Fearless Girl Meets Charging Bull: Copyright and the Regulation of Intertextuality

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This Article approaches the Fearless Girl/Charging Bull controversy as a case study in how copyright law regulates conditions of interaction between existing artistic works and new ones, in order to protect the value and integrity of the former without diminishing production of the latter. To assess the merits of sculptor Arturo DiModica's legal claims in light of the policies underlying copyright law, I turn to the theory of intertextuality and the work of two narrative theorists—M.M. Bakhtin and Gerard Genette. Bakhtin's concept of dialogism and Genette's concept of hypertextuality are especially useful for understanding how the intertextual relationship between Fearless Girl and Charging Bull fits within the range of work-to-work and author-to-author relationships with which literary theory and copyright law are mutually concerned. Analyzing the Fearless Girl controversy through the concepts of dialogism and hypertextuality surfaces a clash between DiModica's Continental view of copyright as a guarantor of authorial supremacy and the utilitarian orientation of U.S. copyright law, which gives authors less control over "second-degree" texts than DiModica would like.

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INTRODUCTION

When dawn broke in Lower Manhattan on International Women's Day in 2017, New Yorkers and the world were introduced to a new piece of public sculpture in Bowling Green Park.[1] The night before, contractors for State Street Global Advisors installed a life-sized sculpture of a pre-teen girl—head held high and arms akimbo—at the north end of the park.[2] The sculpture, Kristen Visbal's Fearless Girl, was purposely positioned directly in the path of an existing sculpture in the park, Arturo DiModica's massive Charging Bull.[3]

1. *See* Renae Merle, *'Fearless Girl' Ignites Debate About Art, Wall Street and the Lack of Female Executives*, WASH. POST, May 12, 2017, https://www.washingtonpost.com/business/economy/fearless-girl-ignites-debate-about-art-wall-street-and-the-lack-of-female-executives/2017/04/20/47ec6d52-239b-11e7-a1b3-faff0034e2de_story.html?utm_term=.c012644788d3 [https://perma.cc/TA9R-CX8M]; Frank Chaparro, *The Statue of the 'Fearless Girl' Will Stare Down the Wall Street Bull for Another Year*, BUS. INSIDER (Mar. 27, 2017), http://www.businessinsider.com/fearless-girl-statue-will-stay-on-wall-street-2017-3 [https://perma.cc/JS2H-Z3WP].

2. *See* Lara Rutherford-Morrison, *A "Fearless Girl" Statue Facing the Bull on Wall Street Sends a Powerful Message About Female Inclusivity in the Workplace*, BUSTLE (Mar. 9, 2017), https://www.bustle.com/p/a-fearless-girl-statue-facing-the-bull-on-wall-street-sends-a-powerful-message-about-female-inclusivity-in-the-workplace-43190 [https://perma.cc/9YX5-4GLC].

3. *See id.*



Figure 1 Fearless Girl and Charging Bull

Fearless Girl, which was originally intended for a one-week display,[4] was created as the centerpiece of an advertising campaign for State Street by the McCann firm.[5] In materials provided to the press following the installation, State Street explained that Fearless Girl was intended "to raise awareness and drive a conversation around the need to improve gender diversity in corporate leadership roles."[6] The sculpture installation was originally conceived as a vehicle for promoting State Street's Gender Diversity Index Exchange-Traded Fund (ETF), which invests in companies that have a higher proportion of women in senior leadership than other companies of the same type.[7] A plaque originally installed at the base of Fearless Girl, but since removed, read "Know the power of women in

4. *See* Bourree Lam, *Why People Are So Upset About Wall Street's 'Fearless Girl'*, ATLANTIC (Apr. 14, 2017), https://www.theatlantic.com/business/archive/2017/04/fearless-girl-reactions/523026/ [https://perma.cc/PVS2-JFKH].

5. *See* David Griner, *Fearless Girl's Dominating Run at Cannes Ends with 4 Grand Prix and 18 Total Lions*, ADWEEK (June 24, 2017), http://www.adweek.com/creativity/fearless-girls-dominating-run-at-cannes-ends-with-4-grand-prix-and-18-total-lions/ [https://perma.cc/SS6P-LQW7].

6. *Fearless Girl Sends Powerful Message*, ST. STREET GLOBAL ADVISORS, https://web.archive.org/web/20171129114823/https://www.ssga.com/global/en/our-insights/viewpoints/enhancing-gender-diversity-on-boards-emea.html (last visited Nov. 29, 2017).

7. *See* Jen Wieczner, *Why the Fearless Girl Statue's Controversial 'SHE' Plaque Was Removed*, FORTUNE (Apr. 17, 2017), http://fortune.com/2017/04/17/fearless-girl-statue-nyc-plaque-she-nasdaq/ [https://perma.cc/5Y75-9ZDF]; *SPDR® SSGA Gender Diversity Index ETF*, ST. STREET GLOBAL ADVISORS, https://us.spdrs.com/en/etf/spdr-ssga-gender-diversity-index-etf-SHE?fundSeoName=spdr-ssga-gender-diversity-index-etf-SHE [https://perma.cc/T3JW-2DY4] (last visited Nov. 15, 2018).

leadership. SHE makes a difference."[8] SHE is the ticker symbol for State Street's Gender Diversity Index ETF.[9]



Figure 2 Original Fearless Girl Plaque

The public responded enthusiastically to Fearless Girl.[10] A reporter for the *Wall Street Journal* described her as a "viral sensation."[11] Tourists snapped photos of their young daughters standing side-by-side with the bronze figure, imitating her defiant posture.[12]

8. Wieczner, *supra* note 7. State Street said that the removal of the plaque had nothing to do with DiModica's complaint and was prompted instead by the sculpture's induction into the New York City Department of Transportation's public art project. *Id.*

9. *Id.* A replacement plaque makes no mention of the fund. *Id.*

10. *See* Nilanjana Roy, *Why Aren't There More Statues of Women?*, FIN. TIMES, June 6, 2017, https://www.ft.com/content/2f9137c6-49ff-11e7-a3f4-c742b9791d43 (discussing the range of responses to the statue, including some hostile and misogynistic ones); Suzanne Vranica, *'Fearless Girl' Steals the Conversation*, WALL ST. J., June 19, 2017, https://www.wsj.com/articles/fearless-girl-steals-the-conversation-1497864600 [https://perma.cc/579B-QLU4] (describing Fearless Girl as a "viral sensation"). *But see* Nick Fugalio & Max Jaeger, *Pissed-off Artist Adds Statue of Urinating Dog Next to 'Fearless Girl'*, N.Y. POST, May 29, 2017, http://nypost.com/2017/05/29/pissed-off-artist-adds-statue-of-urinating-dog-next-to-fearless-girl/ [https://perma.cc/6WPQ-7PJ7]; Ginia Bellafante, *The False Feminism of 'Fearless Girl'*, N.Y. TIMES, Mar. 16, 2017, https://www.nytimes.com/2017/03/16/nyregion/fearless-girl-statue-manhattan.html?_r=0 [https://perma.cc/72F6-FJM8].

11. Vranica, *supra* note 10.

12. *See* Karen Brill, *What This Artist Got Wrong About the Fearless Girl Statue*, ARCHITECTURAL DIG. (May 31, 2017), http://www.architecturaldigest.com/story/wall-street-bull-fearless-girl-statue [https://perma.cc/MRX5-JBG6] (reproducing a photo from a parental tweet).



Figure 3 Tourist Photos: Fearless Girls

DiModica, however, did not share the warm sentiment and was vocal about his displeasure. At a press conference, he derided the installation of Fearless Girl as an "advertising trick."[13] His attorneys fired off a letter to New York Mayor Bill De Blasio demanding that the interloping sculpture be removed.[14] They accused State Street of violating DiModica's copyright by making a "deliberate choice . . . to exploit and to appropriate the Charging Bull through the placement of Fearless Girl."[15] Mayor De Blasio weighed in on Twitter and charged DiModica with perpetuating the sexist exclusivity the sculpture was meant to challenge: "Men who don't like women taking up space are exactly why we need the Fearless Girl."[16]

The controversy over Fearless Girl, which layers emotionally charged gender politics over emotionally charged aesthetic ones, generated a flood of publicity for Fearless Girl (and State Street) across traditional and social media.[17] Three months after Fearless Girl's debut, McCann swept the annual awards at the Cannes Lion International Festival of Creativity.[18] The sculpture's run was initially extended until February 2018,[19] which came and went with no change to the installation. The

13. Merle, *supra* note 1.

14. Letter from Norman Siegel, Partner, Siegel Teitelbaum & Evans, LLP, and Steven Hyman, Partner, McLaughlin & Stern, LLP, to The Honorable Bill de Blasio (Apr. 11, 2017), https://www.scribd.com/document/344998311/Letter-to-Mayor-DeBlasio-on-Charging-Bull-vs-Fearless-Girl [hereinafter DiModica Demand Letter].

15. *Id.* at 2. In addition to raising copyright claims, DiModica alleged trademark infringement. *Id.* at 3. The trademark claim is beyond the scope of this Article.

16. Mark Moore, *De Blasio Defends 'Fearless Girl' Statue*, N.Y. POST, Apr. 12, 2017, http://nypost.com/2017/04/12/de-blasio-defends-fearless-girl-statue/ [https://perma.cc/6N9H-S5Y8].

17. *See supra* notes 1–10.

18. *See* Griner, *supra* note 5 ("It's official: Fearless Girl is one of the most highly honored campaigns in the history of the Cannes Lion International Festival of Creativity.").

19. *See* Moore, *supra* note 16.

current plan is to move Fearless Girl closer to the New York Stock Exchange by the end of 2018—not in response to DiModica's complaints, but because the crowds constantly milling around the two works create a public safety risk in light of heavy traffic nearby.[20] Charging Bull might also be moved, but it is unclear whether the two sculptures are destined for continuing confrontation.[21]

This Article approaches the Fearless Girl/Charging Bull controversy as a case study in how copyright law regulates conditions of interaction between existing artistic works and new ones, in order to protect the value and integrity of the former without diminishing production of the latter.[22] To assess the merits of DiModica's copyright claims in light of the policies underlying copyright law, I turn to the theory of intertextuality[23] and the work of two narrative theorists—M.M. Bakhtin[24] and Gerard Genette.[25] Although the concept of intertextuality has its roots in literary theory, it isn't (and needn't be) exclusive to the study of literature.[26] As Bakhtin reminds us, "dialogic relationships in the broad sense are also possible among different intelligent phenomena, provided that these phenomena are expressed in some *semiotic* material."[27] Because intertextuality is a feature of semiosis beyond

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20. Sarah Cascone, *From 'Charging Bull' to the Bull Market: 'Fearless Girl' Heads to the New York Stock Exchange*, ARTNET NEWS (Apr. 19, 2018), https://news.artnet.com/art-world/fearless-girl-new-york-stock-exchange-1269851 [https://perma.cc/CU3J-JN27].

21. *Id.*

22. *See generally* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (stating that the Copyright Act is structured to achieve a "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other").

23. Theorists of intertextuality view texts relationally rather than as closed systems. *See* María Jesús Martínez Alfaro*, Intertextuality: Origins and Development of the Concept*, 18 ATLANTIS 268 (1996). The classic definition of the term comes from Julia Kristeva's reading of Bakhtin: "[E]ach word (text) is an intersection of words (texts) where at least one other word (text) can be read. . . . [A]ny text is the absorption and transformation of another." Julia Kristeva, *Word, Dialogue and Novel*, *in* THE KRISTEVA READER 37 (Toril Moi ed., 1986). Dialogism and hypertextuality as analytic concepts rest on the principle that "[a]uthors of literary works do not just select words from a language system, they select plots, generic features, aspects of character, images, ways of narrating, even phrases and sentences from previous literary texts and from the literary tradition." GRAHAM ALLEN, INTERTEXTUALITY 11 (Routledge Taylor & Francis Group 2d ed. 2011).

24. M.M. BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS (Caryl Emerson ed. & trans., Univ. of Minnesota Press 1984) [hereinafter BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS]; M.M. BAKHTIN, THE DIALOGIC IMAGINATION (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., Univ. of Texas Press 1981) [hereinafter BAKHTIN, THE DIALOGIC IMAGINATION].

25. GÉRARD GENETTE, PALIMPSESTS (Channa Newman & Claude Doubinsky trans., 1997).

26. *See* ALLEN, *supra* note 23, at 169 ("Intertextuality, as a term, has not been restricted to discussions of the literary arts. It is found in discussions of cinema, painting, music, architecture, photography and in virtually all cultural and artistic productions. Despite the common-sense association between literature and the word 'text,' we need only remember the connection between the early articulations of intertextuality and the development of Saussure's notions concerning semiology to make intertextuality's use in studies of non-literary art forms understandable.").

27. BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS, *supra* note 24, at 184–85.

philology, textual theory can legitimately be brought to bear on works of visual art, including in this case sculpture.[28]

Bakhtin's concept of dialogism and Genette's concept of hypertextuality are especially useful for understanding how the intertextual relationship between Fearless Girl and Charging Bull fits within the range of work-to-work and author-to-author relationships with which literary theory and copyright law are mutually concerned.[29] Analyzing the Fearless Girl controversy through these concepts surfaces a clash between DiModica's Continental view of copyright as a guarantor of authorial supremacy and the more utilitarian, public orientation of U.S. copyright law, which gives authors less control over the production of secondary texts than DiModica would like.[30] My principal argument is that U.S. copyright law is hospitable to intertextuality by design—much more so than Continental author's rights law, which encodes what Bakhtin would characterize as a monologic aesthetics centered on the work as an extension of authorial personality.[31] By giving narrow scope to moral rights and broad scope to fair use, in particular to critical and transformative secondary uses, U.S. copyright law limits the ability of artists like DiModica to control the public's perception of their works by dictating the terms on which other artists interact with them.

Part I begins by situating Bakhtin's and Genette's work on intertextuality within the broader frame of the poststructuralist discourse on authorship. I argue in Part I that Bakhtin and Genette describe what authors do with/in texts in terms that mesh comfortably with copyright's definition of authorship as intentional creativity. After "reading" Fearless Girl (through Genette) as a "hypertext" of Charging Bull, I conclude Part I with the proposition that copyright defines the

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28. *Cf.* Deborah J. Haynes, *Bakhtin and the Visual Arts*, *in* A COMPANION TO ART THEORY 295 (Paul Smith & Carolyn Wilde eds., 2002) ("Bakhtin's ideas—answerability, dialogue, monologism, polyphony, outsideness, chronotope, the carnivalesque, unfinalizability, and heteroglossia, to name but a few—not only offer scholars categories for aesthetics, but also for analyzing visual arts.").

29. The nexus between intertextuality and copyright law is most obvious in cases where one author borrows protectable expression from another author's copyrighted work and incorporates that expression into a "secondary" work. *See* 17 U.S.C. § 106 (2002) (giving the owner of a copyright the exclusive right to reproduce the work in copies and to prepare derivative works based on the copyrighted work).

30. *See generally* Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994) (discussing the ways in which the commodity-based U.S. copyright system differs fundamentally from its personality-based Continental counterpart). *But see* Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991 (1990) (arguing, based on historical documents from the revolutionary period, that philosophical differences between the French and U.S. copyright systems have been exaggerated).

31. Roberta Rosenthal Kwall offers an extended exposition of the conception of copyright as a guarantor of authorial supremacy and finds fault with U.S. copyright law for failing to give authors the control she believes they deserve by virtue of their intimate connection to their works. *See* ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY (2010). I take a different view, believing that limits on authorial control are a strength of the U.S. system and a necessary condition for fulfilling copyright's constitutional purpose of promoting progress in the arts.

conditions of artistic production by regulating the intertextual acts of second-degree authors like Kristen Visbal.

Parts II and III explore DiModica's perspective on the public installation of Fearless Girl, the cultural significance of Charging Bull, and the legal entitlement of artists to control the public reception of their works. Part IV turns to Bakhtin's concepts of monologic and dialogic textuality to explain both DiModica's philosophy of authorship and his expectations of copyright. In Part IV, I argue that DiModica's monologic aesthetic philosophy aligns better with the author-centric Continental copyright tradition than with the more public-minded American tradition.

Part V develops the argument that U.S. copyright law encodes the principle that cultural production is inherently dialogic and intertextual. By defining a range of second-degree works and second-degree uses, the Copyright Act explicitly accommodates intertextuality in the interest of furthering the constitutional objective of promoting artistic progress. Part VI analyzes DiModica's moral rights and derivative work claims on their merits and concludes that DiModica wants copyright to regulate intertextuality in ways that it isn't designed to do.

I. SCHRÖDINGER'S AUTHOR

The primary challenge in marshaling insights from poststructuralist literary theory to analyze problems in copyright lies in the disciplines' very different understandings of authorship. Copyright as a legal regime is centered on the author, who is regarded as the originator or mastermind of her text.[32] DiModica's legal claim against State Street arises from his status as the creator of a protectable "work of authorship."[33] Poststructuralist theory, in contrast, is largely concerned with the displacement or dethroning of the author. In the work of Roland Barthes, for example, the author-as-father (of the work) has been supplanted by "the modern scriptor [who] is born simultaneously with the text."[34] For Michel Foucault, "the author does not precede the work; he is a certain functional principle . . . by which one impedes . . . the free manipulation, the free composition, decomposition, and recomposition of fiction."[35] As a unified locus of aesthetic intention and creative

32. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (stating that being an "'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected" and defining the author as "the person who effectively is . . . the cause of the [work]").

33. *See* U.S. CONST. art. I, § 8, cl. 8 (giving Congress power to grant limited exclusive rights to "authors . . . in their writings"); 17 U.S.C. § 102 (1990) (providing that "copyright protection subsists . . . in original works of authorship"); *Burrow-Giles*, 111 U.S. at 56 ("Under the acts of congress designed to give effect to this section, the persons who are to be benefited are divided into two classes—authors and inventors.").

34. ROLAND BARTHES, IMAGE-MUSIC-TEXT 145 (Stephen Heath trans., 1977).

35. MICHEL FOUCAULT, THE FOUCAULT READER 118–19 (Paul Rabinow ed., Pantheon Books 1984).

productivity, the author is dead in the world of poststructuralism but alive and well in the world of copyright.[36]

Bakhtin and Genette are attractive mediators for this interdisciplinary project because they can be read to bridge the seemingly wide gap between literary theory and copyright when it comes to the treatment of authors and artistic works. They articulate sophisticated but pragmatic theories of textuality that neither fetishize nor abandon the author as an organizing subjectivity and a source of textual meaning.[37] For them, the author is like Schrödinger's cat: simultaneously dead and alive.[38] Their thinking about the relationship between authors and texts partakes of what Michael Baxandall called "skeptical intentionalism"—the recognition that we unavoidably encounter and think about works of art "as products of purposeful activity, and therefore caused," even when we recognize the complexity of that causation and don't subscribe to traditional theories of aesthetic history and influence.[39] Adopting the skeptical intentionalist perspective is helpful given that copyright law conceptualizes the work of art as the manifestation of an author's creative labor[40] and vests legal rights in the person of the author.[41]

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36. *See* BARTHES, *supra* note 34, at 145 ("The Author is thought to *nourish* the book, which is to say that he exists before it, thinks, suffers, lives for it, is in the same relation of antecedence as a father to his child. In complete contrast, the modern scriptor is born simultaneously with the text, is in no way equipped with a being preceding or exceeding the writing, is not the subject with the book as a predicate; there is no other time than that of the enunciation and every text is eternally written *here* and *now*.") (emphasis in original); FOUCAULT, *supra* note 35, at 118–19 ("We are accustomed . . . to saying that the author is the genial creator of a work in which he deposits, with infinite wealth and generosity, an inexhaustible world of significations . . . . The truth is quite the contrary: the author is not an indefinite source of significations which fill a work; the author does not precede the work; he is a certain functional principle by which, in our culture, one limits, excludes, and chooses; in short, by which one impedes the free circulation, the free manipulation, the free composition, decomposition, and recomposition of fiction.").

37. With respect to the question of authorship, Graham Allen reads Genette as neither a proper structuralist nor a proper poststructuralist to the extent that he emphasizes authorial intention. *See* ALLEN, *supra* note 23, at 104 ("[Genette's] emphasis on authorial intention is not only contrary to poststructuralist theory and practice but also runs counter to the major thrust of structuralism."). Allen views the author in Bakhtin's world as a voice behind the text but not attempting to control it. *Id.* at 23.

38. Schrödinger's cat is the name of a famous thought experiment in quantum physics: "The cat is imagined as enclosed in a box with a radioactive source and a poison that will be released when the source (unpredictably) emits radiation, the cat being considered (according to quantum mechanics) to be simultaneously both dead and alive until the box is opened and the cat observed. Schrödinger conceived of it as a thought experiment to illustrate (or ridicule) an interpretation of the quantum-mechanical superposition of states (associated with Niels Bohr), according to which the quantum state of a particle could not be known until an observation was made; prior to that it had to be described physically in terms of all possible states." *Schrödinger*, OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/172599 (last visited Jan. 21, 2019).

39. MICHAEL BAXENDALL, PATTERNS OF INTENTION: ON THE HISTORICAL EXPLANATION OF PICTURES vi (1985). Baxendall also recognizes, however, that "once we start inferring causes and intention in a picture we are doing something that is obviously very precarious indeed." *Id.*

40. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor.").

41. *See* 17 U.S.C. § 201 (1978) ("Copyright in a work protected under this title vests initially in the author or authors of the work."). For an extended exploration of the varied nature of personhood

Both Bakhtin and Genette view the products of authorship as reliant on, and inevitably inflected with, both the author's voice and the voices of others. To be an author for them is by definition to engage in both intentional and unintentional intertextual acts.[42] For Bakhtin, intertextuality is an intrinsic property of language because the words a writer chooses "are already populated with the social intentions of others."[43] The writer "compels them to serve his own new intentions, to serve a second master."[44] In this sense, all textuality is intertextuality; no word is born anew in any text, and no text is born in a cultural vacuum. To quote Julia Kristeva, who first introduced Bakhtin's work to an anglophone audience, "Bakhtin considers . . . the text as an absorption of and a reply to another text."[45] Similarly for Genette, "there is no literary work that does not evoke (to some extent and according to how it is read) some other literary work,"[46] making every text to a greater or lesser extent "a text in the second degree."[47]

Both Bakhtin and Genette are interested in the open, assimilative nature of texts (works) and in text-to-text (work-to-work) interaction as the foundation of artistic production and the engine of stylistic and generic evolution. Under the rubric of hypertextuality, Genette describes an intertextual relationship particularly relevant to the Fearless Girl/Charging Bull controversy.[48] In a hypertextual relationship, the author of a later text (or hypertext) "grafts" a new work onto an earlier one (the hypotext).[49] One of several forms that grafting can take is "continuation," wherein the author of a hypertext extends or completes the hypotext from which it is derived.[50] The continued hypotext is usually a work that its author left unfinished for one reason or another.[51] Sometimes, as is the case with

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interests in intellectual property law, see Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998).

42. Jill Felicity Durey argues that theorists of intertextuality interpreting Bakhtin have tended to ignore or downplay the aspects of his work that describe dialogism as a relationship between authors and not just between texts. *See* Jill Felicity Durey, *The State of Play and Interplay in Intertextuality*, 25 STYLE 616, 617 (1991) ("The essence of his theory lies in the concept of a supposed dialogue between the novelist and earlier writers, *not* just between the texts themselves, as subsequent theorists have seemed to think."). In the same vein, María Jesús Martínez Alfaro refers to the "textualization of Bakhtin" in Kristeva's reading of his work. Alfaro, *supra* note 23, at 276.

43. BAKHTIN, THE DIALOGIC IMAGINATION, *supra* note 24, at 300.

44. *Id.*

45. Kristeva, *supra* note 23, at 39.

46. GENETTE, *supra* note 25, at 9.

47. *Id.* at 5.

48. *See id.* ("By hypertextuality I mean any relationship uniting a text B (which I shall call the hypertext) to an earlier text A (I shall, of course, call it the hypotext), upon which it is grafted in a manner that is not commentary.").

49. *Id.* As examples of hypertexts, Genette offers James Joyce's *Ulysses* and Virgil's *Aeneid*, both of which extend and are derived from Homer's *Odyssey*. *Ulysses* tells the same story as Homer's *Odyssey* in a different way (i.e., in novel form, set in twentieth-century Dublin), and Virgil's *Aeneid* tells a different story (i.e., that of Aeneas, not Odysseus) in the same way (i.e., epic form). *See id.* at 5–6.

50. *Id.* at 161 (explaining the historical origins of the concept of a continuation).

51. *See id.* at 162 ("When a work is left unfinished by reason of the death of its author or some other cause of final abandonment, continuation consists in finishing the work in the author's stead.").

Fearless Girl, the hypertext can be the continuation of a hypotext that its author actually views as finished and complete.[52] The author of such a hypertext reopens the putatively complete hypotext and completes it according to her own intentions. Genette refers to the continuation of an apparently finished text as a sequel or prolongation.[53]

The author of a hypertext can operate with varying degrees of "faithfulness" to the hypotext she chooses to engage.[54] As a continuator, the author of a hypertext can be imitative, corrective, iconoclastic, or refutative—or some combination of those.[55] An unfaithful continuation—the category into which I would place Fearless Girl as a hypertext of Charging Bull—aspires not to complete the hypotext on its own terms but to change or invert its significance: "[O]ne can just as easily reverse the significance of a text by giving it a sequel that refutes it as by modifying its setting, its tone, or its plot."[56] In Genette's framework (implicitly invoking Jacques Dérrida), the unfaithful continuation operates as a "supplement" to the hypotext it continues: it simultaneously augments and displaces the earlier work.[57]

Neither Genette nor Bakhtin considers the dialogic and hypertextual acts of authors, whether intentional or not, in terms of property rights—as potential acts of trespass or misappropriation. Neither understands authorship legalistically, in terms of the possessive individualism that underlies DiModica's attitude toward

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52. GENETTE, *supra* note 25, at 175 ("The function of the continuation, however, is not always to complete a work that has been left manifestly and, as it were, officially unfinished. One can always decide that a work which is finished and published as such by its author is nevertheless in need of a prolongation or completion.").

53. *Id.* at 162 ("The sequel . . . consists in exploiting the success of a work that in its own time was considered complete, and in setting it into motion with new episodes.").

54. Confusingly, Genette uses the term "transtextuality" as the umbrella term for all intertextual interactions and "intertextuality" more specifically to refer to a relationship in which one text quotes from or alludes to another. *See id.* at 1–2 (acknowledging that his use of "intertextuality" is more restrictive than Julia Kristeva's now paradigmatic use of the term). Most theorists use intertextuality as the umbrella term to denote "the structural relations between two or more texts." Margarete Landwehr, *Literature and the Visual Arts: Questions of Influence and Intertextuality*, C. LITERATURE, Summer 2002, at 1, 2. I will follow that convention, treating Genette's concept of hypertexuality as a subtype of intertextuality.

55. *See, e.g.*, GENETTE, *supra* note 25, at 162 (describing a continuator who "imitate[s] as closely as possible the style of the unfinished text"); *id.* at 175 (describing "the category of the unfaithful or corrective continuation"); *id.* at 198 (describing "the sequel that refutes"); *id.* at 199 (describing the "iconoclastic continuator"); *id.* at 200 (describing "a murderous or parricidal continuation").

56. *Id.* at 198.

57. *See id.* at 202 ("By virtue of a well-known ambiguity, the term *supplement* bears a more ambitious significance: the postscript here is wholly prepared to substitute for—that is, to displace and therefore to erase—that which it completes."); *see also* Robert Bernasconi, *The Supplement*, *in* JACQUES DERRIDA: KEY CONCEPTS 19, 19 (Claire Colebrook ed., 2015) ("In *Of Grammatology* Derrida took up the term supplément from his reading of both Jean-Jacques Rousseau and Claude Lévi-Strauss and used it to formulate what he called 'the logic of supplementarity.' . . . Rousseau can be found writing the ambiguous term supplément and its cognates into his narratives. The supplement is an addition from the outside, but it can also be understood as supplying what is missing and in this way is already inscribed within that to which it is added.").

Charging Bull and his displeasure about Fearless Girl.[58] When authors like DiModica are embarrassed or upset by unauthorized secondary uses of their work, they turn to copyright as the domain of legally enforceable authorial prerogatives. In this sense, copyright defines not only the legal conditions for the publication and distribution of cultural works, but also the conditions for second-degree artistic production. Bakhtin and Genette offer copyright scholars a way of understanding and describing how the American copyright system (in contrast with its Continental counterparts) encodes intertextuality as a defining condition of authorship.

II. DIMODICA'S BEEF

DiModica's beef with Fearless Girl does not arise from a garden variety case of piracy or impermissibly lavish quotation. Fearless Girl copies nothing from Charging Bull and is therefore not actionably similar to DiModica's work.[59] At the same time, however, it seems plausible to think of State Street's actions as a form of appropriation: State Street and Visbal conscripted Charging Bull for use in their own semiotic project, engaging in what Genette would have classified as an unfaithful continuation of Charging Bull.[60] Fearless Girl relies on Charging Bull to signify youthful feminine resolve in the face of entrenched masculine power.[61] It relies on Charging Bull to "drive a conversation" about gender equity that State Street and Visbal designed it to instigate.[62] An assertion in DiModica's demand letter

58. *See generally* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (Oxford Univ. Press Wynford ed. 2011).

59. *See, e.g.*, Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc., 150 F.3d 132, 137 (2d Cir. 1998) (explaining that a plaintiff seeking to prove infringement of the reproduction right must prove both actual copying and substantial similarity between the defendant's work and protected expression in the plaintiff's work).

60. *See* GENETTE, *supra* note 25, at 177 (discussing continuations that do not seek to do what the continuator imagines the *author* of the hypotext would have done but instead "add to their hypotext only the prolongation and the conclusion that the *continuator* thinks it fit (or profitable) to adduce") (emphasis added).

61. There is a growing body of both case law and scholarly literature on appropriation art as a method and a movement. *See, e.g.*, Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW (Kembrew McLeod & Rudolf Kuenzli eds., Duke Univ. Press 2011); Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 CARDOZO ARTS & ENT. L.J. 1 (1992); Marci A. Hamilton, *Appropriation Art and the Imminent Decline in Authorial Control over Copyrighted Works*, 42 J. COPYRIGHT SOC'Y U.S.A. 93 (1994); William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1 (2000). The category is defined by a later artist's wholesale, literal copying of an earlier artist's work. *See Cariou*, 714 F.3d at 699 ("The Tate Gallery has defined appropriation art as 'the more or less direct taking over into a work of art a real object or even an existing work of art.'"). My goal in this Article is to examine the phenomenon of artistic appropriation conceived more broadly, within the theoretical frames of dialogism and intertextuality.

62. Ironically, within a year of Fearless Girl's installation, State Street Corporation entered into a five million dollar settlement with the United States Department of Labor over wage discrimination claims brought by more than 300 female employees. *See* Jordyn Holman, *Bank Behind Fearless Girl Statue Settles U.S. Gender Pay Dispute*, BLOOMBERG.COM (Oct. 5, 2017), https://www.bloomberg.com/news/articles/2017-10-05/bank-behind-fearless-girl-statue-settles-u-s-

that Charging Bull is a "necessary element" of State Street's politically engaged art project is to that extent correct.[63] As DiModica's letter fairly points out, Fearless Girl is only fearless in relation to the implicit threat embodied by Charging Bull.[64] Without Charging Bull as an interlocutor, Fearless Girl is just a statue of a little girl standing with her chin in the air and her hands on her hips.

Fearless Girl supplements Charging Bull in the Derridean sense of a surplus that displaces what it augments.[65] Its proximity to Charging Bull expands the visual frame around Charging Bull and alters how the public encounters and understands DiModica's sculpture. With Fearless Girl positioned as it is, the viewer is dissuaded from encountering Charging Bull as a separate work with independent significance.[66] Instead, visitors to Bowling Green are drawn into a visual narrative that incorporates Charging Bull as an adversarial figure. The viewer "reads" the two works together, in dialogue with each other, more or less as a composite work. According to DiModica's demand letter, State Street and Visbal encouraged viewers to perceive Charging Bull and Fearless Girl as a unitary work by creating "visual links" between the two sculptures: both works are made of bronze with a similar patina; in addition, State Street extended the cobblestone apron on which Charging Bull sits so that Fearless Girl and Charging Bull are connected by the ground on which they both stand.[67] In his letter, DiModica denounces the "inextricable link" between the two sculptures—a link that State Street freely admits it intended to create.[68]

DiModica argues that Fearless Girl has turned Charging Bull into "a symbol of male chauvinism."[69] That symbolism, his lawyers say, runs counter to the "positive message" DiModica means his sculpture to convey.[70] He wants the public to see Charging Bull as "a symbol of the hope of the American people for the

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gender-pay-dispute [https://web.archive.org/web/20181230125231/https://www.bloomberg.com/news/articles/2017-10-05/bank-behind-fearless-girl-statue-settles-u-s-gender-pay-dispute] ("The Labor Department alleged that women in senior leadership positions at Boston-based State Street received lower base salaries, bonus pay and total compensation since at least December 2010.").

63. DiModica Demand Letter, *supra* note 14, at 2. This assertion is relevant to DiModica's claim that State Street violated his right to prepare derivative works. *See* 17 U.S.C. § 106(2) (2002). The merits of DiModica's derivative work claim are discussed *infra* Section VI.B.

64. DiModica Demand Letter, *supra* note 14, at 1 ("The statute of the young girl becomes the 'Fearless Girl' only because of the Charging Bull: the work is incomplete without Mr. DiModica's Charging Bull . . . .").

65. *See* Bernasconi, *supra* note 57, at 19 ("The supplement is an addition from the outside, but it can also be understood as supplying what is missing and in this way is already inscribed within that to which it is added.").

66. It remains possible to view Charging Bull as a freestanding work if the viewer stands between Fearless Girl and Charging Bull with his or her back to Fearless Girl. Other sightlines from the street to Charging Bull that exclude Fearless Girl are also possible.

67. DiModica Demand Letter, *supra* note 14, at 2.

68. *Id.*

69. Merle, *supra* note 1.

70. DiModica Demand Letter, *supra* note 14, at 1.

future."[71] Predictably, Visbal views the sculptures and their symbolism differently. She told reporters that she doesn't believe Fearless Girl "detract[s] from Charging Bull and all [it] stands for but, rather, calls for collaboration between men and women in decision making."[72] Whatever one thinks the two works signify in terms of patriotism or capitalism[73] or feminism, there can be little question that they signify something different together than they would apart.[74] Insofar as Visbal's vision for the Fearless Girl/Charging Bull composite work clashes with DiModica's vision for Charging Bull as an independent work, Visbal is the quintessential unfaithful continuator.

Although the two works stand apart, Fearless Girl and Charging Bull are counterposed in a visual dialogue of which DiModica wants no part. Charging Bull was made to stand alone, and DiModica would prefer to keep it that way. He appeals to the law of copyright as a way to control the public presentation and reception of Charging Bull, so that he can prevent the work of another artist from interacting visually and symbolically with his own.[75] The primary relief DiModica wants is relocation of Fearless Girl to clear the sightlines leading to Charging Bull, thereby restoring the public's ability to focus on his work as a solitary object with a significance all its own.[76] He appears to believe, however misguidedly, that his copyright in the sculpture can be leveraged into a monopoly on both the public's attention and his work's physical context. By enforcing his copyright in Charging Bull, DiModica seeks to enforce his vision of the work and to prevent others from, in his view, co-opting his artistic production to serve their own political and aesthetic ends.[77] He wants copyright to restore Charging Bull's—and his own—independence from other works and other authors.

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71. *Id.*

72. Merle, *supra* note 1.

73. Mayor De Blasio described Charging Bull—not flatteringly—as "a celebration of unfettered capitalism." *Id.* Others, too, may see it that way; during the Occupy Wall Street protests, the police had to barricade the sculpture to protect it from being vandalized by demonstrators. *Id.*

74. The question of who gets to decide what a work means has generated a wide and deep literature on the role of the reader relative to that of the author in the interpretation of texts. *See generally* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 54–90 (1983) (tracing the development of theories of textual interpretation from phenomenology through hermeneutics to contemporary reader-response theory). Copyright scholars have explored—and continue to explore—the ways in which copyright theory and jurisprudence can benefit from a more sophisticated approach to readership and audience. *See, e.g.*, Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUM. J.L. & ARTS 445 (2008); Zahr K. Said, *A Transactional Theory of the Reader in Copyright Law*, 102 IOWA L. REV. 605 (2017); Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247 (1998).

75. DiModica's letter claims violations of his reproduction, derivative work, and distribution rights under section 106 of the Copyright Act and his right of integrity under section 106A, the Visual Artists Rights Act (VARA). DiModica Demand Letter, *supra* note 14, at 3.

76. *See id.* at 4. DiModica also wants monetary damages. *Id.*

77. As of this writing, DiModica has not actually sued the City or State Street. His lawyer has said he hopes to settle the matter out of court. Isaac Kaplan, *Fearless Girl Face-off Poses a New Question: Does the Law Protect an Artist's Message?*, ARTSY (Apr. 13, 2017), https://www.artsy.net/article/artsy-

III. AN ARTIST FULL OF (HIS) BULL

To learn the details of the story behind Charging Bull is to realize that there is, in fact, a curious double standard at work in DiModica's critique of State Street's motives and actions.[78] For all of DiModica's professions of artistic high-mindedness and purity of intention, it turns out that Charging Bull's origin story has more in common with Fearless Girl's than DiModica might care to admit. That story begins in Manhattan in the 1980s—"a brash decade in which excess was the norm and ostentatious displays of wealth and power were celebrated in pop culture and among Manhattan's elite."[79]

According to DiModica, the inspiration for Charging Bull came to him in the days following the stock market crash of 1987, the country's worst economic shock since the Great Depression.[80] On his own initiative and at his own expense, he created Charging Bull to represent "the strength, power and hope of the American people for the future" at a time of economic uncertainty and instability.[81] The 18-foot-long, three-and-a-half-ton bronze statue took DiModica two years to make.[82] Ten days before Christmas in 1989, he and a team of movers loaded Charging Bull onto a flatbed truck at his SoHo studio and drove it down Wall Street, delivering it under cover of night to the plaza in front of the New York Stock Exchange.[83] DiModica had no permit from the city or the Stock Exchange to install the sculpture, making Charging Bull's public debut an act of trespass.[84] Executives at the Stock Exchange didn't want anything to do with it.[85] They initially called the police, who lacked the capacity to move the massive sculpture. Later, they hired contractors to haul Charging Bull off to an impound yard in Queens.[86] DiModica subsequently partnered with community activists who were fans of the sculpture and successfully negotiated with the City to have it relocated to Bowling Green, where it has stood ever since.[87]

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editorial-fearless-girl-face-off-poses-new-question-law-protect-artists-message [https://perma.cc/GKT8-TML2].

78. In addition to calling Fearless Girl an "advertising trick," DiModica was dismayed that State Street had not sought his permission before installing Fearless Girl on public property. *See* DiModica Demand Letter, *supra* note 14, at 4 (asserting that "Mr. DiModica's permission was plainly required").

79. Jonathan Lemire, *For Trump, the 1980s Still Hold Relevance*, PATRIOT LEDGER, Jan. 2, 2017, http://www.patriotledger.com/news/20170102/for-trump-1980s-still-hold-relevance [https://perma.cc/TB5K-AF7A].

80. Bruce Lambert, *Neighborhood Report: Lower Manhattan; A Campaign to Save a Bull*, N.Y. TIMES, Oct. 3, 1993, http://www.nytimes.com/1993/10/03/nyregion/neighborhood-report-lower-manhattan-a-campaign-to-save-a-bull.html [https://perma.cc/NTQ5-QWKK].

81. *Id.*

82. *See* Jeremy Olshan, *Wall Street's Famed Bronze Bull Arrived 25 Years Ago (Without Permission)*, MARKETWATCH (Dec. 15, 2014), http://www.marketwatch.com/story/wall-streets-famed-cast-bronze-bull-turns-25-2014-12-15 [https://perma.cc/9YED-AVB7].

83. *Id.*

84. *See id.*

85. *Id.*

86. *Id.*

87. *Id.*

Despite the daunting logistics, Charging Bull was actually not DiModica's first—or even his second—unsolicited art delivery in Manhattan.[88] Getting permission, it seems, is just for other people. As publicity stunts go, State Street appears to have learned a lesson from the master. Unlike DiModica, however, State Street got a permit from the city first.[89] DiModica views Fearless Girl as a presumptuous interloper, but the City of New York, which actually owns the property on which it sits, does not.

As for DiModica's critique of State Street's commercialism, that too should be taken with a grain of salt. In 1993, after Charging Bull had become a tourist attraction, DiModica tried to sell his "gift" to the city for $320,000.[90] When the city declined, he offered to sell it to Merrill Lynch, which has a visually similar bull for its logo.[91] When Merrill Lynch declined, DiModica threatened to sell and move the sculpture to a Las Vegas hotel unless some New Yorker met his price.[92] In addition to trying to sell the sculpture itself, DiModica has used Charging Bull to sell other things. He holds trademark rights in a downsized, two-dimensional logo version of the sculpture, which is federally registered for use in connection with the sale of T-shirts and ties.[93]

The point of highlighting the irony in DiModica's critique of State Street is not to brand him a hypocrite, but rather to suggest that the true source of his displeasure about Fearless Girl is something other than a deeply held, if quaint, conviction that commerce demeans art.[94] After all, how can his outrage over Fearless Girl as an "advertising trick" be taken seriously in light of his own history as a showman and self-promoter? The more credible explanation is that he dislikes Fearless Girl for altering, through its very presence, the public's perception of Charging Bull. That reason comes across more clearly in his demand letter to the City (which focuses on what Fearless Girl "does" to Charging Bull) than in his comments to the media (which focused on Fearless Girl as a marketing ploy). DiModica wants Fearless Girl to be removed not so much because he thinks the sculpture is inauthentic or "bad art," but because its presence inclines viewers to experience and interpret *his* art in

88. *See* Merle, *supra* note 1 ("Years before DiModica donated his iconic statue, he had developed a reputation for foisting gifts on New York that the city didn't want. In 1977, again in the middle of the night, he reportedly dropped several marble statues in front of Rockefeller Center and in 1986 he sneaked a big bronze horse in front of Lincoln Center.").

89. *Id.* (reporting that the permit covers a one-year period).

90. Lambert, *supra* note 80.

91. *Id.*; *see also* The Mark Consists of a Design of a Bull, Registration No. 1,272,654 (documenting Merrill Lynch's federal registration of its bull logo).

92. Lambert, *supra* note 80.

93. *See* CHARGING BULL A DIMODICA NY 2003 NEW YORK, Registration No. 4,451,568; *see also* DiModica Demand Letter, *supra* note 14, at 3 (alleging trademark dilution).

94. Given the consumerization of culture and the rise of mass media in the second half of the twentieth century, it is difficult to defend the notion of a stable conceptual and stylistic boundary between art and advertising. *See generally* JOAN GIBBONS, ART AND ADVERTISING 158 (2011) (arguing that the relationship between contemporary art and advertising is "highly elastic," even though "essential distinctions between the two fields of practice remain").

a way he doesn't like. Simply put, Fearless Girl makes Charging Bull signify something that DiModica didn't intend. The question is whether copyright law can, or should, give him the control and the remedy he wants. The answer to both questions, for reasons that I will explain in Part VI below, is no.

IV. ARTISTIC BULLIES: AUTHORSHIP AS AESTHETIC MONOLOGISM

DiModica turned to copyright as a way of policing the boundaries of his work, to prevent it from being recontextualized and incorporated into someone else's artistic (and political) vision. Implicit in his understanding of the reach and purpose of copyright is what Bakhtin describes as a monologic aesthetics—a view of the relationship between author, language, and work that Bakhtin associates with the genres of epic and poetry.[95] In *The Dialogic Imagination*, Bakhtin describes the monologic work as "a hermetic and self-sufficient whole . . . whose elements constitute a closed system presuming nothing beyond themselves, no other utterances."[96] In a monologic aesthetics, the consciousness of the author merges mystically with the language of the work:

> In poetic genres, artistic consciousness—understood as a unity of all the author's semantic and expressive intentions—fully realizes itself within its own language . . . . The language of the poet is his language, he is utterly immersed in it, inseparable from it, he makes use of each form, each word, each expression according to its unmediated power to assign meaning (as it were, "without quotation marks"), that is, as a pure and direct expression of his own intention.[97]

The monologic work is an aesthetic manifestation of the author's personality and her desire to materialize personal intention through language. Considered in terms of its orientation to other works and authors, the monologic work is a "closed authorial monologue . . . that presumes only passive listeners beyond its own boundaries."[98] In the one-way communicative transaction between the author and the auditor, the auditor's role is solely to discern what the author wants her to hear, bringing nothing of herself to the encounter.

Bakhtin's monologic poet-author is kin of the "Romantic author" whom Barthes and Foucault, writing after Bakhtin, would declare dead—along with its

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95. For Bakhtin, poetry and prose are "the result of opposed tendencies." Alfaro, *supra* note 23, at 274. He views the poetic genres as "centripetal and . . . associated with the unitary and the single." *Id.* Novelistic prose, by contrast, is "centrifugal and leads to plurality and variation." *Id.*

96. BAKHTIN, THE DIALOGIC IMAGINATION, *supra* note 24, at 273.

97. *Id.* at 285.

98. *Id.*

imagined dominion over textual meaning.[99] "The image of literature to be found in the ordinary culture," Barthes wrote,

> is tyrannically centred on the author, his person, his life, his tastes, his passions. . . . The *explanation* of a work is always sought in the man or woman who produced it, as if it were always in the end, through the more or less transparent allegory of the fiction, the voice of a single person, the *author*, "confiding" in us.[100]

Scholars including Martha Woodmansee, Mark Rose, and Peter Jaszi have explored the ways in which copyright law incorporates this hyper-individualized construct of authorship.[101] My call on literary theory is for a different purpose—one centered less on authors and more on (inter)relationships between works. I believe, as Peter Jaszi has ventured in his more recent scholarship, that U.S. copyright law is less wedded to the property assumptions underlying Romantic authorship than previous scholars (including Jaszi himself) have argued.[102] Jaszi sees this as a recent development associated with the evolving jurisprudence of fair use, but I submit that it has really been true all along. Thinking about copyright through the framework of intertextuality rather than that of Romantic authorship helps prove this point.

Bakhtin conceives of different authors and genres as differentially receptive to the reality that dialogism permeates language and texts. Whereas he associates monologism with poets and poetry, he associates dialogism with novelists and prose.[103] Poems tend to be dominated by the poet's singular voice, but novels are populated with different characters belonging to different discourse communities and speaking in different registers—often including a narrator who remains outside the action, on a discursive plane of her own.[104] Bakhtin defines "double-voiced"

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99. *See* BARTHES, *supra* note 34, at 142–43 ("The author is a modern figure, a product of our society insofar as, emerging from the Middle Ages with English empiricism, French rationalism and the personal faith of the Reformation, it discovered the prestige of the individual, of, as it is more nobly put, the 'human person.'"); FOUCAULT, *supra* note 35, at 101 ("The coming into being of the notion of 'author' constitutes the privileged moment of individualization in the history of ideas, knowledge, literature, philosophy and the sciences.").

100. BARTHES, *supra* note 34, at 143.

101. *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991); Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51 (1988); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author*,' 17 EIGHTEENTH-CENTURY STUD. 425 (1984).

102. *See* Peter Jaszi, *Is There Such a Thing as Postmodern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105, 106 (2009) (arguing that elements of postmodernism "are beginning to seep into copyright theory and jurisprudence").

103. *See supra* note 95 (discussing the opposition Bakhtin posits between poetry and prose).

104. *See* Alfaro, *supra* note 23, at 274 ("[I]n the monological genres the author subordinates all the voices present to his/her own intentions. . . . [T]he prose writer . . . allows each voice to keep its own integrity and independence.").

(dialogic) discourse broadly as that which has "an orientation toward someone else's discourse."[105] He offers parody as an example of an obviously double-voiced form: "[I]n all possible varieties of parodistic discourse the relationship between the author's and the other person's aspirations remains the same: these aspirations pull in different directions, in contrast to the unidirectional aspirations of [singled-voiced (monologic) discourse]."[106]

Sometimes, as in parodies, the aspirations of the dialogic author are directly hostile to those of the other author or authors to whom she responds. In some instances, including parody, Bakhtin's dialogic author shares with Genette's unfaithful continuator both a desire to engage the voices of others and a critical orientation toward those voices and their utterances. In U.S. copyright law, as I will discuss in more detail in Part V, fair use doctrine accommodates intertextual showdowns of this type, where authors of copyrighted works are likely to oppose the use of their works in second-degree texts that they view as morally, politically, or aesthetically objectionable.[107]

DiModica's sense of artistic violation at the placement of Fearless Girl in juxtaposition to Charging Bull is readily legible within the frames of Bakhtinian monologism and the related construct of Romantic authorship. It is clear from DiModica's letter to the city that he sees his work as having an intended message and symbolism that Fearless Girl impermissibly distorts:

> [T]he placement of the statue of the young girl in opposition to the Charging Bull has undermined the integrity of . . . the Charging Bull. The Charging Bull no longer carries a positive, optimistic message. Rather, it has been transformed into a negative force and a threat.[108]

In his reaction to Fearless Girl, DiModica reveals his commitment to a monologic vison of his work that forecloses voices from the outside and admits only a single voice—his own. That commitment leads him to deny a panoply of intertextual echoes that viewers themselves might bring to their encounters with Charging Bull: the prehistoric cave drawing of a bull at Lascaux; Zeus in the form of a bull in the myth of Europa; Theseus and the Minotaur; Picasso's famous "Bull" lithographs; or the running of the bulls in Hemingway's *The Sun Also Rises*—to name a few.[109] Of course, none of these associations has anything to do with the "message" DiModica believes he is communicating in his work. Even without

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105. BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS, *supra* note 24, at 199.

106. *Id.* at 194.

107. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that a bawdy rap parody of a classic rock-and-roll song was potentially fair use even though the holders of the copyright in the rock-and-roll song refused to give the parodists a license because the rightholders found the rap song distasteful).

108. DiModica Demand Letter, *supra* note 14, at 3.

109. I owe thanks to Ellen Burt for bringing some of these references to my attention and for emphasizing the extent to which DiModica's work is "propped" on other famous bulls, whether he acknowledges those intertextual relationships or not.

Fearless Girl as his antagonist, DiModica would have no realistic hope of controlling how others see and think about Charging Bull.

DiModica views his sculpture as bounded in a propertistic sense by his own understanding of its purpose and message. This view is consistent with the Continental model of authorship, which puts authorial intention at the center of the relationship between the reader and the text.[110] The author is the authoritative (if not authoritarian) source of textual meaning: "The monologue," Bakhtin asserts, "is finalized and deaf to the other's response, does not expect it and does not acknowledge in it any decisive force. Monologue manages without the other [and] . . . pretends to be the ultimate word."[111] For Barthes, this closing of the text is an inevitable incident of imperial authorship: "To give the text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing."[112] When the work is conceptualized as a closed system of signification, complete unto itself and belonging to the author, opening it up to new meanings through unauthorized modification or dialogic interaction with another work becomes a form of trespass or misappropriation. DiModica turns to copyright law to enforce a monologic model of authorship and the dominion he believes it should entail over both the physical and semiotic boundaries of his work.

V. COPYRIGHTS AND INTERTEXTS

U.S. copyright law has historically been attentive to the intertextuality inherent in artistic production. Courts deciding copyright cases have long recognized that no work is an island unto itself, and all works to a greater or lesser extent are texts in the second degree. An excerpt from *Emerson v. Davies*, decided in 1845, reads like an introduction to the theory of intertextuality:

> No man creates a new language for himself . . . in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. . . . If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in the modern times. . . . Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all known

110. Viewed schematically, the Continental tradition of author's rights comes in two flavors: monism and dualism. *See* Netanel, *supra* note 30, at 21–22. Monism, which underpins German copyright law, is associated with the philosophy of Immanuel Kant. *Id.* at 21. Monists believe that author's rights are exclusively personality rights, not property rights. *Id.* at 20. Dualism, which underpins French copyright law, is associated with the philosophy of Georg Hegel. *Id.* at 21. Dualists believe that author's rights can be split into personality rights and property rights. Dualists view the property component of author's rights as alienable. *Id.* For purposes of this project, the differences between the two strains are less important than what they share, namely the tenet that the artistic work is an extension of authorial personality and therefore cannot be properly understood without reference to authorial intention. *See* KWALL, *supra* note 31, at 40.

111. BAKHTIN, PROBLEMS OF DOSTOEVSKY'S POETICS, *supra* note 24, at 293.

112. BARTHES, *supra* note 34, at 147.

> learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.[113]

The intertextuality inherent in the process of artistic production fundamentally complicates the task of determining the strength and reach of the copyright in any particular work.[114] The Copyright Office registers "works" as unitary things, but in reality, the copyright in any given work is unevenly distributed; it doesn't extend to elements borrowed from other works or the public domain.[115] Accordingly, the infringement analysis demands that elements not original to the author—echoes of other voices and works within the text—be "filtered out," leaving a residue of copyrightable expression.[116]

At the same time, however, the cases recognize that the work as a whole may be more than the sum of its parts.[117] Authorship can lie in the creative assembly of elements—for example, facts—that are not copyrightable in themselves.[118] In *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, the Second Circuit considered the infringement claim of a Tibetan style carpet designer whose design for a "Floral Heriz" carpet was a modified mash-up of two existing designs (hypotexts) from the public domain.[119] The court wrote that

> all creative works draw on the common wellspring that is the public domain. In this pool are not only elemental "raw materials," like colors, letters, descriptive facts, and the catalogue of standard geometric forms, but also earlier works of art that, due to the passage of time or for other reasons, are no longer copyright protected.[120]

Such imported, intertextual elements are not original to the second-degree author and cannot be claimed.[121] After accounting for the significant amount of public domain material in the plaintiff's design, the court in *Tufenkian* nevertheless held that the plaintiff had sufficiently modified the public domain designs to

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113. Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436).

114. Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930) (discussing the difficulty of separating public domain elements in a copyrighted work from those original elements in which the author can legitimately claim authorship and ownership).

115. *See, e.g.*, Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 132 (2d Cir. 2003) ("It is universally true, however, that even works which express enough originality to be protected also contain material that is not original, and hence that may be freely used by other designers.").

116. *See, e.g.*, Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 325 (6th Cir. 2004) ("The canonical statement of law is that *non-protectible elements* must be filtered out.").

117. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (explaining that individual facts are not copyrightable, but sufficiently original compilations of facts are).

118. *Id.*

119. *See Tufenkian Imp.,* 338 F.3d at 129 ("He had composed the Heriz two years earlier by scanning into his computer two public domain images, one of the 'Battilossi' carpet (a Persian antique), the other of the 'Blau' carpet (an Indian Agra, designed by Dorris Blau).").

120. *Id.* at 132.

121. *Id.*

support a copyright in his design (hypertext).[122] Although the plaintiff's copyright was relatively weak, the defendant was still liable for copying what little in the design was demonstrably original to the plaintiff.[123]

Courts recognize, too, that intertextuality can be less intentional and overt, resulting from a kind of cultural osmosis that occurs imperceptibly when we experience works around us that please—and subconsciously inspire—us: "Everything registers somewhere in our memories," Learned Hand wrote in *Fred Fisher v. Dillingham*, "and no one can tell what may evoke it."[124] The defendant in *Fred Fisher*, the famous composer Jerome Kern, testified that he had not consciously copied an eight-note ostinato in the chorus of his song "Kalua" from the plaintiff's song "Dardanella."[125] The court believed him but still found that he had not independently created the sequence.[126] *Fred Fisher* and a long line of "subconscious copying" cases attest that even when artists sincerely believe they are making something original and speaking only in their own voices, they are creating in the second degree, relying on pre-existing works to compose their own.[127] As the Second Circuit said of the defendants in *Sheldon v. Metro-Goldwyn Pictures Corp.*, "they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults."[128]

Judge Hand returned to this point in his canonical opinion in *Nichols v. Universal Pictures Corp.*, observing how hard it was to believe that the plaintiff playwright had not derived her two father characters from stock figures of low comedy.[129] He also noted, without suggesting any intent to copy on the plaintiff's part, that the basic plot of the plaintiff's play was strongly evocative of Shakespeare's *Romeo and Juliet*.[130] Such classics are of course ubiquitous in the culture—the stuff of every high school curriculum and community theater production. Indeed, copyright jurisprudence permits evidence of "widespread dissemination" of an

122. *Id.* at 136.

123. *Id.*

124. Fred Fisher, Inc., v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924).

125. *See id.* at 146 ("The composer swears that he did not use the copyrighted song in any way, so far as he is conscious, but arrived at the accompaniment independently . . . .").

126. *Id.* at 148.

127. *See, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477 (9th Cir. 2000) (holding that Michael Bolton unconsciously copied from a song by the Isley Brothers); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 997 (2d Cir. 1983) (holding that George Harrison unconsciously copied from a song by Ronald Mack).

128. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

129. *See* Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930) ("It is indeed scarcely credible that [the plaintiff] should not have been aware of those stock figures, the low comedy Jew and Irishman. The defendant has not taken from her more than their prototypes have contained for many decades. If so, obviously so to generalize her copyright, would allow her to cover what was not original with her.").

130. *Id.* at 122 ("A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet.").

earlier work to help establish that the author of the later work had access to and copied it, purposefully or not.[131]

Grounded in the premise that intertextuality is intrinsic to acts of authorship, the Copyright Act regulates how artists can use and interact with pre-existing copyrighted works. Copyright law thereby shapes the conditions for cultural production. It also shapes the conditions for dissemination of cultural works, with a focus on the public's interest rather than the author's intentions. Although copyright's exclusive rights under U.S. law are personal to authors, they're not about the personality of the author in a mystical or Romantic sense.[132] The ultimate intended beneficiary of copyright is the public, which enjoys unrestricted access to creative works after the copyrights in them expire.[133] Rewarding authors for their creative labor with a limited right to control the disposition of their works is thus a means to an end and not an end in itself.[134] Consistent with the policy goal of promoting public dissemination, copyrights under U.S. law are freely alienable to encourage a robust market for creative works.[135]

This predominantly utilitarian approach to copyright stands in marked contrast to the Continental natural-rights-based system, which Neil Netanel describes as having "a virulent personalist core of autonomy inalienabilities"[136] that rests on a bedrock belief in the "inseverable personal connection between authors and their creations."[137] It is to this model of copyright authorship that DiModica appeals. To return to Bakhtin, however, the model of authorship encoded in the Copyright Act and propounded in cases going back to *Emerson* is non-monologic; the work of authorship under U.S. law is not conceptualized as "a hermetic and self-sufficient whole" over which the author as progenitor should have full dominion.[138] It is rather, as Barthes wrote, "a tissue of quotations drawn from the innumerable centers of culture."[139]

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131. *See* Loomis v. Cornish, 836 F.3d 991, 997 (9th Cir. 2016) ("A copyright plaintiff . . . may establish a reasonable possibility of access by 'showing that the plaintiff's work has been widely disseminated'. . . . In most cases, the evidence of widespread dissemination centers on the degree of a work's commercial success and on its distribution through radio, television, and other relevant mediums.") (quoting Art Attacks Ink, LLC v. MGA Entm't Inc., 581 F.3d 1138, 1143 (9th Cir. 2009).

132. *See* U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power to grant exclusive rights to authors "to promote the progress of science and useful arts").

133. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.").

134. *See id.*

135. *See* Netanel, *supra* note 30 (asserting that Congress in the 1976 Act embraced a principle of unlimited alienability of copyright).

136. *Id.* at 77.

137. *Id.* at 5–6.

138. BAKHTIN, THE DIALOGIC IMAGINATION, *supra* note 24, at 273.

139. BARTHES, *supra* note 34, at 146.

A. Second-Degree Works and Second-Degree Uses

Presupposing the dialogic nature of artistic production, the Copyright Act defines and protects a range of second-degree works and second-degree uses. These secondary works and uses depend directly and often focally on one or more existing works. Compilations, derivative works, collective works, and supplemental works are statutorily defined[140] classes of texts that, in Kristeva's words, "absorb" and "reply to" other texts in specific ways.[141] Under the Copyright Act, authors of second-degree works can get exclusive rights in them, with the caveat mentioned above that material absorbed from the public domain or from another author lies outside the scope of those rights.[142] Relatedly, copyright in a second-degree work is considered "strong" or "weak," "thick" or "thin" according to how much of the work's content can be regarded as originating with the author.[143] Where the copyright in a work is weak or thin, an accused second-degree work will infringe only if it is virtually identical to the copyrighted work.[144]

Specific second-degree uses defined as exceptions to copyright's exclusivity fall primarily under the rubric of fair use (e.g., news reporting, criticism, and commentary)[145] but are also covered in other places in the statute (e.g., the compulsory license to record "cover" versions of musical works).[146] The compulsory license for musical works is somewhat restrictive, in that it requires the licensor to retain "the basic melody or fundamental character of the work" when making a new arrangement.[147] The doctrine of fair use, by contrast, gives second-degree authors considerably more flexibility in their intertextual engagements.[148]

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140. *See* 17 U.S.C. § 101 (2012) (defining "compilation," "collective work," "derivative work," and "supplemental work").

141. Kristeva, *supra* note 23, at 39.

142. *See* 17 U.S.C. § 103 (1976) ("The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.").

143. *See, e.g.*, Feist Pub'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (holding that the copyright in a factual compilation is thin); Zalewski v. Cicero Builder Dev., Inc., 754 F.3d 95, 107 (2d Cir. 2014) (holding that the copyright in an architectural work containing many elements standard to the colonial style is "very thin"); Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 135 (2d Cir. 2003) (concluding that the copyright in a rug combining the designs of two public domain rugs is thin); Satava v. Lowry, 323 F.3d 805, 812 (9th Cir. 2003) (finding a thin copyright in glass-in-glass sculptures of jellyfish because features of the plaintiff's works were so commonplace to the medium).

144. *See Satava*, 323 F.3d at 812 ("[A] thin copyright . . . protects against only virtually identical copying.").

145. 17 U.S.C. § 107 (1992).

146. 17 U.S.C. § 115 (2010).

147. 17 U.S.C. § 115(a)(2).

148. *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 561 (1985) (explaining that Congress "resisted pressures from special interest groups to create presumptive categories of fair use."); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549, 557 (2008) (pointing out that the statutory limitations on copyright in

Uses beyond those specifically identified in the statute can be fair, with each case evaluated on its own merits.[149] In furtherance of the policy that copyright should promote progress in the arts and sciences, second-degree authors who engage preexisting works in highly transformative ways have relatively wide latitude to do so without permission from right holders—and even against their wishes.[150] Without fair use, "unfaithful continuations" and other antagonistic intertexts would be subject to veto by authors whose aesthetics skew monologic. But as the Supreme Court said in *Fisher v. Dees*, "Copyright law is not designed to stifle critics."[151] Nor is it designed to protect authors from being discouraged or discredited.[152]

Campbell vs. Acuff-Rose Music, Inc., one of the only fair use cases to come before the Supreme Court, tested the scope of fair use in the creation of an unauthorized second-degree work.[153] The dispute centered on a parodic rap hypertext of Roy Orbison's classic rock song "Oh, Pretty Woman."[154] Acuff-Rose Music, which owns the copyright in the composition, sued the members of the band 2 Live Crew for creating and distributing a rap version of the song that reimagined Orbison's dream girl as a streetwalker.[155] When Acuff-Rose denied 2 Live Crew a license to incorporate music and lyrics from the song, the band members decided to proceed anyway, relying on fair use to shield them from liability for infringement.[156] 2 Live Crew's parodic cover of the song, the Court explained, "juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."[157] As Acuff-Rose surely recognized, the juxtaposition does Orbison no favors, reinterpreting the singer's earnest romantic longing as thinly disguised lust.

The Court in *Campbell* held that the band's parodic purpose justified quoting the creative heart of Orbison's song in order to conjure up the original in the minds of listeners.[158] Citing the etymology of the word parody ("a song sung alongside another"), the Court explained that it would be impossible for 2 Live Crew's

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sections 108 through 122 are "highly specific, even regulatory" in their language, whereas fair use is very broad).

149. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994).

150. *See id.* at 579 ("Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright.") (internal citation omitted); *see also* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2619 (2009) ("Fair use defenses are generally successful in transformative and productive use cases as long as the defendants are careful about how much they take in relation to their purpose for doing so.").

151. Fisher v. Dees, 794 F.2d 432, 437 (9th Cir. 1986).

152. *See id.* at 437–38 ("'Destructive' parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author.").

153. *See Campbell*, 510 U.S. 569.

154. *Id.* at 571.

155. *Id.* at 582.

156. *Id.* at 572–73.

157. *Id.* at 583.

158. *Id.* at 588.

audience to recognize the band's irreverent allusion to the original if the rap version didn't directly quote the most recognizable elements of Orbison's composition.[159] Justice Souter's opinion *Campbell* is fully attentive to the generic requirements of parody—a literary undertaking that Genette defines as "the distortion of a text by means of . . . transformation."[160]

The Sixth Circuit panel in *Campbell* concluded that 2 Live Crew's profane take on "Oh, Pretty Woman" wasn't fair use because it presumptively harmed Acuff-Rose's potential market for licensed derivative works.[161] Harm to markets for derivatives is a factor in the fair use analysis because the Copyright Act gives an author the exclusive right to prepare derivative works, which the statute defines as secondary works that "recast, transform, or modify" the copyrighted work in some way.[162] The Court made clear in *Campbell*, however, that authorial control over derivatives does not extend to transformative works that right holders would be inclined to censor for reputational or other reasons.[163] The *Campbell* Court thus interpreted the doctrine of fair use to function as a limit on the scope of the derivative work right where a second-degree author intentionally distorts a copyrighted work for the purpose of criticizing it. Given broad scope, the derivative work right could be a potent weapon in the hands of the monologic author, but the ultimate teaching of *Campbell* is that fair use protects second-degree authors who turn existing works against themselves.

Suntrust Bank v. Houghton Mifflin Co.[164] is a prime example of a post-*Campbell* case in which the doctrine of fair use shielded the creator of an unfaithful continuation from a claim of copyright infringement.[165] The plaintiff was the trustee of Margaret Mitchell's estate, which held the copyright in her best-selling novel *Gone with the Wind* (*GWTW*).[166] The defendant was the publisher of Alice Randall's *The Wind Done Gone* (*TWDG*).[167] Randall wrote her novel, which borrowed heavily from *GWTW*, to deconstruct and criticize the racialized romanticism of Mitchell's novel.[168] After rehearsing a long litany of distinctive elements that Randall imported into her work from Mitchell's novel, the court described *TWDG* as "an encapsulation of [*GWTW*] [that] exploit[s] its copyrighted characters, story lines, and settings as the palette for the new story."[169] There was no mistaking that

159. *Id.* at 580.

160. GENETTE, *supra* note 25, at 25.

161. *Campbell*, 510 U.S. at 590.

162. *See* 17 U.S.C. § 101 (2012) (defining "derivative work" to include "any other form in which a work may be recast, transformed, or adapted").

163. *See Campbell*, 510 U.S. at 597 (explaining that fair use "protects works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism").

164. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257 (11th Cir. 2001).

165. *See id.* at 1277 (vacating the district court's preliminary injunction for Suntrust).

166. *Id.* at 1259.

167. *Id.*

168. *See id.* ("Alice Randall . . . persuasively claims that her novel is a critique of *GWTW*'s depiction of slavery and the Civil-War era American South.").

169. *Id.* at 1267.

Randall's work took a significant amount of protected expression from Mitchell's.[170] And there was no mistaking that Mitchell's trustees did not like the use to which that borrowed expression had been put.[171]

In much the same way that Fearless Girl intrudes upon the semiotic solitude of Charging Bull and asks viewers to see DiModica's sculpture on Visbal's terms, Randall's novel contests the racial and cultural politics of *GWTW*. *TWDG* opens up *GWTW* to a new (and unwelcome) iteration. Houghton Mifflin characterized Randall's work as an intertextual "inversion" of Mitchell's hypotext:

> Houghton Mifflin argues that . . . [Randall's] retelling of the story is an inversion of *GWTW:* the characters, places, and events lifted from *GWTW* are often cast in a different light, strong characters from the original are depicted as weak (and vice-versa) in the new work, the institutions and values romanticized in *GWTW* are exposed as corrupt in *TWDG*.[172]

The fact that Randall inverted Mitchell's story in the retelling could not prevent a finding that the two works were substantially similar for purposes of the infringement analysis.[173] Much in Randall's work was new, but much was also borrowed.[174] Had the court's decision in the case turned solely on the question of substantial similarity, Houghton Mifflin would have been liable for infringement.[175] The same was true of 2 Live Crew's parody of "Oh, Pretty Woman."[176]

Fair use, however, ultimately won the day for Randall and her publisher, as it had for 2 Live Crew.[177] In the fair use analysis, Randall's confrontational dialogism made all the difference. When analyzing the purpose and character of Randall's use, the court relied on the Supreme Court's decision in *Campbell*, which elevated the importance of intertextual transformation relative to other factors in the fair use analysis.[178] The court emphasized Randall's hostility to the racial ideology underlying Mitchell's vision of the pre-Civil War south.[179] Randall's purpose, the

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170. *See id.* ("Our own review of the two works reveals substantial use of *GWTW*.").

171. *See id.* at 1259 (stating that Suntrust sought a temporary restraining order and a preliminary injunction to block distribution of Randall's book).

172. *Id.* at 1267.

173. *See id.* ("While we agree with Houghton Mifflin that the characters, settings, and plot taken from *GWTW* are vested with a new significance when viewed through the character of Cynara in *TWDG,* it does not change the fact that they are the very same copyrighted characters, settings, and plot.").

174. *See id.* at 1270 (explaining that the last half of Randall's book tells "a completely new story," while the first part "flips" Mitchell's story by telling it from Cynara's perspective).

175. *Id.* at 1267 (rejecting Houghton Mifflin's argument that there was no substantial similarity between the two works).

176. *See Campbell*, 510 U.S. at 574 ("It is uncontested here that 2 Live Crew's song would be an infringement of Acuff–Rose's rights in "Oh, Pretty Woman" . . . but for a finding of fair use through parody.").

177. *See Suntrust*, 268 F.3d at 1277 ("Moreover, under the present state of the record, it appears that a viable fair use defense is available.").

178. *See Campbell*, 510 U.S. at 579 ("[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.").

179. *See Suntrust*, 268 F.3d at 1270 (referring to Randall's work as an "attack on *GWTW*").

court wrote, was to "rebut and destroy . . . the mythology of *GWTW* [and to] explode the romantic, idealized portrait of the antebellum South."[180] The theme of intertextual inversion runs throughout the court's discussion of fair use in the case.[181] The opinion describes Randall's protagonist, Cynara, as "the voice of Randall's inversion of *GWTW*" and Cynara's fictional diary as a parodic narrative that "flips *GWTW*'s traditional race roles."[182] In this and other fair use cases, the law's solicitude for transformative intertextuality is linked directly to the copyright system's underlying goals of promoting the public interest and progress in the arts.[183]

Another important factor in the court's decision was evidence in the case that Suntrust was using the copyright as a way of suppressing sequels containing speech with which Mitchell would have disagreed.[184] The trustees argued that they were responsible for using the copyright to ensure "the appropriate cultivation of the franchise."[185] That "cultivation" included, for example, requiring authors of licensed derivative works to make no references to miscegenation or homosexuality.[186] Suntrust's experts in the case testified that distribution of Randall's work would "seriously taint the original" and prevent the trustees from "'protect[ing] the reputation' of their copyright."[187] In a separate special concurrence, Judge Marcus wrote to highlight the importance of fair use in preventing authors from using copyright to suppress speech intended to criticize them or their worldviews: "Suntrust may be vigilant of [*GWTW*'s] public image—but it may not use copyright to shield [*GWTW*] from unwelcome comments, a policy that would extend intellectual property protection 'into the precincts of censorship.'"[188]

Supreme Court cases similarly describe fair use as facilitating the production of second-degree works that copyright holders wouldn't necessarily license. Fair use, the Court has said, creates "breathing space" for secondary uses[189] and functions as "a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good."[190]

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180. *Id.*

181. *See, e.g.*, *id.* at 1270 (describing Randall's work as an "inversion" of *GWTW*).

182. *Id.*

183. *See Campbell*, 510 U.S. at 579 ("[T]he goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works."); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 115 n.3 (2d Cir. 1998) ("Because the social good is served by increasing the supply of criticism—and thus, potentially, of truth—creators of original works cannot be given the power to block dissemination of critical derivative works.").

184. *See Suntrust*, 268 F.3d at 1282 (discussing the testimony of Mitchell licensee Pat Conroy).

185. *Id.* at 1276.

186. *See id.* at 1282 (explaining licensing restrictions on the use of Mitchell's works).

187. *Id.* at 1280.

188. *Id.* at 1283 (Marcus, J., specially concurring).

189. *Campbell*, 510 U.S. at 579 (describing fair use as a "guarantee of breathing space within the confines of copyright").

190. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 478 (1984).

By specifically identifying criticism and commentary as examples of protected second-degree uses, the Copyright Act discourages the use of copyright to enforce authorial monologism in cases involving unfaithful continuations and other disputatious hypertexts. These types of second-degree uses are not protected categorically under the fair use standard—none are.[191] But the statute puts a thumb on the scale in their favor, provided that the scope of intertextual borrowing is proportional to the critical work that second-degree authors set out to do.[192] The court in Randall's case discounted the harm that could come to Mitchell's reputation from publication of a blasphemous sequel: "Destructive parodies play an important role in social and literary criticism and thus merit protection even though they may discourage or discredit an original author."[193] Beyond the very narrow context of moral rights under the Visual Artists Rights Act (VARA), which will be discussed in Part VI below, copyright is not a tool for managing an author's reputation.[194]

There can be little doubt in light of Suntrust's practice of using the copyright in *GWTW* to manage Mitchell's authorial legacy that the trustees would never have granted a license for a hypertext like *TWDG*. Randall would have been liable as an infringer had her unfaithful continuation of Mitchell's work not been defensible as fair use. She and other second-degree authors owe their freedom to recycle and rebut protected elements of other authors' work to the American copyright system's embrace of a plastic fair use doctrine that views productive and transformative second-degree uses as furthering the constitutional goal of progress in the arts.[195]

The flexibility of the American conception of fair use is difficult (some might say impossible) to reconcile with the narrower and more categorical approach to exceptions and limitations in Continental copyright law.[196] That tension is no

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191. *See Campbell*, 510 U.S. at 577 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.").

192. *See* Samuelson, *supra* note 150, at 2544 ("Most uses in the free speech/expression cluster [i.e., those involving criticism, commentary, and news reporting] are fair unless the second author has taken too much, undermined a core licensing market, or engaged in wrongful acts that undermined the claim of fair use.").

193. *Suntrust*, 268 F.3d at 1283 (quoting Fisher v. Dees, 794 F.2d 432, 438 (9th Cir. 1986)).

194. *See* Garcia v. Google, Inc., 786 F.3d 733, 745 (9th Cir. 2015) ("Privacy laws, not copyright, may offer remedies tailored to Garcia's personal and reputational harms."); Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 116 n.7 (2d Cir. 1998) (stating that damage to a photographer's reputation vis-a-vis potential celebrity clients was not cognizable as a copyright harm); *cf.* Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1343 (2011) (describing copyright as an area of the law that is not intended to provide redress for reputational harms but is often used for that purpose).

195. *See generally* Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815 (2015) (discussing the evolution of the doctrine of fair use and the increased focus over time on the transformativeness of the disputed secondary use).

196. *See* P. Bernt Hugenholtz, *Flexible Copyright: Can the EU Author's Rights Accommodate Fair Use?*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS 276 (Ruth L. Okediji ed., 2017) (observing that "fair use in Europe is often regarded as an oxymoron or even a taboo in classic author's rights doctrine"); Jane C. Ginsburg, *Letter from the U.S.: Exclusive Rights, Exceptions, and Uncertain Compliance with International Norms—Part II (Fair Use)* (Columbia Law & Econ., Working Paper No. 503, 2014), https://ssrn.com/abstract=2539178 [https://perma.cc/XQ8M-

accident; in Europe, copyright law is not required to accommodate the First Amendment's guarantee of freedom of expression.[197] U.S. courts have repeatedly described the fair use doctrine as a First Amendment safety valve in copyright law.[198] U.S. copyright holders who look with envy on the control given to authors in the Continental copyright tradition view a broad scope for fair use as a bug in our domestic system.[199] Given the utilitarian underpinnings of the U.S. system, however, fair use is much more accurately described as a feature.

VI. BULLISH ON INTERTEXTS: DIMODICA'S CLAIMS ON THE MERITS

In his demand letter to the City of New York, DiModica accused State Street of violating his moral right of integrity under section 106A of the Copyright Act—VARA—and his right to prepare derivative works under section 106(2).[200] Evaluating his claims on their merits reveals the ways in which the U.S. copyright system accommodates the confrontational dialogism that Fearless Girl represents. Unlike Continental author's rights laws, which codify a form of aesthetic monologism through strong moral rights protections and narrowly drawn exceptions, the U.S. copyright system gives unfaithful continuators like Visbal leeway to challenge the symbolism of the hypotexts they engage.[201]

EAXZ] (suggesting that the current state of fair use law in the United States is incompatible with our international treaty obligations under the Berne Convention).

197. *Cf. Suntrust*, 268 F.3d at 1263 ("The Copyright Clause and the First Amendment, while intuitively in conflict, were drafted to work together to prevent censorship.").

198. *See* Golan v. Holder, 565 U.S. 302, 305 (2012) (describing fair use as a "speech-protective safeguard"); Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) (describing fair use as a "built-in First Amendment accommodation"); *see also* Pierre N. Leval, *Campbell as Fair Use Blueprint*?, 90 WASH. L. REV. 597, 614 (2015) (stating that "fair use serves as the First Amendment's agent within the framework of copyright").

199. *Cf.* Justin Hughes, *Fair Use and Its Politics—at Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 196, at 234 (exploring fair use as a site of ideological struggle between high protectionists, who prefer a narrow, rule-based approach to copyright limitations and exceptions, and low protectionists, who embrace the openness of the fair use standard).

200. DiModica Demand Letter, *supra* note 14, at 3.

201. *Cf.* Lior Zemer, *Multivoiced Authors*, 35 CARDOZO ARTS & ENT. L.J. 383, 401 (2017) (arguing that a copyright system that "treats authors as the main source of creative expressions Holder, 565 U.S. 302, 305 (2012) (describing fair use as a "speech-protective safeguard"); Eldred v. Ashcroft, 537 U.S. 186, 190 (2003) (describing fair use as a "built-in First Amendment accommodation"); *see also* Pierre N. Leval, *Campbell as Fair Use Blueprint*?, 90 WASH. L. REV. 597, 614 (2015) (stating that "fair use serves as the First Amendment's agent within the framework of copyright").

201. *Cf.* Justin Hughes, *Fair Use and Its Politics—at Home and Abroad*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 196, at 234 (exploring fair use as a site of ideological struggle between high protectionists, who prefer a narrow, rule-based approach to copyright limitations and exceptions, and low protectionists, who embrace the openness of the fair use standard).

201. DiModica Demand Letter, *supra* note 14, at 3.

" risks "institutionalizing a 'power aspect' according to which authors . . . limit newcomers from entering the market of creativity . . . lead[ing] [to] the monologization . . . of . . . our creative environment").

A. Fearless Girl and the Right of Integrity Under VARA

Through VARA, the Copyright Act grants moral rights of attribution and integrity for a narrow range of works produced in single copies or limited editions, including sculptures like Charging Bull and Fearless Girl.[202] Under VARA, the right of integrity is defined as the author's right to prevent others from intentionally distorting, mutilating, or otherwise modifying a covered work in a way that would be prejudicial to the artist's reputation.[203] To the extent that the right of integrity allows an artist to control second-degree uses of a protected work, it is a potential regulator of intertextuality as well as a limitation on what buyers can do with artwork they have purchased.[204]

Antipathy to moral rights in the United States has a long pedigree.[205] Writing in 1940 in the *Harvard Law Review*, Martin Roeder used the word "violent" to describe domestic opposition to the adoption of moral rights, which the Berne Convention requires for membership.[206] When Congress finally passed the Berne Implementation Act of 1988, ending 100 years of U.S. resistance to joining the Berne Union, the Senate report expressly rejected moral rights doctrine.[207] Before the enactment of VARA in 1990, the Copyright Act did not protect moral rights as such, although the right of public display and the right to prepare derivative works are sometimes discussed as limited doctrinal proxies.[208] The United States putatively complied with its Berne obligation to protect the rights of attribution and integrity

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202. *See* 17 U.S.C. § 101 (2012) (defining "work of visual art" to include "sculpture, existing in a single copy, . . . or . . . in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author . . . ."); 17 U.S.C. § 106A(a)(1)–(2) (providing for the right of attribution); 17 U.S.C. § 106A(a)(3) (providing for the right of integrity).

203. *See* 17 U.S.C. § 106A(a)(3)(A) (giving the author of a work of visual art, subject to specified limitations, the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right"). VARA also includes a prohibition on "any destruction of a work of recognized stature." 17 U.S.C. § 106A(a)(3)(B).

204. *Cf.* Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95, 100 (1997) (describing moral rights as a continuing negative servitude on an art object).

205. *See* Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 82–83 (2d. Cir. 1995) (discussing historical resistance to moral rights doctrine in the federal courts and in Congress).

206. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554, 557 (1940).

207. S. REP. NO. 100-352, at 8 (1988).

208. *See* Hansmann & Santilli, *supra* note 204, at 112–18 (discussing the public display right and the derivative work right as doctrinal alternatives to the right of integrity and arguing that passage of VARA foreclosed doctrinal evolution that might have expanded the scope of those rights). Notably, however, the first sale doctrine in section 109 of the Copyright Act prevents authors from exercising the public display right to control how copies of their works are displayed after sale. *See* 17 U.S.C. § 109(c) ("Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."). For discussion of the derivative work right as a potential proxy for the right of integrity, see *infra* Section VI.B.

through a patchwork of causes of action in other areas of the law, including defamation, privacy, and unfair competition.[209]

Of the various moral rights recognized in Europe, it was the right of integrity, Roeder wrote, that "aroused the most bitter antagonism" in the United States.[210] In France, that right included, and still includes, a specific prohibition against excessive criticism of an author's work and a blanket prohibition against "all other injuries to the creator's personality"—without regard to any public perception of harm to an author's honor or reputation.[211] It is easy to understand why domestic opposition to the right of integrity was so stiff. A personality right so broadly and subjectively defined conflicts openly with the expressive values embedded in the U.S. copyright system through the doctrine of fair use, which operates as a strong shield for criticism and commentary directed at creative works and their authors.[212] The judicial opinions in *Campbell* and *Suntrust* forcefully communicate those values. In addition, to the extent that the right of integrity is treated in other jurisdictions as completely or partially inalienable, that policy conflicts with the economic-rights orientation of American copyright, which favors vigorous commerce in cultural works as a means of promoting the dissemination of knowledge.[213] A broadly defined right of integrity supports a model of monologic authorship with a focus on protecting authorial personality that is not just foreign but also antithetical to fundamental U.S. copyright values.[214] Consistent with this insight, a panel of Seventh Circuit judges once described VARA as "the stepchild of our copyright laws."[215]

In VARA's legislative history, the House Judiciary Committee took pains to downplay the tension between the American view of copyright as a means of disseminating creative works for the public's benefit and the Continental view of copyright as a means of protecting such works from what Roeder termed "the

209. RALPH E. LERNER & JUDITH BRESLER, ART LAW 1075–76 (2012).

210. Roeder, *supra* note 206, at 565.

211. *See id.* at 556 (citing French cases from the late nineteenth and early twentieth centuries); Cyrill Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT'L L.J. 353, 364–65 (2006) (explaining that France and Germany go beyond the requirements for protecting moral rights in Article 6*bis* of the Berne Convention by decoupling the prohibition on modification from reputational harm or detriment to the artist).

212. The mismatch is captured in Ralph E. Lerner and Judith Bresler's characterization of moral rights as a "Procrustean imposition . . . on the economic underpinnings of U.S. intellectual property law." LERNER & BRESLER, *supra* note 209, at 1113.

213. *See* Netanel, *supra* note 30, at 48–60 (detailing the legal and practical limits on alienability under French and German law).

214. Roberta Kwall argues that the parsimonious protection for moral rights under U.S. law is "out of step with global norms." KWALL, *supra* note 31, at xvi. To the extent that that is true, the difference goes right to the heart of copyright's constitutional justification, which is primarily to facilitate the creation and dissemination of creative works and only secondarily to protect the interests of authors. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) ("By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

215. Martin v. City of Indianapolis, 192 F.3d 608, 611 (7th Cir. 1999).

ravages of public use."[216] The committee's report on VARA emphasizes the "extreme lengths" to which VARA's drafters went "to very narrowly define the works of art that will be covered."[217] With respect to the scope of the rights of attribution and integrity in VARA, the committee assured readers that the statute's protections were tailored to "in no way interfere with ordinary commerce in works of art by art dealers, auction houses, and others similarly situated."[218] VARA protects artists, the report states, "without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system."[219] In addition, the report notes, VARA rights, like all other rights under the Copyright Act, are subject to the safety valve of fair use.[220]

Moral rights under U.S. law are thus very limited in comparison with their French and German counterparts.[221] For example, VARA's rights of attribution and integrity may be waived by creators of covered works,[222] and such rights never vest as an initial matter in creators of works made for hire.[223] Of particular relevance in DiModica's case, the right of integrity under VARA is limited to the prevention of modifications that compromise the *physical* integrity of a copy of the protected work.[224] To distinguish an actionable modification from a non-actionable one, the committee's report on VARA contrasts the act of putting Christmas decorations on a sculpture (a non-actionable modification) with that of cutting a Picasso print into a hundred pieces to increase resale value (an actionable modification).[225] In *MASS MoCA v. Büchel*, the First Circuit held that exhibiting a work in an unfinished state and partially draping it with tarps caused the work to "look different" but did not

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216. Roeder, *supra* note 206, at 557.

217. H.R. REP. NO. 101–514, at 11 (1990). The definition of "work of visual art" expressly excludes "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title." 17 U.S.C. § 101 (2012).

218. H.R. REP. NO. 101–514, at 13 (1990).

219. *Id.* at 10.

220. *Id.* at 13.

221. *See* Netanel, *supra* note 30, at 26 (stating that "United States moral right analogues fall short of the more stringent French and German provisions"). Proponents of strong domestic moral rights have suggested that VARA's protections are insufficient to comply with international treaty obligations under the Berne Convention. *See* KWALL, *supra* note 31, at 37 (stating that "we may not be in compliance with our obligations under the Berne Convention"); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUSTON L. REV. 263, 286 (2004) (suggesting that the right of attribution under VARA is not sufficiently generalized for Berne compliance).

222. *See* 17 U.S.C. § 106A(e) ("The rights conferred by subsection (a) may not be transferred, but those rights may be waived if the author expressly agrees to such waiver in a written instrument signed by the author.").

223. *See* 17 U.S.C. § 101 ("A work of visual art does not include . . . any work made for hire . . . .").

224. *See* LERNER & BRESLER, *supra* note 209, at 1091 (asserting that distorted depictions of a work are not actionable if the work itself remains intact).

225. H.R. REP. NO. 101–514, at 15.

amount to intentional distortion or mutilation.[226] In *English v. BFC&R East 11th St. LLC*, a district court in New York held that obstructing the view of a mural by constructing a building on an adjoining lot was not actionable as mutilation or destruction under VARA because the mural would not be physically damaged or altered in any way by the construction.[227] In sum, VARA's right of integrity protects artists only against physical harm to copies of their works.

Roberta Kwall conceptualizes the right of integrity much more broadly—as functioning to "safeguard the author's meaning and message," which she refers to as a work's "textual integrity."[228] Conceived in this way, the right of integrity is about something more than protecting the work as a physical object; it is a way to control the work as a semiotic object, which is precisely what DiModica wants to do—and believes he can do—by cutting off the intertextual dialogue between Fearless Girl and Charging Bull. My own view of this belief comports with Amy Adler's: it is rooted in a naïve theory of interpretation that denies and devalues the varied meanings that readers, viewers, and listeners bring to their experience and understanding of creative works.[229] A right of integrity so broadly defined also seems impossible to enforce for works like Charging Bull that are installed in busy, open, public spaces. Lior Zemer argues that "[u]rban art, as an engagement with the public, creates a bridge between artists and unsolicited viewers—a continuous invitation to converse with the work."[230] Attempting to silence or limit that conversation in the middle of one of the world's noisiest and most dynamic cities is bound to be a losing battle.

Both legislative history and litigated cases make it clear that VARA's right of integrity is not drawn broadly enough to protect what Kwall defines as textual integrity.[231] It does not give artists the right to prevent so-called contextual modifications—defined as those that "leave the substance of the work intact, but change the appearance or perception of the work by putting it into a context that differs from the one originally intended or envisioned by the author."[232] This limitation, known as the public presentation exception, was written into VARA for the purpose of protecting the "normal discretion" of museums, galleries, auctioneers, and other participants in the art market "to light, frame, and place works of art."[233] Specifically, the statute provides that "[t]he modification of a work

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226. Mass. Museum of Contemporary Art Found., Inc. v. Büchel, 593 F.3d 38, 61 (1st Cir. 2010).

227. English v. BFC & R E. 11th St. LLC, No. 97 CIV. 7446 (HB), 1997 WL 746444, at *6 (S.D.N.Y. Dec. 3, 1997), *aff'd sub nom.* English v. BFC Partners, 198 F.3d 233 (2d Cir. 1999).

228. KWALL, *supra* note 31, at 1, 6.

229. Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 277–78 (2009).

230. Lior Zemer, *Dialogical Transactions*, 95 OR. L. REV. 141, 214 (2016).

231. *See Büchel*, 593 F.3d at 61; H.R. REP. NO. 101–514, at 15 (1990); LERNER & BRESLER, *supra* note 209, at 1091 (asserting that distorted depictions of a work are not actionable if the work itself remains intact).

232. Rigamonti, *supra* note 211, at 365.

233. H.R. REP. NO. 101–514, at 17.

of visual art which is the result of . . . the public presentation, including lighting and placement, of the work is not [actionable] unless the modification is caused by gross negligence."[234] The public presentation exception is what permits museum curators to assemble collections and mount exhibits featuring the works of multiple artists displayed in close proximity to one another. Adler argues that curators performing these functions are themselves artists whose creative vision should not be limited by the supposed intentions of the artists whose works they display.[235]

DiModica alleges in his demand letter that the placement of Fearless Girl violates his right of integrity by intentionally distorting the meaning and message of Charging Bull.[236] Given VARA's focus on physical modifications, however, and its inclusion of the public presentation exception, DiModica's claim is . . . bull. To the extent that Fearless Girl's presence in Bowling Green Park modifies the meaning of Charging Bull for either DiModica himself or members of the public, that modification in no way violates DiModica's right of integrity under VARA. If the right of integrity under VARA were broad enough to protect Kwall's conception of "textual integrity," DiModica would have a stronger case. Similarly, if DiModica were bringing his claim abroad, where simply reframing a work can amount to an actionable moral rights violation, he might prevail in his demand for a court order forcing the removal of Fearless Girl.[237] As it is, U.S. law does not extend protection to the contextual integrity of works covered under VARA. In that regard, it is protective of second-degree authors like Visbal who confront and recontextualize the work of predecessors, modifying the meaning of that work profoundly but from an arm's length.

B. Fearless Girl and the Right to Prepare Derivative Works

The exclusive right under the Copyright Act that most directly limits the production of second-degree texts in the form of continuations and sequels is the right to prepare derivative works. The derivative work right is doctrinally adjacent to the right of integrity in that it gives authors the right to control subsequent

234. 17 U.S.C. § 106A(c)(2) (2012).

235. *See* Adler, *supra* note 229, at 278 ("I propose that the curator (along with the 'original' artist) is always an author of the art she displays. From the initial act of choosing to place an object in an art setting, to deciding on its lighting or placement, all curatorial choices change the meaning of a work.").

236. *See* DiModica Demand Letter, *supra* note 14, at 3. DiModica created Charging Bull before VARA took effect in 1990, but the statute covers works created before its effective date for which title had not been transferred from the author as of the effective date. *See* 17 U.S.C. § 106A(d)(2) ("With respect to works of visual art created before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, but title to which has not, as of such effective date, been transferred from the author, the rights conferred by subsection (a) shall be coextensive with, and shall expire at the same time as, the rights conferred by section 106.").

237. *See* Rigamonti, *supra* note 211, at 365–66 (citing a German high court case in which adding customized frames to paintings that extended the patterns in them was held to violate the right of integrity).

authors' adaptations and transformations of their works.[238] The Copyright Act of 1976 defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[239] The derivative work right was not new to the Copyright Act of 1976, but its scope was considerably narrower under the Copyright Acts of 1870 and 1909.[240] Paul Goldstein attributes the expansion over time to the growth of the film and television industries, whose profitability is largely driven by franchises and merchandising.[241]

The preparation of a typical derivative work involves the reproduction or performance of a substantial amount of material from the preexisting work on which the derivative is based.[242] Based on this fact, Nimmer's treatise takes the position that the derivative work right is redundant; anyone who infringes it simultaneously infringes either the right of reproduction or the right of public performance.[243] If Nimmer is correct in his understanding of the interrelationship between the derivative work right and the rights of reproduction and performance, then DiModica's derivative work claim must fail. As discussed above, Visbal copied nothing from Charging Bull when she created Fearless Girl, so there is no infringement of the reproduction right connected to Fearless Girl's presence.[244] And she can't have infringed DiModica's right of public performance, because there is no such right for sculptural works.[245] By Nimmer's logic, Visbal and State Street did nothing that could be construed as creating a derivative work "based upon" Charging Bull.[246]

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238. *See id.* at 368–69 (discussing how moral rights can sometimes be vindicated through the assertion of economic rights).

239. 17 U.S.C. § 101.

240. *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 211–15 (1983) (explaining the evolution of the derivative work right under U.S. law).

241. *Id.* at 209.

242. *See, e.g.*, Klinger v. Conan Doyle Estate, Ltd., 988 F. Supp. 2d 879, 892 (N.D. Ill. 2013), *aff'd*, 755 F.3d 496 (7th Cir. 2014) (holding that ten short stories incorporating the characters of Sherlock Holmes and Dr. Watson are derivative works of Sir Arthur Conan Doyle's first Sherlock Holmes story); Salinger v. Colting, 641 F. Supp. 2d 250, 267 (S.D.N.Y. 2009), *vacated on other grounds*, 607 F.3d 68 (2d Cir. 2010) (holding that a novel that continues the story of *Catcher in the Rye* and its protagonist, Holden Caulfield, is a derivative work).

243. *See* 2 NIMMER ON COPYRIGHT § 8.09 (2017) (describing the adaptation right as "superfluous").

244. *See supra* Part II.

245. *See* 17 U.S.C. § 106(4) (2012) (providing an exclusive right to publicly perform "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works").

246. *See* NIMMER, *supra* note 243, § 8.09 ("[I]f the latter work does not incorporate enough of the pre-existing work to constitute an infringement of either the reproduction right or of the performance right, then it likewise will not infringe the right to make derivative works because no derivative work will have resulted.").

There are, however, some cases involving derivative work claims that implicate the display right rather than the reproduction and performance rights. The plaintiffs in these cases alleged that the defendants created infringing derivative works by altering the appearance of their copyrighted works through acts or processes of visual incorporation that did not involve copying. Three of these cases involved mounting and laminating art prints onto tiles for sale as wall plaques.[247] In *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, the Ninth Circuit found an infringement of the right to prepare derivative works where the defendant removed selected pages from a coffee table book of Patrick Nagel prints, mounted the prints individually onto ceramic tiles, and sold the tiles at retail.[248] The defendant in the case argued that the preparation of a derivative work must entail reproduction of the underlying work.[249] The court disagreed, holding that the defendant "recast or transformed the individual images by incorporating them into its tile-preparing process" and thereby created an infringing derivative work without making a copy.[250] In *Munoz v. Albuquerque A.R.T. Co.*, a later, unpublished opinion, the Ninth Circuit reached the same result on the same facts without any further analysis.[251]

In *Lee v. A.R.T. Co.*, however, the Seventh Circuit reached the opposite conclusion about the putatively transformative nature of the defendant's tile mounting process.[252] "No one," the court wrote, "believes that a museum violates § 106(2) every time it changes the frame of a painting."[253] That is true, the court explained, "although the choice of frame or glazing affects the impression the art conveys."[254] The Seventh Circuit rejected the Ninth Circuit's view in *Mirage Editions* that mounting a work on a tile transforms or changes it in any actionable way.[255] It declined to interpret the scope of the derivative work right to give artists control over "*any* alteration of a work, however slight."[256] To give artists that degree of control, Judge Easterbrook wrote, would impermissibly expand the scope of authors' moral rights under U.S. law beyond the narrow scope that Congress

247. Mirage Editions, Inc. v. Albuquerque A.R.T. Co., 856 F.2d 1341, 1342–43 (9th Cir. 1988) (finding a violation of the right to prepare derivative works); Munoz v. Albuquerque A.R.T. Co., 38 F.3d 1218 (9th Cir. 1994) (same); Lee v. A.R.T. Co., 125 F.3d 580 (7th Cir. 1997) (finding no violation).

248. *Mirage Editions*, 856 F.2d at 1342.

249. *See id.* at 1343 ("Appellant's contention that since it has not engaged in 'art reproduction' and therefore its tiles are not derivative works is not fully dispositive of this issue.").

250. *Id.* at 1344.

251. *Muñoz*, 38 F.3d at 1218 ("A.R.T. does not dispute it used the same tiling process disputed in *Mirage Editions*. Under the holding in *Mirage Editions*, the ceramic tiles incorporating the Rie Muñoz prints clearly constitute a derivative work. Therefore, the district court did not err in concluding the tiles infringed on Muñoz's copyrights pursuant to 17 U.S.C. § 106(2).").

252. *See Lee*, 125 F.3d at 583 (declining to follow *Muñoz* and *Mirage Editions*).

253. *Id.* at 581.

254. *Id.*

255. *Id.* at 582 ("Yet the copyrighted note cards and lithographs were not 'transformed' in the slightest. The art was bonded to a slab of ceramic, but it was not changed in the process. It still depicts exactly what it depicted when it left Lee's studio.").

256. *Id.*

intended when it enacted VARA.[257] As discussed in Part VI.A above, the right of integrity under VARA does not protect the contextual integrity of a work or allow an artist to control her work's public presentation. In these respects, VARA can be read—as the Seventh Circuit read it—to implicitly limit the reach of the derivative work right.

Although the panel in *Lee* recognized that its decision created a circuit split with *Mirage Editions*, the Seventh Circuit did not elect to rehear the case *en banc*, and the issue has never come before the Supreme Court for resolution.[258] As between the two approaches, the Seventh Circuit's reasoning better serves the overall goals of copyright because it considers the very real potential for conflict between a broad application of the derivative work right (i.e., one that would allow artists to control non-reproductive, physically incorporative uses) and the purposefully narrow scope of VARA's right of integrity. Henry Hansmann and Marina Santilli have argued that VARA's enactment effectively foreclosed the development of doctrinal alternatives to moral rights under U.S. law, including a more expansively defined derivative work right.[259] The Seventh Circuit's decision in *Lee* supports that argument.

The Ninth Circuit's opinion in *Mirage Editions* predated VARA, so the court in that case could not have considered the interaction between VARA and the derivative work right with respect to the prevention of what artists take to be prejudicial distortions of their works. The court could have revisited its reasoning from *Mirage Editions* in *Muñoz*, which post-dated VARA, but it elected not to. However, in the time between *Mirage Editions* and *Muñoz*, another panel of the Ninth Circuit considered the scope of the derivative work right in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*[260]

Nintendo sued Galoob over the Game Genie, a video game enhancement device for use with Nintendo's cartridge-based TV gaming system.[261] The Game Genie allowed the player of a Nintendo game to manipulate up to three features of the game during the course of play.[262] For example, the Game Genie could increase the number of lives of the player's character, increase the character's speed, and allow the character to float above obstacles.[263] The player controlled the changes made by the Game Genie by entering codes provided in a programming manual and code book provided by Galoob.[264] The court held that the Game Genie did not create derivative works of Nintendo's copyrighted video game displays, because the

257. *Id.* at 583 ("It would not be sound to use § 106(2) to provide artists with exclusive rights deliberately omitted from the Visual Artists Rights Act.").

258. *Id.* at 583 n.2 ("Because this opinion creates a conflict among the circuits, it has been circulated to all judges in active service. *See* Circuit Rule 40(e). No judge requested a hearing en banc.").

259. *See* Hansmann & Santilli, *supra* note 204, at 112–16 (discussing doctrinal alternatives to the right of integrity).

260. Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992).

261. *Id.* at 967.

262. *Id.*

263. *Id.*

264. *Id.*

preparation of a derivative work requires the physical incorporation of portions of the plaintiff's work.[265] The fact that the use of the Game Genie altered the player's experience of the game and the appearance of the plaintiff's audiovisual displays did not lead the court to find a violation of the derivative work right.[266] The court analogized the Game Genie to a kaleidoscope, which changes the appearance of a protected artwork work seen through it but does not thereby create a derivative work.[267]

A New York district court in *1-800Contacts, Inc. v. WhenU.com* reached the same conclusion about the alteration of the appearance of a computer display.[268] The case involved pop-up advertisements displayed over web pages in Internet browsers.[269] Relying on the Seventh Circuit's decision in *Lee*, the court in *1-800Contacts* held that changing the appearance of a website by obscuring part of it underneath a pop-up window did not create a derivative work of the underlying website.[270] The court explained that the pop-up ads did not "recast, transform, or adapt" the plaintiff's website because the website remained intact on the user's screen underneath the pop-up.[271] Moreover, the court said, a holding that the temporary superimposition of one window over another on a computer screen would turn every multitasking computer user into an infringer of one or more derivative work rights.[272] Such a result, the court said, would be "jarring."[273]

DiModica's claim belongs to this class of derivative work cases involving alteration to the appearance of a copyrighted work without reproduction or physical incorporation of any material from the protected work. DiModica's letter to the city alleges that when Visbal and State Street placed Fearless Girl in the path of Charging Bull, they effectively created a new work that completely incorporates DiModica's.[274] But the incorporation DiModica alleges consists entirely of an alteration to the public's perception of Charging Bull. The public can now see Charging Bull as part of a larger composition, but nothing about Charging Bull has

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265. *See id.* at 967–68 ("The examples of derivative works provided by the Act all physically incorporate the underlying work or works. The Act's legislative history similarly indicates that 'the infringing work must incorporate a portion of the copyrighted work in some form.'").

266. *See id.* at 969 (stating that the Game Genie "can only enhance, and cannot duplicate or recaste, a Nintendo game's output").

267. *See id.* ("For example, although there is a market for kaleidoscopes, it does not necessarily follow that kaleidoscopes create unlawful derivative works when pointed at protected artwork. The same can be said of countless other products that enhance, but do not replace, copyrighted works.").

268. 1-800 Contacts, Inc. v. WhenU.com, 309 F. Supp. 2d 467, 487–88 (S.D.N.Y. 2003), *rev'd on other grounds*, 414 F.3d 400 (2d Cir. 2005).

269. *Id.* at 487.

270. *See id.* ("Defendants' pop-up ads may 'obscure' or 'cover' a portion of Plaintiff's website—but they do not 'change' the website, and accordingly do not 'recast, transform or adapt' the website.").

271. *Id.*

272. *See id.* at 487–88 ("A definition of 'derivative work' that sweeps within the scope of the copyright law a multi-tasking Internet shopper whose word-processing program obscures the screen display of Plaintiff's website is . . . not supported by the definition set forth at 17 U.S.C. § 101.").

273. *Id.*

274. DiModica Demand Letter, *supra* note 14, at 1–2.

been physically co-opted or incorporated in any way. In fact, there are angles of view from which Charging Bull is visible but Fearless Girl is not. Physically, DiModica's work remains untouched, even though it has been visually incorporated and thereby semiotically transformed. Under existing case law, the derivative work right doesn't reach this kind of virtual incorporation. And, as the Seventh Circuit explained in *Lee*, that result is consistent with VARA's limiting the right of integrity to exclude contextual modifications.

Even if a court were to be persuaded that State Street's placement of Fearless Girl in Charging Bull's path somehow created a derivative work, the creation of that work would almost certainly be a protected fair use. *Suntrust*, which was discussed at length in Part V above, is a closely analogous case involving an unfaithful continuation of a copyright-protected work. From a fair use perspective, Visbal's hypertextual incorporation of Charging Bull is both critical and transformative.[275] Fearless Girl was created to symbolically contest the culture of masculine corporate power that Charging Bull can be read to represent. With respect to the purpose and character of Visbal's use, DiModica's gripe that Fearless Girl radically transforms the meaning of Charging Bull is actually an argument in Visbal's favor.[276] Moreover, to the extent that Fearless Girl's presence could be seen as diminishing the value of Charging Bull, the harm at issue is reputational and not economic.[277] *Campbell* emphasizes that copyright is not intended to protect authors from the reputational harm that results from harsh criticism.[278]

CONCLUSION

Arturo DiModica's complaint about the placement of Fearless Girl and its allegedly harmful effect on Charging Bull's artistic integrity will likely never wind up in court. Nevertheless, the very public dispute over these two highly visible works has raised some novel questions about the scope of U.S. copyright law and its role as a regulator of author-to-author and work-to-work interactions in the art world. Just how much control over the public presentation of a work of art does copyright give an artist? Seeking an answer to that question through the narratological concepts of dialogism and intertextuality reveals fundamental—and, in DiModica's case, legally dispositive—differences between the U.S. copyright system and its Continental counterparts.

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275. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (defining a transformative work as one that "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message").

276. *See id.* at 579 (stating that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use").

277. It is difficult to assess harm to the market in a case involving a work that exists in a single copy and for which there is no established market and no record of a past sale.

278. *See Campbell*, 510 U.S. at 592 (distinguishing between "potentially remediable displacement and unremediable disparagement").

Whereas U.S. copyright law aims primarily to promote commerce in creative works by legitimizing a wide range of second-degree works and uses, Continental copyright law aims primarily to protect authorial personality by giving authors far-reaching control over how creative second-comers interact with their works. The Fearless Girl/Charging Bull controversy highlights how consequential the difference is and offers an important lesson for policy makers: caution is warranted when contemplating alterations to the contours of domestic copyright law in the interest of international harmonization. Our copyright law diverges from its Continental counterparts for reasons that go to the heart of the Constitution's justification for granting the copyright monopoly.

In his letter to the city, DiModica asserted his prerogative as an artist to prevent another artist from interfering with the meaning he wants his work to convey to the public. As this Article has shown, his claim finds no traction in the U.S. Copyright Act. Visbal's sculpture confronts Charging Bull both physically and symbolically. Its placement "writes" Charging Bull into a visual narrative about gender and power that DiModica doesn't like. It supplements Charging Bull in the Derridean sense of a surplus that displaces. What it *doesn't* do while doing all of that is infringe DiModica's copyright. From the perspective of promoting progress in the arts, that's a good thing. Bully for Fearless Girl!