although the courts in *Ringgold*, *Sandoval*, and *Gordon* did consider the quantity of the copyrighted work taken (when, for example, considering the degree to which the copyrighted work was in focus or obstructed), they also placed some weight on their prominence in the new work (when considering, for example, the amount of time the copyrighted work appeared on screen).

copyrighted works might not pass muster under the substantial similarity version of *de minimis* if the works are in focus and clearly visible, but might qualify under this version of *de minimis* if the incorporated works are of little importance to the photograph.

Second, *Knickerbocker* suggests that even if the use is highly noticeable, *de minimis* may be found when the new work is not used for any significant purpose. This is the rationale most likely to protect traditional consumer uses of public photographs, such as mere capture of images or showing home movies to a few friends, since these uses are unlikely to affect copyright owners in any significant way. It is less clear whether uses made possible by new technologies—such as posting images to a website, selling prints, or competing in a film festival—would qualify.

The main problem with the *de minimis* as a separate defense rationale is that most courts do not appear to ascribe to it in the copyright context. As one commentator notes, “[T]he overwhelming thrust of authority upholds liability even under circumstances in which the use of the copyrighted work is of minimal consequence.”<sup>61</sup> For example, the court in *Lebbus v. Woods* refused to consider the fact that the copyrighted work in question appeared only briefly in the defendant’s film, noting that “[w]hether an infringement is *de minimis* is determined by the amount taken without authorization from the infringed work, and not by the characteristics of the infringing work.”<sup>62</sup> Thus, although promising for some common public photography uses, *de minimis* may be generally unavailing as a separate defense to copyright infringement.

Finally, *de minimis* has been considered as part of fair use analysis. In *Amsinck v. Columbia Pictures*, a case in which the plaintiff’s artistic mobile was briefly shown in the defendant’s film, the court incorporated *de minimis* in its discussion of the fourth fair use factor (the effect of the use on the market for the copyrighted work).<sup>63</sup> The court concluded that “[i]n situations where the copyright owner suffers no demonstrable harm from the use of the work, fair use overlaps with the legal doctrine of *de minimis*, requiring a finding of no liability for infringement.”<sup>64</sup> However, it is not clear what the concept of *de minimis* adds to fair use analysis.

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<sup>61</sup> 1 NIMMER & NIMMER, *supra* note 7, at 8.01[G].

<sup>62</sup> *Woods v. Universal City Studios, Inc.*, 920 F. Supp. 62, 65, 38 U.S.P.Q.2d (BNA) 1790, 1792 (S.D.N.Y. 1996).

<sup>63</sup> *Amsinck v. Columbia Pictures Indus., Inc.*, 862 F. Supp. 1044, 1048-49, 33 U.S.P.Q.2d 1131, 1134 (S.D.N.Y. 1994).

<sup>64</sup> *Id.* at 1049.

Indeed, it may merely confuse matters.<sup>65</sup> As one court puts it, *de minimis* is “inappropriate . . . to be enlisted in fair use analysis.”<sup>66</sup>

In sum, the doctrine of *de minimis* in copyright is a confused one; courts apply it in different ways to similar factual scenarios. Nevertheless, it is possible to draw some tentative conclusions. As part of substantial similarity analysis, *de minimis* clearly applies to photographs in which the relevant copyrighted items are obscured or out of focus. Thus, to return to the examples introduced at the beginning of this Part, the photographer in example #1—in which a sculpture appears in a corner of a photograph—would qualify if the incorporated sculpture were not clearly visible. Additionally, some courts apply *de minimis* as a separate defense to cases in which either: (i) the copyrighted work is an unimportant part of the image as a whole, or (ii) the use made of the final image is insignificant. These courts would probably exempt from liability the photographers in example #2 (a photograph that prominently features a sculpture is shown to family and friends) and perhaps example #3 (the same photograph is posted to a website) and example #5 (the same photograph is entered in a photo contest). However, most courts do not subscribe to this latter conception of *de minimis*, and thus it cannot be relied upon. Even the most liberal conception of *de minimis* would not protect the photographer in example #4 (the same photograph is used on a political poster).

2. *Fair Use Is Too Uncertain.* Fair use is a defense to copyright infringement that “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>67</sup> A fair use determination is made by reference to four statutory factors,<sup>68</sup> though courts are permitted to consider any other factor deemed relevant.<sup>69</sup> The fair use test eschews bright-line rules, as the analysis is always fact-intensive.<sup>70</sup>

<sup>65</sup> See *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75-76, 44 U.S.P.Q.2d (BNA) 1001, 1005-06 (2d Cir. 1997).

<sup>66</sup> *Id.*

<sup>67</sup> *Steward v. Abend*, 495 U.S. 207, 236, 14 U.S.P.Q.2d (BNA) 1614, 1627 (1990), *quoting* *Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos.*, 621 F.2d 57, 207 U.S.P.Q. (BNA) 97 (2d Cir. 1980).

<sup>68</sup> These factors are:

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

17 U.S.C. § 107 (2000).

<sup>69</sup> *Id.* See also *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560, 225 U.S.P.Q. (BNA) 1073, 1081 (1985).

<sup>70</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 29 U.S.P.Q.2d (BNA) 1961, 1964



At first blush, fair use seems a promising avenue of defense for consumer use of public photographs. After all, copyright liability for use of public photographs would clearly stifle the creativity of photographers.<sup>71</sup> Yet, as with *de minimis*, the devil is in the details. The fact-intensive nature of the fair use analysis, combined with considerable argument and confusion over how the test should be applied, makes it difficult to predict the applicability of fair use in all but the most obvious cases. Nevertheless, an exploration of some of the cases and factors most likely to be relevant in a public photography fair use determination can provide some insight.

The most obvious problem with fair use for public photography is factor three in the statutory test—the “amount and substantiality of the portion [of the copyrighted work] used.”<sup>72</sup> On its face, this factor appears to militate against a finding of fair use, as photographic images generally copy the entire copyrightable work(s) in question.<sup>73</sup> Indeed, as with *de minimis*, the traditional rule holds that “fair use is typically unavailing when an entire work has been copied.”<sup>74</sup> Several courts applied this rule in the context of visual arts. For example, the 9th Circuit in *Walt Disney Productions v. Air Pirates* held that copying Disney characters for a comic book was not fair use because “excessive copying precludes fair use.”<sup>75</sup> Similarly, where the artist Jeff Koons copied a photograph into sculptural form, the Second Circuit in *Rogers v. Koons* held that too much had been copied to qualify for fair use, even under the relatively liberal standard applied to parodies.<sup>76</sup>

This conclusion seems unfair in the context of photographic works. Unlike the quotation of passages in a book, the sampling of a few notes of music, or the creation of parodic sculptures or comic books, the photographic process makes

(1994).

<sup>71</sup> Further, this reduction in creative output is unlikely to be counterbalanced by an increase in creative output from the advertisers and artists whose works are likely to be included in public photographs, since the added incentive of being able to control public photographs of their works is likely to be minimal. See *infra* notes 170-71 and accompanying text for a fuller discussion of this point.

<sup>72</sup> 17 U.S.C. § 107.

<sup>73</sup> It is interesting to note that some uses that may qualify for *de minimis* may not qualify for fair use. As described in Part II.B.1, *infra*, even works that are shown in their entirety may qualify for *de minimis*, at least in some courts.

<sup>74</sup> 1 NIMMER & NIMMER, *supra* note 7, § 8.01[G]. See also *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 109, 47 U.S.P.Q.2d (BNA) 1295, 1298 (2d Cir. 1998); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 756-57, 199 U.S.P.Q. (BNA) 769, 773 (9th Cir. 1978) (noting that “verbatim copying preclude[s] resort to the fair use defense”).

<sup>75</sup> *Walt Disney Prods.*, 581 F.2d at 758.

<sup>76</sup> *Rogers v. Koons*, 960 F.2d 301, 311, 22 U.S.P.Q.2d (BNA) 1492, 1500 (2d Cir. 1992). Despite its conclusion that fair use would not apply even if Koons’s sculpture were a parody of the plaintiff’s photograph, the court ruled that the sculpture was not a parody, and accordingly was not entitled to the heightened tolerance of the parody defense. *Id.*

it impossible to include anything less than an entire copyrighted work in a photograph if that work fits within the scene the photographer wishes to capture. Indeed, several courts agree that the nature of the work merits consideration when weighing the importance of the third factor. Most prominently, in *Sony Corp. of America v. Universal City Studios*, the Supreme Court held that, due to the nature of audiovisual works, “the fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.”<sup>77</sup> Similarly, the First Circuit in *Nunez v. Caribbean International News Corp.*, held that the third fair use factor was “of little consequence” where a newspaper’s publishing of anything less than an entire copyrighted photograph would have “made the picture useless.”<sup>78</sup> Further, news organizations routinely include entire copyrighted works in their photographs and audiovisual works, yet these qualify for fair use.<sup>79</sup> In sum, although copying an entire work normally militates against fair use, it is not necessarily dispositive, and may be of limited importance in the public photograph context due to the nature of photography.

*Sony* raises another fair use issue of significance for public photography: the difference between commercial and noncommercial uses. Noncommercial uses, according to *Sony*, are presumptively fair uses unless the copyright owner can demonstrate a likelihood of harm.<sup>80</sup> Accordingly, under this standard a number of public photograph uses—such as posting to a personal website or showing a film to friends—would qualify as presumptive fair use. However, it is also clear that some public photograph uses would qualify for the opposite *Sony* presumption: that commercial uses are presumptively not fair use.<sup>81</sup> For example, entering a public photograph in a photo contest with cash prizes or

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<sup>77</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50, 220 U.S.P.Q. (BNA) 665, 681 (1984).

<sup>78</sup> *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 24, 57 U.S.P.Q.2d (BNA) 1239, 1243 (1st Cir. 2000). The court in *Jackson v. Warner Bros. Inc.*, 993 F. Supp. 585, 44 U.S.P.Q.2d (BNA) 1603 (E.D. Mich. 1997), went even farther, counting the third factor in favor of the defendant where the plaintiff’s paintings appeared for less than 60 seconds in the defendant’s film. See also *Ringgold v. Black Ent’t Television, Inc.*, 126 F.3d 70, 80, 44 U.S.P.Q.2d (BNA) 1001, 1009-10 (2d Cir. 1997) (noting that it is correct to consider the brevity of the intervals in which a work is shown in consideration of the third fair use factor, but warning against allowing this to too easily tip the entire fair use assessment against the defendant).

<sup>79</sup> Both the House and Senate Reports on 17 U.S.C. § 107 give the following example of a use that should qualify as fair use: “incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.” *Sony Corp. of Am.*, 464 U.S. at 478 (citations omitted).

<sup>80</sup> *Id.* at 451.

<sup>81</sup> *Id.* Note, however, that this presumption was weakened in a subsequent case. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 29 U.S.P.Q.2d (BNA) 1961 (1994).

selling prints are likely commercial uses.<sup>82</sup> Moreover, technology is blurring an already murky line<sup>83</sup> between commercial and noncommercial uses, and it is not clear which presumption would apply to some uses. For example, it is not clear whether posting photographs to an ad-supported website would qualify as a commercial use.

Further, there is some question regarding how far the *Sony* standard extends. The *Sony* holding—that private VCR recording of television programs for later viewing is fair use—was limited to private activities, and, accordingly, some commentators believe that presumptive fair use extends only to uses that are private in addition to being noncommercial.<sup>84</sup> Although there is little clarity regarding the meaning of “private,”<sup>85</sup> it is likely that many of the imaging activities made possible by new technologies—such as posting a photograph to a website, or screening a film at a film festival—would not qualify.

The theory of market failure, which is described in detail in Part II.C,<sup>86</sup> may also have an effect on fair use analyses. In brief, market failure theory holds that a legal solution such as fair use may be appropriate in cases where the market does not work properly.<sup>87</sup> Thus, a demonstration of failure in the market for use of copyrighted items in public photographs may lead to a fair use holding. There are several reasons to believe that failure is likely in the market for consumer use of public photographs.<sup>88</sup> However, few courts consider market failure in isolation, and the general trend has been to use market failure theory to restrict fair use, not expand it. Thus, for example, in *American Geophysical Union v. Texaco, Inc.*, the Second Circuit ruled that photocopying of scholarly articles by researchers at Texaco was not fair use despite the fact that nonpayment for such uses was traditionally permitted.<sup>89</sup> The reason: a licensing market had arisen that made it

<sup>82</sup> Courts have a fairly liberal view of what constitutes commercial use. See, e.g., *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562, 225 U.S.P.Q. (BNA) 1073, 1081 (1985) (The “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price”); *Rogers v. Koons*, 960 F.2d 301, 309-10, 22 U.S.P.Q.2d (BNA) 1492, 1499 (2d Cir. 1992) (holding that creation of an artwork that was later sold was a commercial use).

<sup>83</sup> See 1 NIMMER & NIMMER, *supra* note 7, § 13.05[A][1][a].

<sup>84</sup> COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS IN THE EMERGING INFORMATION INFRASTRUCTURE, NATIONAL RESEARCH COUNCIL, DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 129 (2000) [hereinafter DIGITAL DILEMMA]; Pamela Samuelson, *Toward a “New Deal” for Copyright in the Information Age*, 100 MICH. L. REV. 1488, 1493 (2002).

<sup>85</sup> DIGITAL DILEMMA, *supra* note 84, at 130-32.

<sup>86</sup> See *infra* notes 114-29 and accompanying text.

<sup>87</sup> See generally Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

<sup>88</sup> See *infra* notes 121-29 and accompanying text.

<sup>89</sup> *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 35 U.S.P.Q.2d (BNA) 1513 (2d Cir.

relatively easy to obtain a license to photocopy articles. Clearly, the same logic could work the other way: if market failure becomes more likely, as is likely to be true of public photography,<sup>90</sup> fair use may be appropriate in areas where it previously had not been used. However, it is not clear whether courts would subscribe to this rationale.<sup>91</sup>

A final factor that may be relevant to a public photography fair use determination is the fact that the copyrighted items incorporated in public photographs are, by definition, visible from public places when captured. Although, in theory, copying a work located in a public place is no more permissible than copying a work located in a private place, a court interested in maintaining freedom of speech and action in public places might consider the location of the copied item in its fair use determination.<sup>92</sup> Further, images incorporating items normally visible in public places might be more likely to be considered news reporting, criticism, or comment, each of which is a favored category for fair use purposes.<sup>93</sup> The reason: that which occurs in, or is visible from, a public place is likely to be of public interest. Accordingly, images of these places, and the copyrightable items in them, are especially likely to be newsworthy, and criticism or comment on copyrightable items could arguably be inferred in some instances simply by showing such an item in its public context.<sup>94</sup> Nevertheless, the boundaries of each of these categories are difficult to discern.<sup>95</sup>

1994). See also *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1385, 40 U.S.P.Q.2d (BNA) 1641, 1667 (6th Cir. 1996).

<sup>90</sup> See *infra* notes 121-29 and accompanying text for a discussion of the reasons why market failure is becoming more likely in the market for public photography.

<sup>91</sup> Further, it is important not to take this logic too far. Some scholars worry that an excessive focus on transaction costs in judicial application of market failure theory may lead to undervaluation of other factors. DIGITAL DILEMMA, *supra* note 84, at 130-32 (noting that a government white paper “interpreted the Sony decision as holding that home taping of programs was fair use because owners of copyrights in these programs had not yet devised a licensing scheme to charge for these uses”); Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1034 (2002) (expressing the author’s view that she “very much regrets” the way in which her market failure theory has focused on transaction costs only).

<sup>92</sup> See *Italian Book Corp. v. Am. Broad. Cos.*, 458 F. Supp. 65, 68, 200 U.S.P.Q. (BNA) 312, 315 (S.D.N.Y. 1978) (holding that newscaster’s use of a copyrighted song that was playing as it filmed a street parade was fair use in part because of the public nature of the song’s performance).

<sup>93</sup> Each of these is listed in the preamble to the fair use statute as a valid purpose of fair use. 17 U.S.C. § 107 (2000).

<sup>94</sup> Think, for instance, of some of Walker Evans’ famous photographs of street advertisements.

<sup>95</sup> 1 NIMMER & NIMMER, *supra* note 7, § 13.05[A][1][a] (noting that the boundaries of the news exception are “sometimes difficult to determine”); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561, 225 U.S.P.Q. (BNA) 1073, 1081 (1985) (“Courts should be chary of deciding what is and what is not news.” (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 215 (2d Cir. 1983) (Meskill, J., dissenting), *rev’d*, 471 U.S. 539 (1985))).

Further, it is not clear to what extent courts will be willing to extend these categories to incorporate consumer activity.

Many more arguments based both on the statutory text and on court decisions can be made both for and against a finding of fair use for use of public photographs. However, most of these arguments depend in large part upon the specific facts of the case at hand, making it difficult to generalize their effect on public photography. Indeed, there is little that can be concluded with any certainty regarding the application of fair use to public photography. Under *Sony*, private, noncommercial uses are likely to qualify, so historically typical amateur imaging activities such as those in example #2 (a photograph of a copyrighted work that is shown only to friends and family) are probably fair use. For each of the other examples, however, there are only arguments and counterarguments;<sup>96</sup> the final decision could go either way.

Thus we come to the real problem with fair use: uncertainty.<sup>97</sup> There are no clear rules regarding how each of the four factors should be analyzed, or how the factors should be weighed against one another. Further, it is not clear how the uses listed in the preamble<sup>98</sup> change the calculus, or what additional factors should be considered.<sup>99</sup> In some ways this uncertainty is not surprising—the fair use test is designed to be malleable, to allow judges to make their own determinations regarding when fairness requires an exception to copyright.<sup>100</sup> Nevertheless, it is problematic, especially for consumers that are likely to be both risk averse and

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<sup>96</sup> In brief, example #1 may qualify because the copyrighted work is a minor part of the photograph, but the fact that it is used for commercial purposes cuts against this likelihood. Example #3 has a chance of qualifying if the website use is noncommercial, but the fact that the incorporated sculpture is prominently displayed makes this less likely. Example #4 may qualify for fair use if a court considers the use criticism or comment, but only if the new work specifically comments on the copyrighted item depicted. The decision in Example #5 may hinge on whether the contest pays cash prizes.

<sup>97</sup> Courts and commentators have long noted the uncertainty fostered by fair use. See, e.g., *Time, Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 144, 159 U.S.P.Q. (BNA) 663, 674 (S.D.N.Y. 1968) (calling fair use “so flexible as virtually to defy definition”); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 132 (4th ed. 2004) (noting that a “vague line, frequently litigated, divides fair and unfair unauthorized copying”); Jed Rubenfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 YALE L.J. 1, 16-17 (2002) (Fair use is “routinely refer[red] to as ‘resistant to generalization,’ ‘unpredictable,’ and ‘subjective’”) (citations omitted); Van Houweling, *supra* note 23, at 1565.

<sup>98</sup> 17 U.S.C. § 107 (2000).

<sup>99</sup> As described earlier, courts can consider factors other than the four statutory factors in their fair use determinations. See *supra* note 69 and accompanying text.

<sup>100</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 29 U.S.P.Q.2d (BNA) 1961, 1964-65 (1994) (stating that fair use “is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis”).

inexperienced with this area of the law.<sup>101</sup> Moreover, the malleability of fair use increases the likelihood of inconsistent application, a fact that adds to the difficulty of predicting *ex ante* what uses are fair.

Technology increases this uncertainty. New public photograph uses confront courts with new issues, such as application of fair use doctrine to images on the Internet. Moreover, technology undermines some of the doctrinal aids that fair use jurisprudence relies upon. For example, the distinction between commercial and noncommercial is blurred by technology,<sup>102</sup> and the definitions of basic terms like “news gathering,” “criticism,” and “comment” need to be re-explored to determine whether they incorporate consumer activity.<sup>103</sup> Also, by enabling consumers to do more with their images, technology increases fair use uncertainty in a different way: at the level of those who need to interpret the doctrine. Consumers who never previously had to make fair use analyses may now be forced to do so, at least for some public photograph uses. Clearly, they will be less confident about their conclusions than would be professionals with fair use experience.

3. *A Defense for Images of Architecture: 17 U.S.C. § 120(a)*. There is an exception to the legal morass described in the last few sections. One type of public photograph can clearly be used for any purpose, commercial or noncommercial, and by anyone, amateur or professional, without fear of copyright liability. This exception is codified in § 120(a) of the Copyright Code (§ 120(a)), which states as follows:

The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.<sup>104</sup>

Section 120(a) resolves the copyright problem for public photographs that contain no third-party copyrightable works other than architectural works. Under this exception, persons using these images do not have to obtain licenses, do not have to worry about the applicability of *de minimis* or the uncertainty of fair use, do not need a lawyer to understand their rights, and can take full advantage of new imaging technologies without worrying that they have crossed an invisible

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<sup>101</sup> For a fuller discussion of the benefits of a clear rule, see *infra* notes 201-05 and accompanying text.

<sup>102</sup> See *supra* notes 80-83 and accompanying text.

<sup>103</sup> See *supra* notes 92-95 and accompanying text.

<sup>104</sup> 17 U.S.C. § 120(a) (2000).

legal line. Moreover, § 120(a) accomplishes all of this with a simple, easily understood, bright-line rule.

Because § 120(a) is used as a model for the copyright reform proposed in Part III, and because it is such an anomaly, it is worth briefly exploring how it was created. In 1990 Congress passed, and the President signed, the Architectural Works Copyright Protection Act<sup>105</sup> (AWCPA), which amended the Copyright Act of 1976 to give formal copyright protection to architectural works. The main purpose<sup>106</sup> of the AWCPA was fulfillment of U.S. obligations under the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), which mandates that all member countries extend copyright protection to architectural works.<sup>107</sup>

It may seem strange that architectural works were not protected by copyright prior to 1990 and that it took a treaty to convince Congress to change this. After all, architectural works are creative works, and many other countries give them copyright protection.<sup>108</sup> Why not the U.S.? There were at least two reasons. First, architectural works were not totally without protection prior to 1990; it has long been the settled doctrine that both architectural plans<sup>109</sup> and the sculptural and decorative aspects of architectural works<sup>110</sup> are protected by copyright. Indeed, two prominent copyright scholars believed that these protections were sufficient for Berne Convention compliance.<sup>111</sup> Second, architectural works are in significant part utilitarian works, and it is axiomatic that the utilitarian aspects of creative works are not protected by copyright.<sup>112</sup>

The history of copyright protection for architectural works is of particular interest for current purposes because it led Congressional deliberations over § 120(a) to be unusually free of outside influence.<sup>113</sup> Thus Congress was able to design copyright protection for architectural works sensibly, without undue pressure from outside interest groups or historical precedent, and with a full

<sup>105</sup> Pub. L. No. 101-650, 104 Stat. 5128 (1990) (codified in scattered sections of 17 U.S.C.) [hereinafter AWCPA].

<sup>106</sup> H.R. REP. NO. 101-735 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6935.

<sup>107</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 2(1), 828 U.N.T.S. 221 (Paris Revision, July 24, 1971) [hereinafter Berne Convention].

<sup>108</sup> Indeed, as noted previously, Article 2(1) of the Berne Convention requires that all signatories extend copyright protection to architectural works.

<sup>109</sup> See 1 NIMMER & NIMMER, *supra* note 7, § 2.08[D][2][a].

<sup>110</sup> 17 U.S.C. § 102(5) (2000).

<sup>111</sup> H.R. REP. NO. 101-735, *supra* note 106, at 6942.

<sup>112</sup> See *Baker v. Selden*, 101 U.S. 99 (1880); *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1080, 55 U.S.P.Q.2d (BNA) 1769, 1777 (9th Cir. 2000); 1 NIMMER & NIMMER, *supra* note 7, § 2.18.

<sup>113</sup> Opposition to § 120(a) was light at the time of its passage. Undoubtedly this was related to the fact that the AWCPA as a whole, by extending copyright to architectural works for the first time, was of net benefit for architects despite § 120(a).

understanding of modern conditions. The fact that Congress chose to exempt public photographs under these circumstances is telling. Indeed, as will be explored in Part III, Congress's stated justifications for this decision are both compelling and applicable outside of the architectural context.

In sum, § 120(a) fully and clearly exempts from copyright public photographs containing no copyrighted works other than architectural works. However, because of its limited scope, § 120(a) solves only a small fraction of the public photography problems described in this Article. Indeed its main value, as will be demonstrated in Part III, is as a model for a new copyright exemption.

### C. MARKET FAILURE AND THE NEED FOR A LEGAL SOLUTION

It may be argued that the story told so far is not necessarily a tragedy. Indeed, one possible answer to the public photography dilemma is to do nothing at all. If consumers are now making professional uses of their public photographs, perhaps the law should simply treat them as it has always treated professionals. Put another way, whenever *de minimis* and fair use are unlikely to apply, consumers could simply obtain a license. Clearly, a license would eliminate the danger: so long as the licensed user stays within the bounds of the license, nobody has the right to stop that use on copyright grounds. However, there are several reasons to believe that reliance on the licensing market would be misplaced. To understand these reasons, a bit of economic background will be helpful.

Classical economic theory holds that in conditions of perfect competition, individuals working to maximize their own well-being will simultaneously maximize social well-being.<sup>114</sup> The reason: in a perfect market, assets end up in the hands of those who value them most. For example, the person who values a car most is the person willing to pay most for it, and, accordingly, is the person to whom the car will be sold. When all assets are in the hands of those who value them most, aggregate social value, as measured by the sum of these individual values, is maximized.<sup>115</sup> However, this theory assumes perfect markets, an assumption that seldom reflects reality.<sup>116</sup> When market imperfections are severe enough to prevent assets from moving to the parties that value them most, we have what economists call market failure.<sup>117</sup>

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<sup>114</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannon ed., Methuen and Co., Ltd. 5th ed. 1904), bk. IV, ch. II, para. 2.9, *available at* <http://www.econlib.org/library/Smith/smWN13.html> (last visited Nov. 7, 2005).

<sup>115</sup> *Id.*

<sup>116</sup> See, e.g., COOTER & ULEN, *supra* note 97, at 43 (noting that perfect competition "is unlikely to be realized in the real world").

<sup>117</sup> *Id.* at 44.



Market failure in the copyright context was first described in detail by Wendy Gordon.<sup>118</sup> In her seminal article on the subject, Professor Gordon argues that market imperfections—most notably transaction costs and externalities—sometimes prevent efficient uses of copyrighted works.<sup>119</sup> In areas where these imperfections are likely, legal measures that serve to correct them may be justified.<sup>120</sup> As explained in detail below, one such area is the market for consumer use of public photographs.

Transaction costs—the costs of transferring a right<sup>121</sup>—are likely to be quite high with respect to consumer use of public photographs. First, consider the costs associated with finding out if the relevant work is copyrighted and locating the owner if it is.<sup>122</sup> Both of these tasks will often be quite expensive, as ownership information may not be readily apparent on the work itself, and there is no central database that contains all of this information.<sup>123</sup> Second, negotiation costs will be considerably higher for consumers than they would be for professionals. Consumers are more likely than professionals to be unskilled and inexperienced at licensing negotiations and hence may negotiate longer and over standard terms. Even if a lawyer is hired to counteract this experience effect, the cost of the lawyer is a transaction cost, as are the costs associated with finding and building a relationship with that lawyer. Finally, all of these costs may be multiplied several times over for public photographs that contain more than one copyrighted work.<sup>124</sup>

Compounding the transaction cost problem, consumers often make low-value uses of public photographs.<sup>125</sup> They may post images to websites, enter films in

<sup>118</sup> See generally Gordon, *supra* note 87.

<sup>119</sup> *Id.*

<sup>120</sup> Professor Gordon used market failure theory to help explain fair use. However, it should be noted that market failure is just one possible justification for fair use, not the only one. Gordon, *supra* note 91, at 1034-35 (“[M]aximizing economic value ‘as measured by willingness to pay’ is not the only norm that matters or should matter for fair use.”) (citations omitted).

<sup>121</sup> WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 16 (Harvard Univ. Press 2003).

<sup>122</sup> An even more basic cost that might be categorized as a search cost is the cost of education regarding the need to obtain a license. Many consumers undoubtedly have no idea that a license may be necessary for certain uses of public photographs. See Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235, 238 (1991) (noting that consumers’ ideas about copyright law have “little to do with actual copyright law”).

<sup>123</sup> Although there is a database of works that have been registered with the Copyright Office, registration is not a prerequisite for copyright protection.

<sup>124</sup> One might argue that new technologies will also lower some of the transaction costs of obtaining a license. In particular, communication and information costs are lowered by technologies such as the Internet and mobile phones. Nevertheless, these effects are unlikely to be strong enough to overcome the enormous transaction cost barriers faced by an amateur photographer.

<sup>125</sup> Low value, in this case, means that the user would not pay much for the ability to make the

film festivals, or sell prints, but none of these uses is likely to bring a revenue windfall. There will, of course, be some exceptions to this rule—an amateur photographer who sells a photograph to an ad agency or an amateur filmmaker who gets a national distribution deal—but these exceptions are likely to be uncommon, even in the age of new technologies. When considered together, the likelihood of high transaction costs and uses of low monetary value make market failure likely. As one author puts it, “[i]f transaction costs exceed anticipated benefits . . . no transactions will occur.”<sup>126</sup>

Transaction costs are only part of the market failure story. Public photography use also exhibits another characteristic that can lead to market failure: externalities. Externalities occur when the parties to a decision do not internalize all the costs and benefits of that decision, which can lead to incorrect decisions being made from the standpoint of social utility. Externalities are likely in public photography because photographers do not internalize the significant social benefits that their activity provides. In particular, as will be discussed in more detail in Part III, use of public photographs promotes social ideals such as democracy, autonomy, free speech, and diversity of speech.<sup>127</sup>

Thus high transaction costs and the presence of externalities make failure likely in the consumer market for use of public photographs. This conclusion makes intuitive sense: it is absurd to expect amateur photographers shooting in Times Square to obtain a license for each copyrighted item in their images.<sup>128</sup> It also opens the door for legal solutions that might be unjustified absent market failure.<sup>129</sup> Without such a solution, consumers face an unenviable choice: they must either abandon use of public photographs or risk legal consequences for those uses. Unfortunately, as described above, current copyright defenses do not provide an adequate solution. A new legal solution is needed if consumers are to use public photographs without fear of legal liability.

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use. However, the use may nevertheless be of high social value if there are positive externalities associated with use of public photography. See *infra* notes 126-27 and accompanying text.

<sup>126</sup> Gordon, *supra* note 87, at 1628.

<sup>127</sup> See *infra* notes 157-61 and accompanying text.

<sup>128</sup> Why does the licensing market work for professionals? There are several answers. First, in many instances it may not. Either *de minimis* or fair use applies to many professional uses of public photographs, and in these cases there is no need for a market. Second, many of the transaction costs described above, especially those related to the experience of the user, are higher for consumers than they would be for professionals. Third, professionals are more likely to make public photograph uses of high monetary value, and thus are able to overcome the transaction costs necessary to obtain a license.

<sup>129</sup> See generally LANDES & POSNER, *supra* note 121, at 115-22 (describing various economic rationales for fair use); Gordon, *supra* note 87 (describing fair use as a solution to market failure).

### III. A SOLUTION: EXTENDING THE ARCHITECTURAL EXEMPTION TO ALL COPYRIGHTED WORKS

There is a simple solution to the problem described in Part II. It permits both consumers and professionals to confidently use their public photographs in any way without fear of copyright liability, and thereby allows society to benefit from this activity. It is clear, easy to understand, and does little harm to copyright owners. The solution: extend a modified version of the 17 U.S.C. § 120(a) architectural exemption to all copyrighted works, so that use of images incorporating these works does not violate copyright. Section A describes this proposal in detail. In particular, it fleshes out the proposal with a number of modifications and clarifications needed to apply § 120(a) to nonarchitectural works.

Section B presents a three-part justification for the proposal, mirroring the three justifications that Congress gave for its passage of § 120(a). In addition to describing and expanding upon Congress's § 120(a) justifications, each Subsection demonstrates that these justifications apply with equal force to the proposed expansion of § 120(a). Subsection 1 describes the benefits of public photography free of copyright constraints, concluding that these benefits are substantial and becoming more so as new technologies become available. The low costs of the proposal are explored in subsection 2. Finally, subsection 3 describes the relative merits of bright-line rules and balancing tests, concluding that a bright-line rule is superior for public photography.

#### A. A DESCRIPTION OF THE SOLUTION

This Article proposes the expansion of § 120(a), in modified form, to cover all copyrightable works. To help frame the discussion, the sample language below shows what such an expanded provision might look like:

**Limitations on Exclusive Rights: Photographic Representations.**  
Notwithstanding the provisions of § 106, the creation, distribution, duplication, or public display of photographs (including motion pictures) of or including a copyrighted work shall not be a violation of copyright if the work depicted is ordinarily visible from a public place.

In basic effect, this sample provision works like § 120(a). The main difference is an expansion in scope—the copyright exemption in the suggested provision applies to all copyrightable works photographed in public places. Additionally, several changes and clarifications have been made to address issues raised by this

change in scope, and to correct some imperfections in the original provision. Each of these changes is discussed below.

First, the proposal applies only to works ordinarily visible from a public place, whereas § 120(a) applies to works that are “located in or ordinarily visible from a public place.”<sup>130</sup> The elimination of “located in” is necessary because of the difference in mobility between architectural works and many other types of copyrightable works. Because many non-architectural works, such as small paintings and small sculptures, can be moved, a clever copyist might avoid copyright by simply moving a copyrighted item to a public place. This problem is avoided in the revised language.

Of course, this limitation begs the question of what “ordinarily visible” means. Clearly, it incorporates items such as billboards and public art that are fixed in place. It should also include items such as jewelry, clothing patterns, and advertisements that are often found in both public and private places. A more difficult question centers on copyrighted items that are only sporadically and temporarily visible in public places, such as artworks being moved from an artist’s studio to a gallery. Although it seems unreasonable to mandate that all such items in transit be covered to maintain the exclusive right to photographic copies, it is even more unreasonable to ask the public to discern which items are in transit and which are not. Accordingly, the word “ordinarily” is intended merely to prevent photographers from moving copyrightable works to public places themselves; all other copyrighted works that are visible from a public place are included within the ambit of the proposal.

Second, unlike § 120(a) the proposed standard applies only to photographic images, and not to paintings and other non-photographic pictorial works. The reason: there are several compelling justifications for treating photographic images differently from other visual works, justifications that do not extend to non-photographic pictorial works. First, once a photographer chooses a scene, it is impossible to change or eliminate certain features; that which fits in the field of view when the shutter is tripped will be part of the image. Sculptors, painters, and other visual artists can choose which elements of a scene to incorporate, and can alter or disguise other elements if desired. For example, a photograph of Times Square is almost certain to incorporate copyrighted works, while a painting of the same space could easily alter the copyrightable elements sufficiently to avert copyright liability.<sup>131</sup> Second, photographic images are more likely to be made by

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<sup>130</sup> 17 U.S.C. § 120(a) (2002).

<sup>131</sup> It is now theoretically possible for photographers ex post to eliminate elements of a scene with image editing software. However, broadly speaking, the purpose of a photograph is to depict reality; the removal or obfuscation of copyrighted elements frustrates this purpose. Moreover, many consumers have neither the skill nor the software necessary to make these adjustments.

consumers than are other visual works. As will be discussed in detail below,<sup>132</sup> standards that apply to consumer activity should be simple and easily understandable. Third, despite § 120(a)'s coverage of all pictorial works, Congress's main stated area of concern was photographic images.<sup>133</sup> Put another way, limiting the exception to photographic works is not only more justifiable, but better tailors the provision to address Congress's stated concerns.

Finally, it is important to address an issue left open by Congress in its passage of § 120(a): the definition of the term "public place."<sup>134</sup> After all, "public place" could mean many different things, including public streets, state-owned buildings, and perhaps even privately-owned businesses open to the public. Although there is no ideal answer to this question, the best approach is to try to match public expectations, thereby minimizing the gap between the law and the public's perception of it.<sup>135</sup> Based on their past experiences, most people probably expect a great deal of freedom to use images captured on public streets. This is less likely to be true of images captured on private property, even if that property is open to the public. Similarly, few people would expect complete freedom to use images taken in places that are not open to the general public, whether those places are state-owned or privately owned. Working from these insights, "public place" can be defined as any place that is both owned by the state and open to the general public.

Some may worry that this definition would include museums and other institutions where it might be preferable to maintain a higher level of copyright protection. However, nothing in this proposal would prevent these institutions from limiting photography, as is often done currently (although any such limitations may be subject to First Amendment review).<sup>136</sup> Another possible problem may arise from consumer confusion between privately-owned property and publicly-owned property, as might occur, for example, on Main Street at Disneyland. This issue might be resolved using a "reasonable consumer" model:

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<sup>132</sup> See *infra* notes 200-05 and accompanying text.

<sup>133</sup> H.R. REP. NO. 101-735, *supra* note 106, at 6953 (evincing a Congressional desire to protect tourist and scholarly "photographs").

<sup>134</sup> For clarity, it should be noted that images need not be captured from public places to qualify for § 120(a). For example, a tourist who moves into a private parking lot to shoot Times Square does not suddenly lose the protection of § 120(a). Rather, so long as each architectural work in his image is visible from a public place, § 120(a) applies regardless of where the image was taken. This should also be true of the expanded rule proposed herein.

<sup>135</sup> See LESSIG, *supra* note 10, at 199-207 (noting the importance of creating laws that do not make the average citizen a habitual lawbreaker).

<sup>136</sup> See generally Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086 (1998).

if a reasonable consumer would consider Disneyland's thoroughfares to be public streets, then they qualify as public places.<sup>137</sup>

The sample provision provided above and the discussion of its details are merely starting points. More exhaustive analysis is necessary before any such provision can be finalized, and reasonable people can disagree about some of the details.<sup>138</sup> However, the basic idea—that use of public photographs should be free of copyright constraints—is a clear improvement over the status quo, and justifiable as such. It is to this justification that this Article turns in the next section.

## B. A JUSTIFICATION FOR THE SOLUTION

Congress gave three reasons for § 120(a): the benefits are large, the costs are negligible, and a simple rule is preferable.<sup>139</sup> In addition to describing and expanding upon each of these rationales, this section demonstrates that each provides support for the proposed expansion of § 120(a).

1. *Benefits.* Congress's first justification for § 120(a) centers on the value created by ensuring that copyright does not limit use of pictorial representations of architecture. This value, in Congress's view, was much more than mere avoidance of the evils commonly associated with copyright.<sup>140</sup> Rather, Congress was focused on the plight of tourists taking pictures of landmarks,<sup>141</sup> scholars using photographs for their studies,<sup>142</sup> and the "important public purpose"<sup>143</sup>

<sup>137</sup> Disney could easily avoid this result by clearly informing its customers upon entry that Disneyland is private property.

<sup>138</sup> In particular, there may be good reasons to add a clause to prevent blatant copying of copyrighted works (especially photographic works) on public streets, such as a requirement that the new § 120(a) apply only to works that are minimally transformative or that do not significantly harm the primary market for the original work. However, the costs of such an addition, particularly the uncertainty it would add, may outweigh the benefits.

<sup>139</sup> H.R. REP. NO. 101-735, *supra* note 106, at 6953.

<sup>140</sup> Basic axioms of copyright theory hold that copyright harms the public interest by allowing the holder to extract monopoly rents and by limiting dispersion of the copyrighted works to inefficiently low levels. See, e.g., Richard A. Posner, *The Law & Economics of Intellectual Property*, DAEDALUS, Spring 2002, at 6, 9-10; William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 6-7 (2000).

<sup>141</sup> H.R. REP. NO. 101-735, *supra* note 106, at 6953 (noting that "[m]illions of people visit our cities every year and take back home photographs, posters, and other pictorial representations of prominent works of architecture as a memory of their trip").

<sup>142</sup> *Id.* (noting that "numerous scholarly books on architecture are based on the ability to use photographs of architectural works").

<sup>143</sup> *Id.* See also *Architectural Design Prot.: Hearing on H.R. 3990 and H.R. 3991 Before the Subcomm. on Courts, Intell. Prop., and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 70-71 (1990) [hereinafter *AWCPA Hearings*] (statement of Ralph Oman, Register of Copyrights and Associate

served by their freedom of action. Expanding upon Congress's reasoning, this subsection argues that numerous benefits flow from freedom to create and use public photography, and that these benefits apply with equal force outside the architectural context.

It has long been known that the image is an extremely effective communications tool.<sup>144</sup> Indeed, belief in the power of images is so commonly held that it has become an adage: a picture is worth a thousand words. In some instances even the adage may be an understatement<sup>145</sup>—think of the Rodney King video, or an Ansel Adams landscape. As one author puts it, “photography is the most pervasive and influential means of depiction in modern culture.”<sup>146</sup> This does not mean, of course, that images are always the most effective means of communication, but it is clear that certain types of ideas and emotions are conveyed more effectively through images than through any other means of communication.<sup>147</sup>

Notwithstanding this power, large-scale communication with images, except in its most basic form, has always been a one-way street—from large media companies and advertisers to consumers. The reason: it was too expensive for consumers. New technologies change this. As described above,<sup>148</sup> large-scale communication with images is, or soon will be, within the means of most of the public. Accordingly, new technologies are bringing an extremely effective form of communication to the masses,<sup>149</sup> a change that can dramatically improve social

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Librarian of Congress for Copyright Services) (noting that pictorial representations of architectural works “serve a valuable public interest”).

<sup>144</sup> See Brent D. Ruben, *Animal Communication*, in *ENCYCLOPEDIA OF COMMUNICATION AND INFORMATION* 26 (Jorge Reina Schement, ed., 2002) (“Messages take a variety of forms—visual, tactile, olfactory, gustatory, and auditory. Visual messages are particularly important to humans.”); Calvin Massey, *Civic Discourse Amid Cultural Transformation*, 12 *CARDOZO STUD. L. & LITERATURE* 193, 199 (2000); Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 *IND. L.J.* 663, 668-70 (1992); Note, *supra* note 136, at 1095.

<sup>145</sup> “A picture may be worth a thousand words, but a thousand words rarely communicate as quickly and effectively as a well-chosen picture.” Chris Woodford, *Information Design*, in *ENCYCLOPEDIA OF NEW MEDIA* 234 (Steve Jones, ed., 2003).

<sup>146</sup> Joel Snyder, *Photography*, in 3 *INTERNATIONAL ENCYCLOPEDIA OF COMMUNICATIONS* 274 (Erik Barnouw, ed. 1989).

<sup>147</sup> Evidence of the effectiveness of images in communications surrounds us. For example, advertisements in newspapers, magazines, and on our streets often rely primarily on images to communicate their messages.

<sup>148</sup> See *supra* notes 36-38 and accompanying text.

<sup>149</sup> This contrasts with written and verbal communications, for which there was always an outlet. Even the poorest (literate) individual could always write an essay or a letter to the editor, pass out handbills, pick up the telephone, or speak in a public park. The options for image communications were less attractive: getting quality photographs was an expensive endeavor, and distribution was largely limited to showing prints to friends and entering photo contests.

welfare by promoting communicative efficiency. To understand the potential significance of this change, consider the effect of bringing literacy, or the telephone, from the elites to all corners of society.<sup>150</sup> As with those changes, the ability to use images in communication when such use is more efficient than other forms of communication can have a large social and economic impact.<sup>151</sup>

Photographic images can also give voice to segments of the population unable to speak effectively using other means of communication. Non-native English speakers, the illiterate, and the poor may find communication with images easier than verbal or written communication. After all, effective written and oral communication generally requires a common language and a minimum level of education, whereas anybody who knows how to work a camera—a process that is often as simple as pressing a button—can create images.

This last point is important for several reasons. First, it provides further support for the argument made above: that inexpensive imaging can create large communicative efficiencies, thereby increasing social welfare. Indeed, the efficiencies are largest for those who do not have any other effective means of large-scale communication. Second, it suggests that imaging can increase the diversity of social discourse, an effect that can create further economic benefits as new ideas become available.<sup>152</sup> Finally, apart from its economic benefits, giving a voice to those who previously had none promotes a number of important social ideals, including individual autonomy and robust democratic discourse.<sup>153</sup>

The communicative value of images is likely to be especially important in photographs of public places. Photographers wishing to communicate with broad audiences often do so by depicting the world around them, thereby appealing to a common reservoir of visual experience they share with the viewer. As Ansel Adams once wrote, “Photography is a way of telling what you feel about what you

<sup>150</sup> It may be a bit of an exaggeration to liken photography’s technological changes to literacy and the telephone, but only because most members of society today already have a variety of communication tools at their disposal. Nevertheless, communication using images is different enough from these other possibilities that there is reason to believe it will have a significant impact.

<sup>151</sup> More generally, several scholars have noted the potential importance of the amateur production made possible by new technologies, particularly the Internet. See, e.g., Yochai Benkler, *Freedom in the Commons: Towards a Political Economy of Information*, 52 DUKE L.J. 1245, 1246-47 (2003) (noting that decentralized, nonmarket production can now play a much more important role in the economy); Hunter & Lastowka, *supra* note 28, at 8 (noting that amateur content production is providing benefits “previously provided exclusively by the mechanisms of copyright law”).

<sup>152</sup> Yochai Benkler has suggested that bringing more diversity into society’s productive system may yield substantial benefits. Benkler, *supra* note 151, at 1254 (“The promise of the networked information economy and the digitally networked environment is to bring this rich diversity of living smack into the middle of our economy . . .”).

<sup>153</sup> Each of these ideals is discussed in greater detail *infra* notes 155-59 and accompanying text.



see.”<sup>154</sup> Public places are paradigmatic examples of this shared visual experience, and copyrightable works viewable from these places become a part of those places. Images of public places, and of the copyrightable works visible from them, are likely to be socially valuable precisely because they appeal to, and comment on, this common experience.

Relatedly, it is clear that much of the value of copyrightable works located in public places comes from the places and not the works. This is why advertisers are willing to pay for public placement,<sup>155</sup> and why artists are willing to work for a lower fee (or even without pay) if their art will be located in a public place.<sup>156</sup> Thus, to the extent that copyright interferes with the public’s freedom of action with respect to such places, it may transfer some of the value of such places from the public to copyright owners. In more concrete terms, a copyright holder with the ability to prevent others from using public photographs incorporating his work also controls the use of some images of the public place itself. This justifies treatment separate from that given to copyrighted works not visible from public places.

Finally, and more generally, a number of scholars have made compelling arguments regarding non-economic benefits that may be harmed when copyright constrains consumer activity. Joseph Liu describes the need for copyright to consider consumer interests in autonomy, communications, and creative self-expression.<sup>157</sup> Yochai Benkler writes about copyright’s potential effects on democracy, autonomy, and social justice.<sup>158</sup> Jed Rubenfeld believes that copyright unjustifiably impinges on freedom of expression.<sup>159</sup> And Molly Shaffer Van Houweling worries about the effect of copyright on the expressive opportunities of the poor.<sup>160</sup> To some degree all of these authors share the insight that the

<sup>154</sup> John Kemp, *Photos Use Scenes You’ve Seen*, TIMES-PICAYUNE, Oct. 7, 1993, at 4H1.

<sup>155</sup> In one stark piece of evidence of the value of placing an ad in a public place, a building owner in Times Square sued Warner Brothers, the distributor of *Spider-Man*, because the studio digitally altered an ad that would otherwise have appeared in a shot of Times Square. The case was dismissed. *Sherwood 48 Assocs. v. Sony Corp. of Am.*, No. 02-9100, 2003 WL 22229422 (2d Cir. 2003).

<sup>156</sup> One piece of support for artists’ willingness to work for free in exchange for public exposure comes from the large public art projects implemented in recent years by several cities, including Chicago, Los Angeles, and San Francisco. In each of these projects, artists were invited to decorate blank, uniform sculptures that were then installed in various spots throughout each city. The artists donated their services, and proceeds from the projects went to charity.

<sup>157</sup> Liu, *supra* note 23, at 406-20.

<sup>158</sup> Benkler, *supra* note 151, at 1262-72. More specifically, Benkler discusses the positive effects of nonproprietary, commons-based production on democracy, autonomy and justice. He views copyright as one potential impediment to achieving these effects. *Id.* at 1263, 1272-73.

<sup>159</sup> Rubenfeld, *supra* note 97, at 4.

<sup>160</sup> See generally Van Houweling, *supra* note 23.

currently dominant copyright debate, which focuses primarily on incentives and wealth maximization, is both myopic and outdated. Other factors need to be considered as new technologies increase expressive opportunities. Moreover, many of these factors take on added significance in the public photograph context. Autonomy, democracy, social justice, and free speech are all concepts that are especially threatened by restrictions on activity in public places. Communications and creative self-expression, as described above,<sup>161</sup> are particularly threatened by restrictions on photography.

In sum, Congress was right: there is a valuable public interest to be served by ensuring that images incorporating architectural works are free of copyright constraints. Yet these same advantages apply equally to images incorporating other copyrightable works visible from public places. Of course, society can capture some of the benefits described above without modifying copyright, since some public photograph uses would qualify as *de minimis* or fair use. Yet there are many public photograph uses that are not clearly covered by either of these doctrines.<sup>162</sup> Further, as Congress intuited with respect to architectural works, the uncertainty associated with each of these doctrines, particularly fair use, is likely to have a significant chilling effect even on some public photography uses that are permissible.<sup>163</sup>

2. *Costs.* Congress's second reason for passage of § 120(a) was its view that the costs of the provision would be minimal. More specifically, Congress determined that copyright protection for pictorial representations of architectural works is not necessary to incentivize architects to create those works.<sup>164</sup> This subsection explains why reduced incentives must be the focus of any discussion of the costs of copyright reduction, and applies this metric to public photographs of non-architectural works. It concludes that the costs of the proposed expansion of § 120(a) are likely to be small.

In the United States, copyright law is usually justified by the need to give authors adequate incentives to create copyrightable works.<sup>165</sup> This justification

<sup>161</sup> See *supra* notes 147-51 and accompanying text.

<sup>162</sup> See *supra* Parts II.B.1 and II.B.2.

<sup>163</sup> For discussion of Congress's insight regarding fair use uncertainty, see *infra* notes 183-85 and accompanying text.

<sup>164</sup> See H.R. REP. NO. 101-735, *supra* note 106, at 6953 (justifying the exemption by noting that pictorial uses "do not interfere with the normal exploitation of architectural works," and by noting "the lack of harm to the copyright owner's market"); AWCPA Hearings, *supra* note 143, at 70-71 (statement of Ralph Oman, Register of Copyrights and Associate Librarian of Congress for Copyright Services) (noting that "the economic incentive to be protected is that relating to the built three-dimensional structure . . . [and] two-dimensional reproductions of architectural works . . . are not a necessary component of that economic incentive").

<sup>165</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 225 U.S.P.Q. (BNA) 1073, 1080 (1985) ("By establishing a marketable right to the use of one's expression, copyright

derives from the U.S. Constitution, which authorizes the creation of intellectual property rights to “Promote the Progress of Science and Useful Arts.”<sup>166</sup> Without copyright, the theory goes, creative works suffer from an appropriability problem: they can be copied and sold by third parties at their marginal cost. Thus creators are prevented from recouping their up-front creative costs and are dissuaded from creating more works, and the public loses the benefits these new works might bring.<sup>167</sup> Copyright, which is primarily designed to benefit the public,<sup>168</sup> solves this problem by granting creators temporary monopoly rights that allow them to recover their fixed creative costs, thus assuring a continued supply of new creative works. Put another way, it is by increasing artists’ incentives to create that copyright is able to achieve its Constitutional purpose.<sup>169</sup>

If copyright’s purpose is achieved by increasing incentives, then the cost of failing to extend copyright to a given area (or of removing a copyright grant) can be measured primarily by the resulting reduction in creative incentives, or, more precisely, by the effect this reduction has on the continued supply of creative works. Thus, Congress was correct to focus on the likely effect of § 120(a) on architects’ incentives when considering the costs of that section. Congress’s conclusion—that freedom to make and use pictorial representations of architectural works without fear of copyright liability would not have any significant effect on architects’ creative incentives<sup>170</sup>—makes intuitive sense. It is unlikely that many architects create their works primarily, or even in part, because of anticipated revenue from pictorial representations of the work. Generally speaking, there is no such revenue.

This same conclusion holds true for the vast majority of non-architectural, copyrighted works visible from public places. To see why, consider the nature of

supplies the economic incentive to create and disseminate ideas.”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450, 220 U.S.P.Q. (BNA) 665, 681 (1984) (“The purpose of copyright is to create incentives for creative effort.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 186 U.S.P.Q. (BNA) 65, 67 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”). See also 1 NIMMER & NIMMER, *supra* note 7, § 1.03[A]; Landes, *supra* note 140, at 5.

<sup>166</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>167</sup> See COOTER & ULEN, *supra* note 97, at 120-21; Landes, *supra* note 140, at 5.

<sup>168</sup> *Sony Corp. of Am.*, 464 U.S. at 429.

<sup>169</sup> Nevertheless, it should be noted that Congress is given great deference by the courts regarding how best to achieve copyright’s Constitutional purpose. In one recent case the Supreme Court found that Congress could rationally determine that factors other than creative incentives—such as adherence to an international copyright treaty—may promote the useful arts and sciences regardless of their effects on creative incentives. *Eldred v. Ashcroft*, 537 U.S. 186, 205-06, 65 U.S.P.Q.2d (BNA) 1225, 1235-36 (2003).

<sup>170</sup> See *supra* note 164.

such works: advertisements, public artworks, jewelry, clothing patterns, newspapers, and magazines. There is almost never a market for photographic representations of these works alone. Rather, to the extent that photographic images including these works are valuable, it is generally due to the value of a representation of the place in which the work is depicted (think of a home video of Times Square) or to the creative spark that the photographer brings to the reproduction (think of Walker Evans' photographs of street signs). Clearly, creators of works for which there is no photographic representation market are not incentivized by the possibility of revenue from photographic representations. Accordingly, removal of the exclusive right to use such photographic representations will have no incentive effect with respect to these creators.

There may be rare exceptions, cases in which, for example, photographs of a mural have significant value apart from the place in which it is depicted and the way in which it is photographed. Yet separating these values is impossible, and giving the muralist control over all of them is heavy-handed, especially considering the small percentage of works for which this is an issue. Further, even in these exceptional cases it is unlikely that the potential revenue from photographic representations represents a significant part of the creator's incentives. Rather, such creators are often fully compensated in other ways: the prestige of having their work in the public eye, the advertisement value of having many people view their work, or perhaps even payment from a patron.<sup>171</sup> Creative works are not going to disappear from public places if the exclusive right to use photographic representations is revoked.

Further, even if there is an incentive effect, a reduction in incentives is not necessarily a bad thing. As discussed above,<sup>172</sup> classic appropriation theory predicts that without any intellectual property protection there will be an inefficiently small amount of creative work,<sup>173</sup> but it does not suggest that more protection is always better. Rather, there is a point at which the marginal value of additional intellectual property incentives is outweighed by the marginal cost of giving those incentives. If society has passed this point—if creators are given more copyright protection than is necessary to incentivize them to create the optimal amount of creative work—a reduction in copyright is efficient. Numerous scholars have convincingly argued that the U.S. copyright system is at just such a point.<sup>174</sup> Of course, this general conclusion does not prove that any

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<sup>171</sup> See LANDES & POSNER, *supra* note 121, at 48, 53 (discussing how authors derive benefits other than royalties from publication).

<sup>172</sup> See *supra* notes 166-69 and accompanying text.

<sup>173</sup> See COOTER & ULEN, *supra* note 97, at 120-21.

<sup>174</sup> See generally LESSIG, *supra* note 10; LANDES & POSNER, *supra* note 121, at 214; James Boyle, *The Public Domain: The Second Enclosure Movement and The Construction of The Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 38-44 (2003).

reduction in copyright would be efficient: complete elimination of copyright protection for paintings, for example, would clearly do more harm than good. Nevertheless, it does suggest that reducing a certain type of copyright benefit while leaving other copyright benefits in place—the proposed expansion of § 120(a) is a good example—may bring creative incentives closer to the ideal level, not farther away.

Moreover, technology may have reduced the need for financial incentives to spur creativity.<sup>175</sup> Amateur creative production is becoming a more important part of societal creative production,<sup>176</sup> and is often undertaken without expectation of financial reward. Indeed, even complex tasks requiring numerous inputs can now be accomplished without financial incentives.<sup>177</sup> Although this effect is most important for works like open-source software, it may have some effect on works visible from public places.<sup>178</sup> For example, the Internet allows amateur muralists to organize themselves to create a mural more easily than was previously possible. Similarly, inexpensive design and production equipment makes it easier for consumers to produce posters, newsletters, and other items that may be viewed in public places.

Some may argue that regardless of constitutional permissiveness<sup>179</sup> a discussion of incentives does not capture the entire cost of the proposed expansion of § 120(a). Those in the natural rights school of copyright may argue that there is another cost that should be considered: the cost to the dignity and autonomy of creators who lose control of some aspects of their works. This argument, however, is especially weak in the context of works visible from a public place. As discussed above,<sup>180</sup> giving the creator control over photographic representations of his work would give him some degree of control over the public places from which the work is viewed. If you put up a sculpture in the middle of Times Square and have the right to control images of that work, then you have effective control over some activities of the public in relation to Times Square. Put more generally, the right of the artist to control his work conflicts with the public's freedom of activity with respect to public places. Moreover,

<sup>175</sup> See LITMAN, *supra* note 43, at 102-03 (noting that much proprietary content is being published on the web despite the lack of a clear financial incentive); Boyle, *supra* note 174, at 44-49. See generally Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002).

<sup>176</sup> See *supra* notes 36-38 and accompanying text.

<sup>177</sup> See generally Benkler, *supra* note 175.

<sup>178</sup> Boyle, *supra* note 174, at 47-48.

<sup>179</sup> As aforementioned, there is some constitutional leeway to consider factors other than incentives, so long as those factors rationally relate to promotion of the useful arts and sciences. See *supra* note 169. Nevertheless, it seems unlikely that this leeway is so broad as to permit a pure natural rights argument.

<sup>180</sup> See *supra* notes 156-57 and accompanying text.

given the benefits gained by creators from placing their works in public places—publicity and a chance to shape opinions, among others—one might consider placement of a creative work in a public place an implied license to use that work in ways that might not otherwise be permitted.

In sum, as with § 120(a) itself, the costs of the proposed expansion of § 120(a) are likely to be low. Creative incentives, the main determinant of costs, are unlikely to be affected in any significant way. Further, even if there are exceptional cases where the proposal does reduce creative incentives, it may simply bring them closer to the ideal level, not farther away.

3. *The Superiority of a Simple, Bright-Line Rule for Public Photography.* It may be argued that there is a paradox in congressional reasoning in support of § 120(a). The two uses of architectural images about which Congress specifically expresses concern<sup>181</sup>—tourists snapping photographs of architectural landmarks<sup>182</sup> and the use of architectural images in scholarly works—are among the uses most likely to qualify for fair use.<sup>183</sup> Why is an exception for pictorial uses necessary if the particular uses Congress is most concerned about are already privileged? The answer is Congress's third stated reason for § 120(a): avoidance of "ad hoc" fair use decisions.<sup>184</sup> As discussed above, there is a great deal of uncertainty inherent in the fair use test.<sup>185</sup> By creating a simple, bright-line rule, Congress eliminated the possibility that courts might find some uses of architectural images unprivileged, and gave photographers confidence that their uses of such images were privileged.

Creation of a bright-line rule, however, has its drawbacks. Most prominently, bright-line rules can be overinclusive and underinclusive, thereby creating unfair results in some cases.<sup>186</sup> Indeed, it is exactly this problem—placement of the § 120(a) bright line—that has most concerned scholars critical of § 120(a). These concerns have taken three forms. First, scholars puzzle over Congress's singling out of pictorial representations for special treatment, while sculptural

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<sup>181</sup> See *supra* notes 141-42 and accompanying text.

<sup>182</sup> It can be inferred from the date of the AWCPA—1990—that Congress did not have in mind tourists who make nontraditional, technologically-enabled uses of their images.

<sup>183</sup> See Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM.-VLA J.L. & ARTS 477, 495 n.73 (noting that tourist snapshots and an architecture student's drawings would likely qualify as fair use). With respect to scholarly works, see 17 U.S.C. § 107 (2000) (noting that scholarship is a privileged class of use).

<sup>184</sup> H.R. REP. NO. 101-735, *supra* note 106, at 6953.

<sup>185</sup> For a fuller discussion of the uncertainty inherent in most fair use determinations, see *supra* notes 97-103 and accompanying text.

<sup>186</sup> Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 591 (1992) (noting that simple rules are sometimes over- and underinclusive).

representations of architectural works are judged under the fair use doctrine.<sup>187</sup> To paraphrase one author, why should copyright extend to pencil sharpeners in the shape of the Chrysler Building, but not to posters and t-shirts depicting the same building?<sup>188</sup> Second, scholars complain about the lack of an obvious justification for limiting the § 120(a) exception to architecture.<sup>189</sup> As one author notes, there is no compelling reason to treat visual representations of a monumental outdoor sculpture differently from those of the Guggenheim museum.<sup>190</sup> Finally, and relatedly, there is some concern regarding what qualifies as architecture for purposes of § 120(a).<sup>191</sup> For example, one author puzzles over whether the Washington Monument would qualify as an architectural work.<sup>192</sup>

A related problem was presented in one of the few cases to interpret the limits of § 120(a). In *Leicester v. Warner Brothers*, the creator of a sculptural work sued Warner Brothers for showing his work without permission in scenes of the film *Batman Forever*.<sup>193</sup> He claimed that his work, which was attached to a building, was separately copyrightable as a sculptural work, and therefore not subject to § 120(a).<sup>194</sup> The court disagreed, ruling that the work was subject to § 120(a), and noting “it would be counterintuitive to suppose that Congress meant to restrict pictorial copying to some, but not all, of a unitary architectural work.”<sup>195</sup>

*Leicester* is important because it further demonstrates the difficulty of separating architectural works from other types of works for purposes of § 120(a). A rule that all copyrightable works attached to buildings are subject to § 120(a) enormously expands the scope of that provision, and there is no clear theoretical basis for treating, for example, a free-standing sculpture differently from a sculpture attached to a building. On the other hand, a rule that all copyrightable works attached to buildings are not subject to § 120(a) eviscerates the provision, and makes it easy to avoid simply by placing separately copyrightable works on architectural works.

There are answers to these line-drawing concerns. As a preliminary matter, even if a bright-line rule creates some unfair results at the margin, this is not the

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<sup>187</sup> See, e.g., Ginsburg, *supra* note 183, at 495; Clark T. Thiel, *The Architectural Works Copyright Protection Gesture of 1990*, or, “Hey, That Looks Like My Building!,” 7 DEPAUL-LCA J. ART & ENT. L. 1, 23-24; Raphael Winick, Note, *Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990*, 41 DUKE L.J. 1598, 1626 (1992).

<sup>188</sup> Ginsburg, *supra* note 183, at 495.

<sup>189</sup> See, e.g., Ginsburg, *supra* note 183, at 494-95; Winick, *supra* note 187, at 1626-27.

<sup>190</sup> AWCPA Hearings, *supra* note 143, at 187 (letter from Jane C. Ginsburg).

<sup>191</sup> See, e.g., Ginsburg, *supra* note 183, at 494-95; Winick, *supra* note 187, at 1626-27.

<sup>192</sup> Thiel, *supra* note 187, at 24-25.

<sup>193</sup> *Leicester v. Warner Bros.*, 232 F.3d 1212, 57 U.S.P.Q.2d (BNA) 1001 (9th Cir. 2000).

<sup>194</sup> *Id.* at 1219.

<sup>195</sup> *Id.* at 1220.

end of the analysis. Rather, in cases where, as here, the choice is between a bright-line rule that draws arguably arbitrary distinctions at the margin and a balancing standard that adds uncertainty to the legal analysis, the question to ask is which rule, on balance, is most likely to maximize social welfare.<sup>196</sup> In the case of architectural photography, Congress clearly viewed the uncertainty of fair use as a significant problem,<sup>197</sup> while the harm caused by the line-drawing problems described above is less clear. Thus, it was reasonable to favor § 120(a), with its bright-line test, over the uncertainty of fair use.

Second, the proposed expansion described in this Article would resolve many of the most problematic aspects of § 120(a). The expansion would clearly apply to any copyrightable item visible from a public place. Thus, it would no longer be necessary to distinguish architectural works from sculptural works, or to decide if copyrighted works attached to buildings fit within the scope of the provision. Moreover, although the expanded section would apply only to photographic copies, the line drawn in the proposal between photographic and other creative works is far more defensible than § 120(a)'s current distinction between pictorial works and sculptural works.<sup>198</sup>

Nevertheless, the expansion of § 120(a) does not eliminate all possibility of over- and underinclusiveness. In particular, as described above, the definition of "public place" may not always match consumer expectations.<sup>199</sup> Further, there is some possibility for abuse by those intent on profiting from the creativity of others.<sup>200</sup> However, against these potential problems must be weighed the advantages of a bright-line rule. Two such advantages are of particular importance. First, bright-line rules are clear—whether or not you agree with the result, simple rules make it easy (relative to balancing tests) to know how the law applies to a particular activity. Second, bright-line rules leave little room for judicial interpretation, thus promoting confidence and consistency.

These two advantages—clarity and consistency—are sorely needed at the intersection of copyright and public photography. The first Parts of this Article described how consumers taking advantage of new technologies are both more

<sup>196</sup> Obviously, once a basic rule structure is chosen, the rule can and should be fine-tuned to minimize its weaknesses. These measures may include, for example, adding some elements of balancing to a bright-line test, or creating some clear safe harbors in a balancing test.

<sup>197</sup> H.R. REP. NO. 101-735, *supra* note 106, at 6953.

<sup>198</sup> For a full discussion of why the distinction between photographic works and other types of visual works is defensible, see *supra* notes 131-33 and accompanying text.

<sup>199</sup> See *supra* notes 134-37 and accompanying text.

<sup>200</sup> One might, for example, imagine a photograph of an advertisement for a photography exhibition, cropped to show only the photograph depicted in the ad, and sold as a print. However, the danger of this possibility should not be exaggerated, as the quality of the copy is likely to be quite low.



likely to infringe third party copyrights and more likely to be sued if they do so. Thus, copyright law for the first time is likely to directly affect the actions and fortunes of consumers using public photographs. Yet current copyright law is not comprehensible to the average consumer.<sup>201</sup> As Jessica Litman writes, copyright is a “complex, internally inconsistent, wordy and arcane code, since the only folks who really needed to know it were folks for whom copyright lawyers were an item of essential overhead.”<sup>202</sup> Rules that may have made sense when only professionals needed to understand copyright need to be simplified when applied to consumers.

The proposed expansion of § 120(a) accomplishes this in the public photography context. It clearly identifies a set of public photograph uses that are privileged, thereby allowing consumers to avoid fair use and *de minimis*, doctrines that even the most knowledgeable copyright lawyers often find incomprehensible.<sup>203</sup> Indeed, there is value to this clarity even in circumstances where *de minimis* or fair use would apply. It is much easier for a consumer to read and rely upon clear wording in a statute than to be confident about a case-based fair use determination.<sup>204</sup>

The clarity of a bright-line rule helps consumers in another way. A complex, ambiguous legal standard like fair use favors those with the power and resources to litigate. Consumers unsure of their legal rights will rarely be willing to risk litigation, even in cases where a fair use determination seems likely. Rather, a cease-and-desist letter from the copyright owner will often be enough to convince consumers to stop making the use in question. This is less likely to be true of a statutory rule like § 120(a) that makes the legality of the use absolutely clear. Such a rule would make the user more confident of his rights, and more likely to defend them.

Finally, the simple rule proposed in this Article makes intuitive sense: it conforms to people’s instincts about what copyright should and should not protect. The average person believes that he should be able to do what he likes with photographs taken in public places, just as he has always done. Tell him that he cannot, or that he must undertake an elaborate balancing test to find out, and he is likely to respond that the rule makes no sense.<sup>205</sup> And he would be right.

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<sup>201</sup> LITMAN, *supra* note 43, at 72.

<sup>202</sup> *Id.* at 19.

<sup>203</sup> See *supra* note 97.

<sup>204</sup> This was Congress’s insight when it expressed concern about the “ad hoc” nature of fair use determinations. H.R. REP. NO. 101-735, *supra* note 106, at 6953.

<sup>205</sup> See LITMAN, *supra* note 43, at 115 (discussing the likely reaction of a typical consumer faced with a copyright rule that does not conform to his expectations).

## IV. CONCLUSION

Technological changes are empowering consumers to use photographs in ways once reserved to professionals. However, these same technologies make it more likely that consumers will come into conflict with copyright owners whose works are incorporated in their images. This conflict is especially likely with respect to photographs of public places, many of which inevitably include third-party copyrighted works.

Copyright law is ill-equipped to handle these changed circumstances. In particular, the *de minimis* and fair use tests, which in the past have served as bulwarks against unreasonable application of copyright, are not well-suited to this task today. In most courts *de minimis* does not apply to the vast majority of public photography uses. Fair use's greatest weakness—uncertainty—is becoming a more significant liability in an age where image uses are no longer easily classified and image users are less likely to be legally sophisticated. photographs of architectural works as a model, Congress should exempt from copyright all uses of photographic representations of copyrighted items ordinarily visible in public places. The benefits of such a change would be great, and the costs minimal. Moreover, this change would create a simple, easily-understood rule that is well-suited to the needs of consumers.

