

Navigating Copyright Law in a Digital World with an Analog Rulebook: Guidance for Visual Artists

By STEPHANIE MOSER*

Introduction

WHEN YOU THINK OF VISUAL ART, what comes to mind? It might be rooms in a museum filled with Renaissance paintings, a sculpture garden nestled in a rolling green field, the seashell collages your mom used to adorn her bathroom in the summer, or maybe the digital art print you bought on Etsy from a small creator to decorate your apartment. All these examples are considered visual art under current copyright laws.¹

Just one flip through any art history book or a stroll through a museum will show different eras of visual art. Notably, style, subject matter, and medium have shifted over the centuries of recorded art.² In recent years, art evolved in the digital space at lightning speed and produced a new kind of artist: a small creator who creates, promotes, and sells all their own work.³

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1. See 17 U.S.C. § 102; *see also Visual Arts*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/registration/visual-arts> [<https://perma.cc/HZC3-4MJP>] [hereinafter *Visual Arts*] (defining visual arts as pictorial, graphic, and sculptural works).

2. *See* Robert Glass, *What is art history and where is it going?*, SMARTHISTORY, <https://smarthistory.org/what-is-art-history/> [<https://perma.cc/MV55-Q9RH>].

3. *See generally* Rita Job, *6 Things You Can Do To Promote Your Art*, AGI FINE ART (Aug. 25, 2016), <https://agifineart.com/advice/promote-your-art/> [<https://perma.cc/93HD-89JC>] (discussing how working artists can promote their art); *see generally* Julia Rittenberg & Kelly Main, *How To Sell Art Online And Make Money In 2023*, FORBES (last updated Dec. 20, 2022, 12:46 AM), <https://www.forbes.com/advisor/business/how-to-sell-art-online> [<https://perma.cc/HU8B-NLY5>] (instructing artists on how to sell their art without intermediary help besides an internet service provider).

Copyright law has long protected artists and their creative works from infringement, which occurs whenever an entity copies the work of another without permission.⁴ The first mention of copyright protection in the United States arose in the U.S. Constitution.⁵ Since then, there have been additional acts and updates, such as the Copyright Act of 1976 which serves as the backbone for our current copyright landscape.⁶ When working properly, copyright law balances the interest of individuals, who want access to creative works, and the rights of the creator, who wants to be compensated for their creations.⁷ Since the Copyright Act of 1976, there has been very little change in the copyright landscape.⁸ This disparity has left small creators in the dust with little support or protection for their art under current copyright laws,⁹ leading to a call for change from many scholars.¹⁰ Many sources have also popped up online to help artists protect themselves from infringement.¹¹

This Comment focuses on how the current copyright landscape does not support small, online visual artists or creators (used interchangeably). Part I discusses the current state of the copyright landscape. Part II explains how this system does not support small creators in today's world. Part III provides examples of what small creators can do to protect themselves. Finally, Part IV discusses how small creators can work with each other as well as their followers to demand change with a unified voice.

4. See *Definitions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-definitions.html> [<https://perma.cc/9S3B-GE7S>].

5. See U.S. CONST. art. I, § 8, cl. 8.

6. See Pamela Samuelson & The Copyright Principles Project (CPP), *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1210 (2010) [hereinafter Samuelson].

7. *Id.*

8. See generally *id.* at 1177–78 (explaining that when the Copyright Act was passed in 1976, Congress did not anticipate the challenges that technological advances would pose for enforcement).

9. See Sean Pager, *Making Copyright Work for Creative Upstarts*, 22 GEO. MASON L. REV. 1021, 1025 (2015).

10. See, e.g., Samuelson, *supra* note 6; see generally Pager, *supra* note 9, at 1044–53; Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 40–49 (2010) (discussing a need for change in the copyright laws to support current artists. Each author offers nuanced, but similar, reform ideas that tackle big picture issues including changing the black letter law by unifying artists in today's digital world).

11. See generally *Copyright Infringement and "Fair Use" Basics for Art and Artists*, ART BUS. INFO FOR ARTISTS, <https://www.artbusinessinfo.com/copyright-and-fair-use-for-artists.html> [<https://perma.cc/J7EX-RVGL>]; Brian Gabriel, *A Beginner's Guide To Copyright Law For Artists*, CARTOON BREW (Aug. 25, 2017, 5:12 PM), <https://www.cartoonbrew.com/law/beginners-guide-copyright-law-artists-153115.html> [<https://perma.cc/M97M-9YGV>] (showing two examples that populate when searching for copyright infringement resources online).

I. The Copyright Landscape Today

Copyright statutes today present in a deceptively simplistic way. Just create something, and a copyright automatically attaches!¹² With this automatic copyright, the author secures their bundle of rights: the right to reproduction, the right to create derivative works, the right to distribute copies of the work, the right to perform the work publicly, and the right to display the work.¹³ As a result, the creator can manage their rights themselves, or they can license or sell their rights to another entity.¹⁴ However, there is more to the story. Indeed, “[c]opyright law is complex, totemic, and the source of nearly unending litigation.”¹⁵

This section will discuss: (1) how creators can secure a copyright and register their work with the Copyright Office, (2) what defenses may be used in a copyright dispute, and (3) a case example to contextualize the abstract concepts that comprise the copyright landscape.

A. How Does a Creator Secure a Copyright and Register Their Work with the Copyright Office?

1. Securing a Copyright

To understand today’s copyright landscape and the process by which an artist can secure a copyright, it is important to start with the statute, 17 U.S.C. § 102, which states:

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and

12. *Guide to Laws for Artists in the United States*, LAW SOUP, <https://lawsoup.org/legal-guides/artist/> [https://perma.cc/6M36-M4KH].

13. 17 U.S.C. § 106.

14. See Jean S. Perwin, *To Sell or to Rent: The Difference Between Copyright License and Transfer*, GRAPHIC ARTISTS GUILD, <https://graphicartistsguild.org/to-sell-or-to-rent-the-difference-between-copyright-license-and-transfer/> [https://perma.cc/Z5VK-374R].

15. Isaac Kaplan, *Art Copyright, Explained*, ARTSY (Aug. 4, 2016, 3:51 PM), <https://www.artsy.net/article/artsy-editorial-art-copyright-explained> [https://perma.cc/A64W-E9F2].

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.¹⁶

The three key elements to achieve copyright protection include the following: (1) the work falls into a copyrightable subject matter category, (2) an original work was created, and (3) the work is fixed in a tangible means of expression.¹⁷ Further, the creation must be made by a human to achieve copyright protection.¹⁸

i. Copyrightable Subject Matter

If an artist's work falls into the list of subject matter mentioned above,¹⁹ a copyright will attach. This Comment specifically focuses on "pictorial, graphic, and sculptural works[,] collectively known as visual arts,²⁰ and defined as "includ[ing] two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans."²¹ Examples of specific works commonly registered in this category include advertisements, craft kits, illustrations, jewelry designs, labels, maps, masks, paintings, stationary, textile designs, websites, and more.²²

ii. Originality

A work qualifies as original if there is a modicum of creativity within the work that was independently created,²³ meaning "that the work was not merely copied from another source."²⁴ A "modicum of creativity" is an abstract term. The U.S. Supreme Court has grappled with what may suffice as a modicum of creativity on a few occasions, including in

16. 17 U.S.C. § 102.

17. PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE: 2020 VOLUME I: PERSPECTIVES, TRADE SECRETS AND PATENTS 3-4* (2020); *see generally* U.S. COPYRIGHT OFF., *COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES*, ch. 900 VISUAL ART WORKS 7 (3d ed. 2021) [hereinafter *COPYRIGHT COMPENDIUM*].

18. *COPYRIGHT COMPENDIUM*, *supra* note 17.

19. *Id.*

20. *Visual Arts*, *supra* note 1.

21. 17 U.S.C. § 101.

22. *Visual Arts*, *supra* note 1.

23. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991).

24. *COPYRIGHT COMPENDIUM*, *supra* note 17.

*Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*²⁵ There, Rural Telephone Service attempted to assert its copyright for a phone book it created against Feist Publications, who allegedly infringed.²⁶ The Court ultimately stated that the act of selecting and organizing facts (i.e., arranging phone numbers and addresses in alphabetical order) by Rural Telephone Service lacked the modicum of creativity necessary to transform “mere selection into copyrightable expression.”²⁷ The Court highlighted that it is not the effort put into the work that distinguishes it as copyrightable, but rather the creativity, even if only a modicum or a small amount of creativity is needed.²⁸

iii. Fixation

For visual artwork to be “fixed in any tangible medium of expression,”²⁹ that work must be recorded in a way that allows it to be perceived, reproduced, or communicated for a period of time longer than a transitory duration.³⁰ This requirement, known as “fixation,” can be achieved in a variety of ways, and this largely depends on the type of art created.³¹ For instance, fixation for visual art may involve attaching an artwork to canvas, paper, clay, print, film, or digital files.³² Fixation has evolved alongside technology in creative works.³³ In *Midway Manufacturing Co. v. Artic International, Inc.*, the U.S. Court of Appeals for the Seventh Circuit determined that a video game met the fixation requirement despite not fitting exactly within the text of 17 U.S.C. § 102.³⁴ The court grappled with whether a video game counted as an audio-visual work despite missing “a set of images displayed in a fixed sequence.”³⁵ In other words, the video game was not “fixed” according to the definition provided in the statute.³⁶ As art evolves in the digital world, this case is important for visual artists because it was one of the first times a court addressed how new technology affected the rights of visual artists.³⁷

25. See *Feist*, 499 U.S. at 346.

26. *Id.* at 362.

27. *Id.*

28. *Id.* at 362–63.

29. COPYRIGHT COMPENDIUM, *supra* note 17, at 6.

30. *Id.*

31. *Id.* at 7.

32. *Id.* at 6.

33. See generally *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1010 (7th Cir. 1983).

34. *Id.* at 1014.

35. *Id.* at 1011.

36. *Definitions, supra* note 4.

37. See generally *Midway*, 704 F.2d at 1014.

Once an artist both creates something within the enumerated list of copyrightable subject matter with a modicum of creativity and fixes an artwork in the world, the artist automatically has control over the bundle of rights associated with the copyright. From there, an artist can protect their rights by registering their copyright with the Copyright Office.

2. Registering with the Copyright Office

It is recommended for artists whose work is at risk of infringement to register a copyright after they complete their piece.³⁸ While “[i]mitation is the sincerest form of flattery . . . if it begins to detract from your bottom line, then defending your interests will likely become necessary at some point.”³⁹ But, it may be difficult for some artists to understand their work is at risk of infringement or appreciate the benefits of copyright registration.

i. Is My Art at Risk of Infringement?

Art is vulnerable to copy and reproduction by third parties if theft of the art in question is lucrative.⁴⁰ Artists who have a higher chance of falling prey to this are those who have designs with commercial appeal and those that prove “easy and conducive” for reproduction.⁴¹ For instance, artists who have a large online following, create unique characters popular with collectors, or design works conducive to reproduction in other mediums should register their work with the Copyright Office.⁴² While it is never certain that an artist’s work will be copied, the possibility always exists.⁴³ This possibility, however, can be better predicted with greater exposure and popularity of an artist’s work, especially on the internet.⁴⁴

Another issue artists must address is determining who might pose a risk of infringement. There are two main categories of entities that may infringe: companies and other artists.

38. See *Copyright Registration Law and Your Art Pros and Cons of Registering Your Art*, ART-BUSINESS.COM, https://www.artbusiness.com/register_and_copyright_art_for_artists.html [<https://perma.cc/UNB7-VMTM>].

39. *Id.*

40. See *id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. See *id.*

One company regularly in the headlines for stealing online designs is the clothing company Shein.⁴⁵ Shein often recreates online designs by small creators and proceeds to sell them at a vastly cheaper price.⁴⁶ Part of the reason Shein may use this tactic is that small creators often have a following on social media amongst whom their handmade designs are popular.⁴⁷ With respect to Shein as a clothing company in particular, textile designs fall under the visual arts category of copyrightable subject matter.⁴⁸ As such, the original creators may assert their copyrights against Shein, which is much easier to do when the work is registered with the Copyright Office.

Small creators must be wary not only of corporations copying their work,⁴⁹ but other artists as well. The case *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith* provides an example of this situation. There, Goldsmith licensed her copyrighted photograph of Prince to Vanity Fair “for use as an artist reference.”⁵⁰ However, instead of using the photograph as a reference, Andy Warhol made fifteen additional works based on Goldsmith’s photograph, which is known as the Prince Series.⁵¹ Goldsmith became aware of these additional works and reached out to the Warhol Foundation about the “perceived violation” of her copyright.⁵² The Warhol Foundation responded by suing

45. See, e.g., Malu Hernandez, *30+ Businesses Shein Stole Designs From: The Complete List*, ETHICALLY DRESSED (Mar. 1, 2023), <https://ethically-dressed.com/30-businesses-shein-stole-designs-from-the-complete-list/> [<https://perma.cc/MAX4-LMBR>]; Angela Hamilton, *5 Times Shein has Copied Designs from Independent Fashion Brands*, ECO CLUB (May 24, 2023), <https://ecoclubofficial.com/shein-stealing-designs-independent-fashion-brands/> [<https://perma.cc/E77Y-AMJS>]; Sharon Pruitt-Young, *Why Indie Brands Are At War With Shein And Other Fast-Fashion Companies*, NAT’L PUB. RADIO [NPR] (July 20, 2021, 4:25 PM), <https://www.npr.org/2021/07/20/1018381462/why-indie-brands-are-at-war-with-shein-and-other-fast-fashion-companies> [<https://perma.cc/9TQ6-GS92>].

46. See Hernandez, *supra* note 45; Hamilton, *supra* note 45; ECO CLUB, *supra* note 45; Pruitt-Young, *supra* note 45.

47. See Hernandez, *supra* note 45; Hamilton, *supra* note 45; ECO CLUB, *supra* note 45; Pruitt-Young, *supra* note 45.

48. See generally *Visual Arts*, *supra* note 1; see generally *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 481 (6th Cir. 2015) (deciding that as long as the graphic features on clothing could be identifiable separately from the clothing and exist independently of its utilitarian aspects, the clothing is protectable subject matter under the Copyright Act).

49. See *Ringgold v. Black Ent., Television Inc.*, 126 F.3d 70, 71–82 (2d Cir. 1997) (providing another example where a corporation stole an artist’s work without permission or compensation. Here, BET used a poster of Ringgold’s famous work, “Church Picnic Story Quilt,” on the set of one of its TV shows. On appeal, the court found that using the poster as set decoration was not fair use nor de minimis, causing summary judgment to be remanded for further consideration regarding the fair use defense. This is an example of a famous artist going toe-to-toe with a popular TV network over a copyright infringement suit).

50. 11 F.4th 26, 32 (2d Cir. 2021).

51. *Id.*

52. *Id.*

Goldsmith for a declaratory judgment for non-infringement and, in the alternative, claiming a defense of fair use.⁵³ Goldsmith countersued to allege infringement.⁵⁴

Importantly, Andy Warhol is a household name with a reputation of pop culture art, whereas Lynn Goldsmith, although successful in her photography career, does not have the same name recognition.

Another so-called artist of whom today's creators should be wary is artificial intelligence (AI).⁵⁵ As the rise in AI art continues, creators constantly face new infringement issues unsupported by today's copyright landscape.⁵⁶ An AI infringement lawsuit is still uncharted territory, and it is something artists must keep in mind when posting works online.⁵⁷

ii. The Benefits of Registration with the Copyright Office

There are four main benefits that come with copyright registration. First, registration enables an artist to recover statutory damages.⁵⁸ Without registration, an artist may only recover the infringer's profits as their damages.⁵⁹ Typically, the infringer's profits are less than the statutory damages that an artist may recover if their work is registered.⁶⁰ Second, when a work is registered prior to infringement, the court can award attorney's fees as part of the judgment if the artist wins the infringement case.⁶¹ This is quite helpful for small artists in particu-

53. *Id.*

54. *Id.*

55. *See, e.g.,* Darian Woods & Adrian Ma, *AI-generated images breach copyright law, artists say*, NAT'L PUB. RADIO [NPR] (Feb. 7, 2023, 5:39 PM), <https://www.npr.org/2023/02/07/1155185861/ai-generated-images-breach-copyright-law-artists-say> [<https://perma.cc/H2C2-9XGE>]; Esther Ajao, *Implications of AI art lawsuits for copyright laws*, TECHTARGET (Feb. 1, 2023), <https://www.techtargget.com/searchenterpriseai/news/365530156/Implications-of-AI-art-lawsuits-for-copyright-laws> [<https://perma.cc/Y4RZ-3A3A>]; Winston Cho, *AI Art Generators Spark Multiple Copyright Lawsuits*, HOLLYWOOD REP. (Jan. 17, 2023, 4:10 PM), <https://www.hollywoodreporter.com/business/business-news/ai-art-generators-copyright-lawsuits-1235302611/> [<https://perma.cc/9MQH-6GKF>] (discussing multiple articles on how AI is changing the digital art realm and sparking controversial copyright discussions amongst different groups).

56. *See generally* Woods & Ma, *supra* note 55; Ajao, *supra* note 55; Cho, *supra* note 55.

57. *See generally* *What Is Glaze?*, GLAZE, SAND LAB, U. OF CHI., <https://glaze.cs.uchicago.edu/what-is-glaze.html> [<https://perma.cc/DP2M-8FMG>] (showing new technology that can add a cloak layer to online art to protect it from AI identification and misuse. The legal repercussions are still unknown, but there are ways artists can protect their work from infringement to avoid a lawsuit.).

58. ARTBUSINESS.COM, *supra* note 38.

59. *Id.*

60. *See id.*

61. *Id.*

lar because an intellectual property attorney's fees can prove expensive over the course of a copyright infringement trial.⁶² Third, to bring suit against an alleged infringer in federal court, the work in question must already be registered with the Copyright Office.⁶³ Finally, registration with the Copyright Office gives an artist prima facie evidence for when the work was created.⁶⁴ The registration documents show the date of the work's creation, which can demonstrate that the alleged infringement occurred after the work was made.⁶⁵ Without registration, it is much easier for an alleged infringer to assert that they independently created the work and did not infringe.⁶⁶ Additionally, evidence of registration may help dissuade potential infringers because they receive notice that the work is protected by the registration.

Another benefit, which is not regularly discussed, is that intellectual property attorneys are more likely to take on an infringement case on a contingency fee basis if the work was registered before any alleged infringement.⁶⁷ This is because owning proper documentation for a registered copyright streamlines many of the facts associated with the case and allows for a larger damage award.⁶⁸

Registering work with the Copyright Office puts an artist a step ahead of any future infringement. Registration happens completely online and is relatively inexpensive for a single work.⁶⁹

B. Two Defenses to Copyright Infringement

So far, the basics of copyright law seem straightforward. Create a work, get an automatic bundle of rights, and register the work to get

62. See, e.g., *How Much Does It Cost to Pursue a Copyright Infringement Claim?*, TRAVERSE LEGAL (Jan. 6, 2012), <https://www.traverselegal.com/blog/how-much-does-it-cost-to-pursue-a-copyright-infringement-claim/> [<https://perma.cc/6ZYL-X7HG>]; Steve Vondran, *How Much Does It Cost to Litigate a Copyright Case?*, VONDRAN LEGAL (July 23, 2020), <https://www.vondranlegal.com/how-much-does-it-cost-to-litigate-a-copyright-case> [<https://perma.cc/X2AV-AK94>]; *Typical Fees*, CISLO & THOMAS LLP, <https://cisloandthomas.com/overview/typical-fees/> [<https://perma.cc/4B4N-K5Q4>] (showing different examples of expected fees for a copyright infringement case; ultimately, cost depends on many factors, but the longer the litigation, the more the hourly rates will add up).

63. ARTBUSINESS.COM, *supra* note 38.

64. *Id.*

65. *Id.*

66. *See id.*

67. *Id.*

68. *Id.*

69. See *Copyright Registration*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/circs/circ02.pdf> [<https://perma.cc/ES7B-CAJL>] (outlining how to register a copyright online); *Fees*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/fees.html> [<https://perma.cc/TLV7-GRPK>] (listing all fees associated with registering a copyright).

ahead of any future litigation. The path forward becomes murky as soon as an artist faces their first alleged infringer.

An alleged infringer can claim many different defenses to copyright infringement; two popular defenses include the fair use defense and independent creation.⁷⁰ Defendants use these defenses because they provide an opportunity to expand and comment on creative works without facing prosecution.⁷¹ This is where much of the confusion concerning copyright law arises because most of the defenses, although present in the Copyright Act, gained greater support and context via case law.⁷²

1. The Fair Use Defense

To set the tone for how the legal community perceives fair use defenses, a quote: “[w]e now come to a section of copyright law that is almost guaranteed to supply full employment for copyright lawyers for the foreseeable future: fair use.”⁷³ The fair use defense clarifies that the reproduction of creative works by another for the purpose of criticism, comment, news reporting, teaching, scholarship, or research is not infringement of a copyright.⁷⁴ This defense is tedious because the four non-exclusive factors that help determine if fair use has occurred heavily depend on the facts of the case at hand, and each fact needs to be weighed carefully by the fact finder in court.⁷⁵ The four non-exclusive factors typically used in fair use defenses include the following: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyright work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁶

A commonly cited case when raising the fair use defense is *Cariou v. Prince*. In this case, Cariou published a book entitled *Yes Rasta*, which included classical portraits and landscapes that he took while living

70. See generally Daniel H. Park, *Defenses to a Claim for Copyright Infringement*, BERMAN FINK VAN HORN (Jan. 20, 2020), <https://www.bfvlaw.com/defenses-to-a-claim-for-copyright-infringement/> [https://perma.cc/8S5D-LH2G].

71. See 1 ART LAW DESKBOOK § 1.44 (2018).

72. See discussion *supra* Section I.B.

73. ART LAW DESKBOOK, *supra* note 71, § 1.43.

74. 17 U.S.C. § 107.

75. See generally ART LAW DESKBOOK, *supra* note 71, § 1.44.

76. 17 U.S.C. § 107.

among Rastafarians in Jamaica.⁷⁷ Prince took many of these photos and incorporated them into a series of paintings and collages entitled “Canal Zone.”⁷⁸ Cariou sued Prince citing copyright infringement, and Prince raised a fair use defense.⁷⁹ In its opinion, the appellate court highlighted that a determination of fair use “is an open-ended and context-sensitive inquiry.”⁸⁰ The four factors mentioned above are more like guidelines for the court to use to determine fair use, rather than strict elements.⁸¹ This results in the fair use defense having various outcomes based on unique facts when heard by different circuit courts, adding to the confusion of this defense.⁸² Because of this, the court found that most of Prince’s works fit into the loose fair use definition and, thus, were not infringing on Cariou’s copyright.⁸³ Most of the works were transformative by nature because they had a completely different aesthetic and character when compared to the original works.⁸⁴ “Transformative” can be defined as something that adds a new expression, meaning, or message to an original work.⁸⁵ The more transformative the new work, the more likely it will qualify as fair use.⁸⁶ The court highlighted that most fair use analysis turns on a comparison of the works in question to determine if the alleged copy is transformative enough that it does not infringe.⁸⁷

Creators should be aware that the fair use defense is flexible enough to allow other people to use their works in a transformative way, and that transformative nature differs based on the facts of the case and how the court chooses to apply the black letter law to the facts at hand.

2. Independent Creation

As discussed, originality is a critical standard that a creator must meet to obtain copyright protection.⁸⁸ If an alleged infringer can show that they independently created the work, there is no infringement

77. 714 F.3d 694, 698 (2d Cir. 2013).

78. *Id.*

79. *Id.*

80. *Id.* at 705.

81. *Id.*

82. *See generally id.* at 710.

83. *Id.* at 712.

84. *Id.*

85. Richard Stim, *Fair Use: What Is Transformative?*, Nolo, <https://www.nolo.com/legal-encyclopedia/fair-use-what-transformative.html> [<https://perma.cc/38FV-KDTN>].

86. *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)).

87. *See generally Cariou*, 714 F.3d at 707–09.

88. *See discussion supra* Section I.A.1.ii.

because they did not copy.⁸⁹ However, if two works are substantially similar, the plaintiff can prove circumstantial copying.⁹⁰ Most courts disagree over whether the existence of two substantially similar works is enough to prove copying.⁹¹ Thus, if a plaintiff can show a valid copyright for their work existed before the substantially similar, infringing work was created, they have a higher chance of winning an infringement lawsuit. However, it is important for all creators to remember that infringement suits depend on the facts of the case, and always relate back to the black letter law in the Copyright Act.⁹²

For example, in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, the U.S. District Court for the Southern District of New York found that the defendant copied from the plaintiff based on the fact that the plaintiff's song was chart-topping, and thus, it was likely the defendant heard the song at some point and subconsciously remembered it before creating the infringing song.⁹³ This case highlights that intent is irrelevant, and if two works are very similar, it is hard for the subsequent work to defeat an infringement claim.⁹⁴ Therefore, in a visual art situation, the original creator could make arguments to highlight that the alleged infringer had seen the original work in the world before creating their work. Overall, *Harrisongs* highlights how important it is for creators to document when they created their works and registered them with the Copyright Office. Timing, documentation, and likelihood to encounter a work in the world can be what turns an infringement case in one party's favor. Today, if a creator's work goes viral on a social media platform, this inquiry may be easy to prove in a court of law, but may present some challenges. For instance, how viral would a work need to be for a court to draw the same conclusion in *Harrisongs*?

89. Steven Buchwald, *Independent Creation Paper Trail To Fend Off Copyright Suits*, BUCHWALD & ASSOCS. (Mar. 10, 2014), <https://buchwaldlaw.com/2014/03/independent-creation-copyright/> [https://perma.cc/37TX-5ABH].

90. Henry J. Lanzalottie, *Is Proof of Access Still Required – Proving Copyright Infringement Using the Strikingly Similar Doctrine: An Analysis of the Fourth Circuit's Decision in Bouchat v. Baltimore Ravens, Inc.*, 9 JEFFREY S. MOORAD SPORTS L.J. 97, 98 (2002).

91. *Id.*

92. *See generally* Blehm v. Jacobs, 702 F.3d 1193 (10th Cir. 2012) (providing an example of a visual art case where a plaintiff lost an infringement suit that explored substantial similarity, independent creation, and protectable elements in a copyrighted work. The court determined that Blehm's protectable material was not substantially similar to that of the Jacobs' material because what was substantially similar between the two works was not protectable under copyright law, and it did not matter that the Jacobs had access to Blehm's material when they created their work).

93. *See generally* 420 F. Supp. 177, 179–81 (S.D.N.Y. 1976).

94. *See generally id.*

Creators must be aware of infringement defenses as they create and share their works in the world today. Because of the chance of infringement, it is important for artists to keep a timeline of popular works circulating in the world, especially those online, and register their works with the Copyright Office to deter any infringement.

C. *Rogers v. Koons*: A Classic Copyright Infringement Lawsuit

A classic case of visual art copyright infringement that highlights the benefits of registration and demonstrates almost all the essential copyright principles is seen in *Rogers v. Koons*. This case further highlights that, even in the 1990s, larger creators—here, Koons—would take advantage of smaller creators—here, Rogers—and claim that exposure was sufficient payment for the blatant copying.⁹⁵ The opening statement of this case calls out this issue immediately:

The copying was so deliberate as to suggest that defendants resolved so long as they were significant players in the art business, and the copies they produced bettered the price of the copied work by a thousand to one, their piracy of a less well-known artist's work would escape being sullied by an accusation of plagiarism.⁹⁶

In this case, Koons created a sculpture of a couple holding puppies based on a photo he saw on a roadside stand.⁹⁷ This photo, entitled “Puppies,” taken and copyrighted by Rogers, was printed onto a postcard.⁹⁸ Rogers’s copyright information was listed on the postcard.⁹⁹ Koons purchased the postcard, tore off the copyright information, sent the postcard back to his art studio, and proceeded to make a sculpture entitled “String of Puppies,” which looked strikingly similar to the Rogers photo.¹⁰⁰ The similarity was probably due to Koons instructing his painters that the “work must be just like [the] photo—features of photo must be captured”¹⁰¹

Rogers learned of this sculpture and sued Koons to assert his copyright over the photo that Koons used to create the sculpture.¹⁰² At trial, Koons attempted to assert a fair use defense.¹⁰³ However, the U.S. Court of Appeals for the Second Circuit determined that Koons operated in

95. 960 F.2d 301, 303 (2d Cir. 1992).

96. *Id.*

97. *Id.* at 304–05.

98. *Id.* at 304.

99. *Id.* at 305.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 308.

bad faith, which “militates against a finding of fair use.”¹⁰⁴ Bad faith was a major factor in the determination against fair use and thus provides another example of how fair use turns on the facts of individual cases. After hearing these facts, both the trial court and appellate court found for Rogers in a motion for summary judgment.¹⁰⁵ The court determined that Koons blatantly copied Rogers’s photo and obtained a substantial profit from the resulting sculpture.¹⁰⁶ Because Rogers had a valid copyright at the time of infringement, he sought to secure both compensatory damages and punitive damages.¹⁰⁷

These cases highlight how important it is for creators to keep records of when they created their works, register their works with the Copyright Office, display their copyright notices, watch out for infringement, and understand the benefits of pursuing infringement claims. Additionally, *Rogers* highlights how large creators often use small creators’ work with little regard for any rights that the small creator might have over the work in question. This case also demonstrates how a small creator can prevail if they understand their rights, register and monitor their copyrights, file an action when infringement happens, and have the grit to see the case through to conclusion.

II. The Current Copyright Landscape Does Not Protect Today’s Visual Artists Effectively

People unfamiliar with copyright laws may think that they are fair to most parties.¹⁰⁸ However, copyright laws arose in a time when the spread of information was slow, and it was easier to find and sue copyright infringers.¹⁰⁹ Congress could not have foreseen the access that the public would have to creative works when it passed the Copyright Act in 1976.¹¹⁰

The current copyright landscape is an analog rulebook applied to a digital world.¹¹¹ Because of this, small creators do not benefit from the laws meant to protect them.¹¹² There are two major culprits as to why

104. *Id.* at 309.

105. *Id.* at 307.

106. *Id.* at 309.

107. See James Traub, *Art Rogers vs. Jeff Koons*, DESIGN OBSERVER (Jan. 21, 2008), <https://designobserver.com/feature/art-rogers-vs-jeff-koons/6467> [https://perma.cc/D36U-PTV5].

108. See Samuelson, *supra* note 6, at 1176–77.

109. See *id.* at 1177.

110. *Id.*

111. Pager, *supra* note 9, at 1035.

112. See *id.* at 1039.

the current copyright landscape does not adequately protect today's visual artists: (1) the current copyright laws do not protect creators in today's digitally based world, and (2) the current copyright laws are written and used in a way that do not support individuals asserting their rights without additional support by other entities, which can prove expensive.

A. Current Copyright Laws Fail to Protect Creators in Today's Digital World

Many scholars have highlighted that the current copyright laws were written in a way that supported the creators at the time, but not current creators or those yet to come.¹¹³ Sean Pager, author of *Making Copyright Work for Creative Upstarts*, states that each update to copyright laws included clunky language, which watered down and confused the intricacies of copyright law; this ultimately made it impossible for laypeople to decipher the law's provisions.¹¹⁴ Copyright laws remain outdated, and they do not protect artists from the challenges that they face in the digital world.¹¹⁵ When the most recent Copyright Act was written in 1976, the art that needed copyright protection was created through a "capital-intensive process requiring specialized studios, and the like – and skilled personnel to operate it."¹¹⁶ Additionally, visual art was manufactured in factories and subsequently shipped to stores or to the end user.¹¹⁷ The bundle of rights a copyright owner initially had upon creation were also assigned elsewhere, likely to an intermediary who would control how the art was used in the world.¹¹⁸ These intermediaries would also handle any legal issues that arose with respect to infringement.¹¹⁹ Because of the way that art was produced, assigned, and distributed when the Copyright Act of 1976 passed, there is an assumption in the way the laws were written that this is the only way art would interact with the world.¹²⁰

Today, creators do not work within the scheme the copyright laws were written to support. Creators, especially small creators, now create, market, sell, and distribute their own work.¹²¹ They create art and web-

113. See generally *supra* note 10 and accompanying text.

114. Pager, *supra* note 9, at 1024.

115. *Id.* at 1025.

116. *Id.* at 1033.

117. *Id.* at 1033–34.

118. See Litman, *supra* note 10, at 36.

119. See *id.* at 35.

120. See Pager, *supra* note 9, at 1034.

121. *Id.*

sites, manage social media accounts, coordinate shipping, and provide customer service. On top of the day-to-day work, creators today also maintain control over their bundle of copyrights and should know how to use them effectively.

On the flip side, infringers can also copy works without investing in a largescale production scheme.¹²² Ordinary users on computer networks can “accomplish widespread, unauthorized copying and distribution” of creative works.¹²³ This does not fit into the current copyright landscape, which makes it difficult to reprimand online copyright infringers.¹²⁴ Previously, artists could only allege infringement when they saw an infringed work in the real world. In today’s internet age, an artist can discover infringement with a quick internet search. However, the way copyright law currently stands does not accommodate the lightning speed at which an infringement can happen. While Congress could not predict how technology would shape the future of the creative world when it enacted the Copyright Act of 1976,¹²⁵ its updates have only prompted confusion, and the case law riddled with legalese is too confusing for the average artist.

B. The Language of Current Copyright Laws Does Not Support Individual Artists Without Third-Party Support

Pager suggests there is an assumption in the current copyright landscape that there would always be an intermediary that worked to support the production and distribution of art and handle all the copyright formalities.¹²⁶ Under this theory, the creator of the artwork would not need to understand completely how the copyright laws were applied or used in infringement litigation because there would be support from the intermediaries they worked with, such as legal counsel, publishers, or managers.¹²⁷ However, key copyright doctrines that are considered bright-line rules, such as the fair use defense,¹²⁸ require a deep analysis with outcomes that are hard to predict based on case law.¹²⁹ Even basic questions, such as the identity of the author or the validity of a copyright, have caused lengthy disputes.¹³⁰ The lay-

122. Samuelson, *supra* note 6, at 1193.

123. *Id.*

124. *Id.*

125. *See id.*

126. Pager, *supra* note 9, at 1034.

127. *See id.*

128. *See discussion supra* Section I.B.1.

129. Pager, *supra* note 9, at 1025.

130. *Id.*

ers of the copyright landscape contain many “traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors”¹³¹ from succeeding in the copyright landscape without conforming to the pipeline of creation described above.

Not only was the Copyright Act written in a nonintuitive way, but it was also written in consideration and benefit of wealthy individuals.¹³² The laws enforced today assume that all parties have the funds to hire attorneys to protect and enforce copyrights.¹³³ This issue ties back to the fact that copyright rules are confusing, often necessitating the help of an attorney. That help, however, comes with a price and leaves small creators outside the full protection of copyright law if they do not have the funds to hire representation.¹³⁴

How did the copyright landscape morph into serving those with deep pockets? Likely, it was due to expensive lobbying by a few critical players. Jessica Litman, author of the law review piece *Real Copyright Reform*, provides a recap of the events leading up to the enactment of the Copyright Act of 1976.¹³⁵ Lobbyists representing broadcast and cable television demanded special treatment during the Act’s passage, and halted its development until their requests were codified.¹³⁶ Most recently, telephone companies and Internet Service Providers (ISPs) pressed Congress for five years until the Digital Millennium Copyright Act (DMCA) was enacted.¹³⁷ In the run-up to the DMCA’s passage, titans from telephone companies and ISPs clashed with those from entertainment and software companies, ultimately resulting in the addition of liability safe-harbor provisions to the DMCA at the ISPs’ request.¹³⁸ It should be noted that even in the most recent change of the copyright landscape, artists and creators were not included in the discussion.¹³⁹

Ultimately, the way copyright law currently stands assumes that there is a network of support and entities, other than just the creator, who work to distribute and manage the rights associated with a work.¹⁴⁰ Whether the network is there to completely manage the rights

131. Litman, *supra* note 10, at 33.

132. See Pager, *supra* note 9, at 1034.

133. See Litman, *supra* note 10, at 33.

134. See Pager, *supra* note 9, at 1021.

135. See Litman, *supra* note 10, at 6.

136. *Id.* at 6–7.

137. *Id.* at 6.

138. *Id.*

139. See generally *id.* (discussing the players involved in changing the copyright landscape at different times; there is no mention of artists or creators).

140. See *id.* at 35–37.

associated with the work or act as a decipherer of cryptic rules, the result for today's creators is the same: trouble.

Today, copyright interests rest in the hands of the millions of ordinary people who regularly create in their homes.¹⁴¹ These creators who produce, market, and distribute their creations mainly online have a personal stake in copyright law, even if they don't know it.¹⁴² Yet, there has been no mobilization of these individuals to try and sway the copyright landscape thus far.¹⁴³ Because of this, copyright laws remain to serve those with deep pockets who have the time and money to lobby Congress.¹⁴⁴ Ultimately, because creators no longer work within the bounds of what is normal and expected under the current copyright landscape, the Copyright Act no longer supports the artists that it was written to protect.¹⁴⁵

III. How Visual Artists Can Navigate Today's Copyright Landscape

Copyright was created to protect artists and creators, but its protection is not as helpful today as it was in the past as small creators now promote and sell their creations online.¹⁴⁶ Knowing that, how can the millions of artists create with some peace of mind that they are doing all they can to protect their work from online infringement? Strategies for navigating the current copyright landscape can be broken into two categories: (1) things a creator can do to prevent or deter infringement, and (2) things a creator can do after infringement occurs.

A. What a Creator Can Do to Deter Infringement

Despite most of copyright law being stuck in the 1970s, there are things creators can do today, as individuals, to help protect themselves against potential infringement without needing to memorize the Copyright Act or decipher case law.

The first thing a creator should do is register their copyright for the reasons discussed in Part II.¹⁴⁷ Then, before posting any work

141. *See id.* at 6.

142. *See id.* at 6–7.

143. *See id.*

144. *See id.*

145. Pager, *supra* note 9, at 1025–26.

146. *See generally* Job, *supra* note 3; *see also* Samuelson, *supra* note 6, at 1177 (referencing how Congress could not foresee the radical transformation of the internet).

147. *See* discussion *supra* Part II.

online, creators should carefully read all terms of service for any website domain on which they choose to share their work.¹⁴⁸ This is basic internet safety, but it could help a creator understand how to move forward if their work is ever infringed on the website, or if the work is used outside the desired or licensed use.¹⁴⁹

One way to deter copyright infringement is to include a copyright notice (for example the “©” mark) on or near the art, to put potential infringers on notice that a work is protected.¹⁵⁰ Registration is not required to add the “©” mark, nor is it required to include the mark after registration, but it helps deter potential infringement.¹⁵¹ This mark serves as a deterrent because if a creator can show willful infringement (a situation where the infringer knew or should have known they were infringing), the owner of the original creation may win statutory damages up to \$150,000 in addition to actual damages.¹⁵² This would prove costly for the infringer, and the potential damage award or settlement may be enough to deter infringement.

Another recommended step artists should take before posting their creations online is including a watermark.¹⁵³ A watermark will prevent potential infringers from copying or screenshotting the original creation.¹⁵⁴ The best watermark is one that is located in the middle of the work, so it cannot be cropped out, with ten to twenty percent opacity.¹⁵⁵ This will obscure any image an infringer may try to steal. It is also recommended to post small, cropped, and low-resolution versions

148. See *Seller University*, AMAZON, <https://sell.amazon.com/learn#beginners> [<https://perma.cc/6FVX-X6DZ>] (providing educational resources to help brands, businesses, and entrepreneurs succeed as selling partners).

149. See *generally Report Infringement*, AMAZON, <https://www.amazon.com/report/infringement> [<https://perma.cc/MB8Y-UTHX>] (providing Amazon’s copyright infringement reporting procedures).

150. *How to protect your art on the web*, ART, <https://art.art/blog/protect-art-web> [<https://perma.cc/8A3M-P8SG>].

151. *The International Copyright Symbol*, COPYRIGHTLAWS.COM (Jan. 10, 2023), <https://www.copyrightlaws.com/copyright-symbol-notice-year/> [<https://perma.cc/JE6T-2E33>].

152. 17 U.S.C. § 504; see generally Steve Vondran, *Willful copyright infringement can be EXPENSIVE, but what does willful really mean?*, JD SUPRA (Mar. 10, 2023), <https://www.jdsupra.com/legalnews/willful-copyright-infringement-can-be-6916534/> [<https://perma.cc/UXC2-JESG>].

153. Ritika Tiwari, *Digital art copyright: How to go about it?*, REDPOINTS (Dec. 13, 2022), <https://www.redpoints.com/blog/digital-art-copyright/> [<https://perma.cc/E8LD-8QTU>].

154. *Id.*

155. *The Most Common Copyright Questions Asked By Artists: Answered!*, ART IS MY CAREER, <https://www.artismycareer.com/management/the-most-common-copyright-questions-asked-by-artists-answered/> [<https://perma.cc/8NPE-4YKX>].

of the art online.¹⁵⁶ This makes it more difficult for infringers to copy the work and use it elsewhere.¹⁵⁷

Overall, much of the burden is on creators to try and deter infringement from the start with various tactics to protect their art before posting online.

B. What a Small Creator Can Do After Infringement Occurs

Creators need to stay vigilant after posting their works online. Ritika Tiwari, author of the article *Digital Art Copyright: How to Go About It?*, highlights that “[i]gnorance is never bliss, especially when someone is trying to copy your artwork.”¹⁵⁸ To search for stolen work, creators can do a reverse image search to see if any of their creations have been posted somewhere without their consent.¹⁵⁹ Once a creator finds an infringement, there are a few avenues they can take to try and assert their copyrights: (1) take advantage of the DMCA takedown protocols, and (2) assert copyrights directly against an infringer.

1. Take Advantage of the DMCA Takedown Protocols

The DMCA protects ISPs from liability when their users illegally use copyrighted material.¹⁶⁰ Individual creators can take advantage of the DMCA because it allows them to report to the ISP that their creative work is being used illegally online.¹⁶¹ The ISP then removes the content from the infringing website.¹⁶² This process is known as a DMCA takedown.¹⁶³ This process can apply to all copyrightable works that are posted online, even if they are not registered with the Copyright Office.¹⁶⁴ Most DMCA takedowns involve submitting a form on the ISP’s website; the ISP will then take the next steps after the form is filed.¹⁶⁵

156. Tiwari, *supra* note 153.

157. *See id.*

158. *Id.*

159. ART IS MY CAREER, *supra* note 155.

160. James Williams, *What is a DMCA Takedown?*, TINGEN L., PLLC (July 21, 2020), <https://tingen.law/2020/dmca-takedown/44253/> [<https://perma.cc/583J-B97M>].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *See generally Report Infringement*, *supra* note 149.

2. Assert Copyrights Directly Against an Infringer

When an artist sees theft, it is important to act quickly. A DMCA takedown is one route, but a creator can also contact the infringer directly.¹⁶⁶ In most situations, an email will convince an infringer to take down the stolen work.¹⁶⁷ If they refuse, the next step may be to contact an attorney to put together an official cease and desist letter.¹⁶⁸ From there, filing a lawsuit may be the next step depending on the facts of the alleged infringement.

As of December 2022, another option creators have when they experience infringement is to submit an infringement claim to the Copyright Claims Board (CCB), which acts as a small claims court specifically for copyright infringement suits.¹⁶⁹ This allows creators to submit infringement claims, with or without a lawyer, for damages of \$30,000 or less.¹⁷⁰ This is promising for small creators because typical copyright litigation is expensive due to attorneys' fees. The results of the CCB's first 100 cases have been slightly underwhelming to the copyright community because only one was resolved (i.e., settled) through the CCB system.¹⁷¹ This may be because one of the main pitfalls of the CCB is that it involves a voluntary process,¹⁷² meaning that defendants who have been sued in CCB by a plaintiff can opt out of CCB.¹⁷³ For CCB to be a truly viable option for creators, defendants should not be able to opt out of infringement claims. Alleged infringers should have some fear that creators can fight back legally. The threat of owing damages for copying someone's art should be enough to deter infringement in the first place, and if it does not, it should allow creators to have an opportunity to fight in a court system to obtain damages.

The following scenario is a common one for small creators: a company infringes on a copyright, the small creator asks them to stop or

166. .ART, *supra* note 150.

167. *Id.*

168. *See id.*

169. *See Copyright Small Claims and the Copyright Claims Board*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/small-claims/> [https://perma.cc/AB4X-FJXM].

170. *See id.*

171. Jonathan Bailey, *The First 100 Cases at the Copyright Claims Board*, PLAGIARISM TODAY (Aug. 18, 2022), <https://www.plagiarismtoday.com/2022/08/18/the-first-100-cases-at-the-copyright-claims-board/> [https://perma.cc/Z4PQ-2J2Q].

172. *Copyright Small Claims Court*, COUNSEL FOR CREATORS LLP (Mar. 14, 2022), <https://counselforcreators.com/log/copyright-small-claims/> [https://perma.cc/2KAJ-SCFP].

173. *Id.*

pay to use the work, and the company responds they have already paid in exposure.¹⁷⁴

An example of a small creator fighting for her rights occurred when Alison Altafi, known as “Loominarium” and a purveyor of hoop weavings, had a company steal an image of her work online.¹⁷⁵ As of February 2024, Loominarium has amassed 21,100 followers on Instagram and 34,400 followers on TikTok.¹⁷⁶ She regularly posts content of her work, and in 2021 she posted a photo taken by her photographer of her office, which was then used as a promotional photo to launch her new website.¹⁷⁷ Soon after posting, she saw an Anthropologie Instagram ad that looked suspiciously familiar.¹⁷⁸ One of the images in the Instagram ad was the photo Loominarium just posted on her website, and her Instagram account was tagged in the ad.¹⁷⁹ Loominarium and her photographer immediately reached out to Anthropologie to confront the infringement of the photographer’s copyrights, because they did not consent to the photo being used and were not receiving any payment for the use of the photo.¹⁸⁰ Anthropologie responded to the message by denying they used the image in a clickable ad, that they usually ask for permission, and “there was a lapse in [their] process” in this situation.¹⁸¹ Loominarium and her photographer did not accept that as an answer, and sent Anthropologie an invoice for use of the photo on their Instagram.¹⁸² Ultimately, Anthropologie paid the invoice and issued an apology.¹⁸³

This is an example of a happy ending to an infringement issue where a small creator held their own against a large corporation and prevailed. It is fair to assume from this interaction that Anthropologie was hoping that the creator they stole from would not understand how

174. See generally Katie Barnes, *Free exposure’ doesn’t pay the bills... or does it?*, SCRATCH (Aug. 23, 2022), <https://www.scratchmagazine.co.uk/feature/free-exposure-doesnt-pay-the-bills-or-does-it/> [https://perma.cc/HRH5-QTQ8].

175. Alison Altafi (@loominarium_fiberart), TIKTOK (Aug. 27, 2021), https://www.tiktok.com/@loominarium_fiberart/video/7001108957490187525?t=8bWzAdQkIR8&_r=1 [https://perma.cc/5TC4-DNQJ].

176. *Id.*

177. See generally Loominarium Fiber Art, <https://loominariumfiberart.com/> [https://perma.cc/695E-RG7W].

178. Altafi, *supra* note 175.

179. *Id.*

180. *Id.*

181. *Id.*

182. See Alison Altafi (@loominarium_fiberart), TIKTOK, (Sept. 22, 2021), https://www.tiktok.com/@loominarium_fiberart/video/7010748005468884229?_r=1&t=8bWz64GiU6V [https://perma.cc/X4GN-4YJT].

183. *Id.*

to protect their copyrights and would be happy with being tagged in the photo with significant exposure. However, small creators should not accept online exposure as payment for infringing on their copyrights.

Another suggestion for creators, especially those who have social media followings, is to lean on those followings for help. The importance of a social network is not highlighted nearly enough in the resources available to today's creators. A key part of protecting work online is to remain vigilant and report whenever infringement occurs online.¹⁸⁴ When more people are familiar with an artist's work, it is more likely someone, such as a social media follower, may report back to the creator about the potential infringement. This can allow the small creator to learn of the infringement and navigate the proper channels to report it or confront the infringer. This can also give the small creator a channel to publicize the theft to their followers.

Navigating in today's copyright landscape as a small creator is confusing. Potential infringers often hope that small creators do not understand their enumerated rights. However, the above suggestions can provide some relief for small creators and help them arm themselves to wield their copyrights in the digital space.

IV. Small Creators and Their Followers Should Unify Their Voices to Demand Change

The methods stated above are helpful to navigate a system that has failed to support today's small creators. At its core, copyright law was created to support artists by protecting their creations and motivating artists to continue creating new expressive works.¹⁸⁵ However, it takes a lot of time, money, and influence to move copyright law in the direction that artists desire.¹⁸⁶ In order to achieve that goal, millions of creators online need to band together into a unified voice and demand change from Congress.¹⁸⁷ It would be even more powerful if the artists' appreciators and followers add their voices to call for change.

One way to help promote a unified call to action from Congress is to promote awareness to the public via a flow of easily accessible information. There are many webpages available for artists that provide information on protecting one's rights or avoiding infringement

184. See Tiwari, *supra* note 153.

185. See Samuelson, *supra* note 6, at 1176.

186. See discussion *supra* Part III.

187. See generally Litman, *supra* note 10, at 36.

on someone else's rights.¹⁸⁸ Most of these pages end with a note stating that the page was written with help from a law firm or by an intellectual property attorney with an advisement to contact them for a free consultation.¹⁸⁹ This is helpful for artists if they need legal help, but these pages may not appeal to an average internet user unless they were specifically having an infringement problem.

To remedy this, creators could use their platforms to advocate change. Social networks can not only help individual creators promote their work or know when their works are infringed, but also serve as a resource for information and a call to action for the individuals within the creators' networks. In today's world, social media can be used to bring together diverse groups of people to achieve a single goal. Additionally, having many individuals band together for a call to action means pooled resources can turn the tides in Congress the same way radio, internet, and cable providers turned the tides in the past.

Creating a network that has unified voices and resources may help draw more attention to the need to change the current copyright landscape so that it better protects today's creators in the digital age.

Conclusion

The current copyright landscape does not support the creators it was meant to protect. Copyright law is "a complex system of procedures and institutions" that is unwelcoming to those who are not well-versed in legalese and do not have the resources to pay for representation.¹⁹⁰ Infringers should not feel entitled to steal a work and profit from it without compensating the original creator. It is too easy for infringers to take advantage of the gaps and confusion stemming from an analog copyright rulebook in a digital visual art world.

While artists have found ways to work within the system, these solutions are just bandages on a gushing wound. Copyright laws should be doing more for creators to promote creativity and prevent copying. This can only happen if the millions of small creators work together with their supporters to create a unified call to action to update the analog rules of the Copyright Act to accommodate artists in today's digital world.

188. See, e.g., Williams, *supra* note 160; Buchwald, *supra* note 89; Park, *supra* note 70; ARTBUSINESS.COM, *supra* note 38.

189. See *id.*

190. See Pager, *supra* note 9, at 1026.