

Copyright and the Single Work

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Amy Adler, [Why Art Does Not Need Copyright](#), 86 *Geo. Wash. L. Rev.* 313 (2018).

A photograph taken by Walker Evans is worth more—both in the market and in the eyes of critics—than a virtually identical photograph taken by an unknown artist, just as a handbag bearing the name Prada is worth more—both in the market and in the eyes of those who place social value on such goods—than a work of similar craftsmanship by an unknown manufacturer. In both cases, audiences are potentially responding to a number of factors: aesthetics, critical reception, reputational value, and the status conferred by scarcity.

Part of what enables audiences to evaluate these factors is a belief that the object has the genealogy it purports to have. We term this information state “[authenticity](#),” a characterization that is capacious enough to embrace a number of modes of production. An authentic Warhol might have involved the work of several assistants, all making visible the concept formerly existing only in Warhol’s mind; an authentic designer bag might involve a certain amount of outsourcing to overseas fabricators. A Sol LeWitt wall is the physical manifestation of a two-part work: the directions to accomplish LeWitt’s conception in each new space and a certificate of authenticity. The certificate of authenticity is key to the work’s existence; without it, [as a lawsuit once claimed](#), the work essentially ceases to exist. Authenticity can even, in some instances, certify falseness, as when the U.S. Postal Inspection Service seized and then [auctioned off](#) 12,000 fake Salvador Dali works in 1995. When asked why a buyer would pay \$4,000 for a known fake, the curator of the Salvador Dali Museum mused that the notoriety that the works had garnered as “authorized fake Dalis” upped the price buyers were willing to pay.

Given the role that authenticity plays in the art market in particular, Amy Adler contends that copyright law is beside the point.

The traditional story undergirding U.S. copyright law is that many creators are motivated to create by the expectation of revenue from selling copies of their work; without a right that allows them to restrict copying by others, this expectation will be considerably diminished. A number of scholars, [Rebecca Tushnet](#) and [Jessica Silbey](#) among them, have challenged the explanatory power of this narrative by highlighting the myriad ways in which creation occurs for reasons other than economic ones, including the simple joy of creative activity. Such literature often suggests that to the extent that copyright law is meant to incentivize creation, it does little work for these creators.

In her article [Why Art Does Not Need Copyright](#), Professor Adler takes another approach to this argument, suggesting that while the typical economic story may be true for some creators—best-selling novelists or movie studios—it is decidedly not true for creators of visual or fine art. Such artists, Professor Adler notes, have little to no desire to sell multiple copies of their work, and the number of artists who can count on licensing their work for derivative uses (museum postcards or calendars, for example) is few. With no copies to be made, copyright law enters the picture only to the extent it is used as a tool to vindicate reputational and related interests (perhaps not quite as surprising a reason as the article suggests); to the extent unauthorized copies are a concern, the market’s desire for authenticity serves a policing role, thus obviating the need for copyright law. And because the presence of copyright law complicates and makes uncertain other beneficial uses of visual art in scholarship and educational texts, copyright law, “rather than being essential for [visual] art’s flourishing, actually impedes it.” (P. 322.) Professor Adler’s article thus joins a [growing literature](#) (including works by Chris Sprigman, Kal Raustiala, and Kevin Collins) that questions copyright law’s relevance not by highlighting the ways in which creators are motivated by noneconomic incentives but by bringing the audience into the equation. For audiences who desire scarce, unique, or customized works, the creator

can, in at least some instances, build that desire into the purchase price, rendering copies (and thus copyright law) both unnecessary and undesirable.

Professor Adler acknowledges that her theory may not have completely squared-off edges—her definition of “visual art,” borrowed from the Visual Artists Rights Act, inherently contemplates artists producing works in single or limited editions and thus does not include the many artists who might well anticipate revenue from the sale of multiple copies. The photographer who offers multiple copies of photographs for sale at a gallery and the artist who segments the market by selling a watercolor at a higher price and prints of the work at a lower price may well need copyright to preserve their income. It is only a select few artists, moreover, who can attract the attention needed to have their reputation guarded by the art world; the Matthew effect can be as entrenched in that world as in any other environment. So it may not always be the case, as Professor Adler writes, that “the small minority of artists lucky enough to have a market for copies or derivative works are artists for whom the price of their original, unique works is so substantial that the value of their income from copyright will be trivial in comparison”—at least, if we take a broad view of the term “artist.” (P. 337.) But it is almost certainly true, that for some [artists-as-brand](#), “[a]rt’s market value, increasingly divorced from aesthetics, resides to a large extent in the identity and reputation of the artist to whom it is attributed.” (P. 347.) If that is the case, we might wonder whether the search for fakes aligns—as Professor Adler is suggesting—less with copyright law and more with trademark owners’ attempts to preserve authenticity (and, in the case of luxury goods, [scarcity](#)) on behalf of their customers.

We may never resolve the contested concept of authenticity in a world of Andy Warhol, Richard Prince, Sherrie Levine, and the [Dafen Oil Painting Village](#); any concept that ultimately depends on the views of the audience is subject to continual reevaluation. A federal district court’s 1993 [decision](#) that a Calder mobile was authentic, to take but one example, was essentially overturned by the contrary conclusion of the market’s recognized expert, leaving the mobile without a buyer. This is not to say, however, that authenticity’s importance is thereby diminished. When, as Professor Adler notes, a Sherrie Levine photograph is aesthetically indistinguishable from the Walker Evans photograph on which it is based, the “work” in each case has been reduced to the statement of authenticity itself. What that says for the proper scope of copyright law, and the role that audiences should play in defining it, is the provocative question that Professor Adler asks us to ponder.

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