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Bauer Lecture: Draft

I would like to thank the Cardozo L R for their invitation to speak, and all those who have taken the time to discuss this issue w me in the recent past, including my commentator Marci Hamilton<sup>1</sup>.

I also thank the audience for its attendance and attention, and I look forward to the criticisms/reactions from all of you and from Prof Hamilton.

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The title of this lecture is obviously borrowed from a song title by Tina Turner, "What's Love Got to Do with It?" My title is "What's Art Got to Do with It?"

You may be wondering, "what the IT is"-- that is, what's this thing that Wendy Gordon is going to argue that maybe art has to do with. Since my writing has concentrated on copyright and other forms of intellectual property, and since our setting is a law school, the natural reaction is to assume the lecture will be

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<sup>1</sup>Jane Cohen, Elinor Fuchs, Joan & Russell Hardin, Sam Postbrief, Larry Sager. Readings: iris murdoch, arthur danto, sartre, clive bell, schopenhauer.

addressing what Art Has To Do With Law, particularly copyright. That's true enough.

But I like the Tina Turner lyric for an additional reason. Think about Tina Turner's question--posed defensively by the song's interlocutor-- "what's love got to do with it?". In that question the "it" is clearly the speaker's situation in life. And one doesn't struggle much to answer the question "what's love got to do with it" -- the likely answer is that love's got "everything" to do with it.

The presence or absence of love, particularly in the world of popular music, has everything to do with life and one's situation in it. Analogously, my contention is that at least some art has EVERYTHING to do with one's ontological situation, and that this relationship-- [between the way people relate to art and the way people relate to their place in the universe] -- in turn has implications for law.

Let me begin with the law, and turn later to life.

Most recent copyright legislation and case decisions have

given primacy to ownership interests over aesthetic interests. I believe this has often happened for structural and public-choice reasons<sup>2</sup> unrelated to the substantive issues at stake. But whatever the causes, it seems as if most lawmakers today are intent on making art safe for copyright. In my published writing I have tried to reverse that hierarchy, arguing essentially that copyright needs to be made safe for art.<sup>3</sup>

For example, when copyright was originally brought from Britain to this country, creativity was a defense to copyright infringement. The only persons who had to worry about infringement suits were slavish copyists -- such as pirate booksellers who reprinted whole books without permission. However, as creative versions of books became more and more valuable, the law changed. Creativity ceased being a defense to copyright infringement.

Translations, dramatizations, performances, abridgements, and, eventually, virtually all new versions of a work were brought within the copyright owner's control. (There are a few exceptions, such as where the "fair use" doctrine applies, or such as the compulsory licenses that pertain in the music industry. But

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<sup>2</sup>See, e.g., Mala Pollock

<sup>3</sup>Yale piece

speaking generally, a copyright owner today has the power to veto any new version of his work. Further, the courts are vigorously expanding the copyright holder's rights to control the uses made of his work.<sup>4</sup>

In an ordinary case, this works fine. When a novelist has a book that's adaptable to the screen, he ordinarily looks to license his film rights to the highest-paying movie studio, and in turn the highest-payor is usually the studio best situated to earn a profit by serving public taste. So the movie-- the creative "derivative work" -- is made, the initial copyright owner gets some compensation, and the public is pleased. No harm is done by the law's indifference to the second creator's creative impulses. The second creator- the movie studio-- just buys a license.

But in some cases the copyright owner doesn't want to license new versions. This happens particularly often when the new version somehow mocks or casts doubt on the original, or puts the original in touch with controversy or a part of American life outside the so-called mainstream.<sup>5</sup> One example is Walt Disney: refusal to license parodies of Mickey Mouse. Another is 2 Live

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<sup>4</sup>Mirage

<sup>5</sup>Chicago piece

Crew recently- Ray Orbison's Pretty Woman. Possibly appropriation art is another example. When a new view brings a distinctively fresh wind, Refusals to license are particularly likely to occur.

But even in noncontroversial cases, such as ART HISTORIANS who need copyright permission for warring heirs, or textbook authors need to quote at length, permission may be refused. Or Tom Stoppard's use of Hamlet in R & Gild are dead... if Shakespeare's works were still in c. {today, life plus 50. many generations of art in that time.} While we might well disagree on whether these particular versions or fresh views are socially valuable or not, I think we all can see that a blanket rule enforcing any and all refusals to license might lead to our culture being centrally controlled by a few media monoliths. For this reason, in the past I've suggested that in some of these cases of creative use it may be appropriate to allow the new creator to go forward, subject only to an obligation to pay an allocable share of her profits to the copyright owner on whose prior work she has built.<sup>6</sup>

But if my perspective says that copyright law should be altered to make room for art, That immediately leads to the question, what is art. Or at least it requires our identifying some things that are incontestably art, such as paintings or

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<sup>6</sup>Id; also see Va article; Columbia article.

poems, and asking why creating a safe harbor for their creators-- even if they copy from predecessors-- may be a good idea. That is, my reversal of the hierarchy requires us to face the q of why art may sometimes deserve special status capable of overriding ordinary proprietary categories. The latter is the theme of my lecture.

Or one could put the theme in somewhat different words. I'm concerned with identifying what is there in art which might justify allocating at least some artistic things<sup>7</sup> on a basis that is non-economic, non-pecuniary. In particular: how should we allocate the liberty of copying. Should it all be a question of whether the potential copyist is willing & able to pay the copyright owner's price.

In law, non-pecuniary allocations have often been identified with questions of "inalienability" or "tragic choice." For both of these terms the relevant debate has been framed largely by the work of Guido Calabresi, a scholar who has long been fascinated by the market and its limitations. But for our purposes, a better starting place is the more general notion, framed by philosopher Michael Walzer, that different goods may have different "spheres

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<sup>7</sup>The "thing" here is the privilege to copy.

of justice." That while it might be appropriate to distribute eggs or waterskis according to whomever bids the most money for each, that there are some goods (let's say babies, or bodies, or votes) for which a purely pecuniary allocation seems wrong. He argues that if we let everything be determined by the cash nexus-- if, for example, we let political office be the direct result of purchase-- we would drastically decrease the amount of equality in our world, as those with money would monopolize all goods and all sources of authority. Keeping some goods at least partially<sup>8</sup> out of the cash nexus is essential to maintaining a diverse and equal society.

But why should art be one of those special goods? One possibility, taking a leaf from Walzer himself, is that the arts can be political, an alternative source of authority and world view. Admittedly, Plato argued that the arts being a source of alternative authority is precisely why all poets should be banished. But in our culture (and Walzer makes ref to individual cultural valuations) , in our culture we are conditioned by the first amendment and democracy, we think that in the realm of ideas diversity is most necessary.<sup>9</sup> Yet we must admit, w Plato, that

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<sup>8</sup>"Priceless: when the books are burned; "priced" in the market.

<sup>9</sup>Also, as Iris Murdoch has noted, Plato himself was a poet ,

some art is low, destructive rather than constructive. So not an easy argument; quite complex.

Another possibility: art as flow. (Mihay CHicksentmihay) But many other sources of flow.<sup>10</sup>

One cd multiply examples and possibilities.

What I want to concentrate on, however, is that art is one place where we exercise a particular faculty. Both as creators and as viewers. Related to Clive Bell's "aesthetic emotion" and Simone Weil's "loving attention." Even related to Schopenhauer's objective viewing absence of will, and Sartre's union of en soi & pour soi<sup>11,12</sup> Its' what a religious person would call our spiritual

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who would not have voted to banish himself because of his words' artistry.

<sup>10</sup>Another: immediacy over secondary payoffs. (Ivan Illych). Such a rule would say, any creativity is OK even when it uses prior peoples' works. But creative moments require a culture to spread; incentives; may be necessary to give some monopoly rights to get that. Uncertain result.

<sup>11</sup>ALSO: character Roquentin in his encounter with the chestnut tree

<sup>12</sup>"I was the root of the chestnut tree', roquentin cries... "or rather I was entirely conscious of its existence. Still detached from it-- since I was conscious of it-- yet lost in it, nothing but it" Sartre< NAUSEE. As Danto says, "there is no point at which one's awareness of the root will or can obliterate the further awareness that one is aware" and that one is free.

faculty, or an existentialist might call our faculty for coming to terms with our essential freedom and contingency in the world. I suspect that whatever one's world view, Christian, deist, existentialist, one takes that view toward both the universe and toward art-- or, more particularly, that the philosopher who considers art will begin to treat it in the same way as he treats the world.

And bring to it whatever one brings to the world: the deist Bell finds deism in it, etc. As a teenager (more optimistic than I am now) I thought the function of art was to pay back life for its glories--came out of a fundamental feeling of gratitude toward the world. [Incidentally: my Eng teacher, I think her name was Mrs. Laue]

Cd pursue historically.<sup>13</sup> But for now, just want to make this clearer-- reminding us of what it feels like:

what is the faculty? the edge. sense of almost-understanding. tension relieved by creativity. See forms in

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Danto in SARTRE at 35

<sup>13</sup>through Clive Bell (deist), Simone Weil (Christian) Jean-Paul Satre

relation to each other: they are saying, I am here, As we see we are. Not in terms of how we WANT to be {need more clarity here}

To explain, let me use Two apparently contradictory aphorisms of John Ruskin's:

The first is: I want you to begin with  
                   colour in the very  
                   outset, and to see  
                   everything as children  
                   would see it. For,  
                   believe me, the final  
                   philosophy of art can  
                   only ratify their opinion  
                   that the beauty of a  
                   cock-robin is to be red,  
                   and of a grass-plot to be  
                   green                   ...<sup>14</sup>

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<sup>14</sup>The Art CRit of John Ruskin, ed by Robert Herbert, at 2

The second is: "The arrangement of colours  
                   and lines is an art  
                   analogous to the  
                   composition of music, and  
                   entirely independent of  
                   the representation of  
                   facts."<sup>15</sup>

The sensitivity to life AS IT IS: the child. Child's motivation:  
 so new. Adult: needs to be reminded. Art is something AS IT IS.  
 Needn't be the same,-- red for red bird-- but calls attention to  
 its own existence as (metaphorically speaking) the world does to  
 the child.

Of course it's a fiction to say art or nature calls attention to  
 itself. Less a fiction with art: intentionality of artist, using  
 item to call attention to itself. Nature: the source of the  
 LOOKING energy is kids' inquiry.

There are many kinds of art that serve many kinds of purposes.  
 But I want to focus today on the kind of art that Sch erroneously

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<sup>15</sup>Id

thought constituted the entire field: that art which is made by objectively attending to the world, or which helps others so attend. It has to do with JUST BEING in the world. To paraphrase Schopenhauer:

... art is the abstraction of self from will, which makes possible objective viewing. The artist who goes to the Danube sees at the river a multitude of beautiful vistas; the business traveler sees a horizontal line, bisected with the vertical line of bridges, leading to the traveller's destination.

Once again: as children we attend naturally. As adults, esp in western culture, need to be reminded to attend [tragedy/mortality teaches us too, but that's a horrible time to find out for the first time] Such art can remind to attend, can result from attending.

Might be asked (Larry Sager)- bungee jumping. Gives a jolt, consciousness of life, in death-defying. Why not privilege IT? we do privilege such activities [to the extent self-destruction isn't overall destructive] Trips to North Pole. Arguments about women in the draft General death defyingness: too risky,

negative. We DO privilege sport, pushing self, etc, we fund trips to the moon. Another place where find the faculty: religion. That is privileged too-- deduction for religion. The way churches/synagogues alter entry prices with means. Unlike grocery. Also merit: monk Thich Nhat Hanh <sup>16</sup>: "washing the dishes not to get the dishes clean, but rather wash the dishes in order to wash the dishes." Art can remind one to NOTICE, stepping to a shallow portion of the insistent stream.

In fact, we privilege all nonprofit: things done for their own sake. To paraphrase Kant, as ends, not means. (Of course, unrealistic view of nonprofits; many of them being source of salaries & security, quite instrumental for participants)

I could be making a metaphysical claim, that this kind of experience is more valuable than other kinds: coming to terms w reality. or I cd be making a utilitarian claim: Flow. Or we think when we HAVE these exper that they are essential, weighty, immensely important to our well being. And so on. But if we indivly have these sensations, and if we have them more often when making or viewing art, then art is important, and deserves some special trtment.

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<sup>16</sup>The Miracle of Mindfulness

In a post-Derrida world, however, it will inevitably be argued that there is no such thing as just BEING in the world. That all our experience is culturally conditioned, that when we think we are surrendering individual will-- looking at the rocks and the sunset or the Danube for their own sake-- we are just falling into a group will. That everything is implicitly instrumentalist. No need to debate that-- a matter of degree. The stream of will/instrumentality: strong force, weak force elsewhere. There's something wonderful in the ceasing to strive, of letting the ego coast, of coming into contact with what my old-fashioned self calls the stream of being.

How does my account square with some of the new literature on the history of aesthetics? Particularly the writings by Mark Rose (focusing on England) and Martha Woodmansee (focusing on Germany) suggesting that there is great historical interdependence between the notion of authorship and the devt of copyright.

Let me focus on Martha Woodmansee's new book, THE AUTHOR, ART AND THE MARKET: REREADING THE HISTORY OF AESTHETICS. 1994.

How might Martha react to my account? For example, I argue that the immediacy of creation should be privileged even when it

involves some copying: that the life as lived is more impt than the mere possib of monetary incentives to another class of author.<sup>17</sup> To this Martha might chuckle at the irony of seeing the elevation of artistry being used to undermine copyright, when such elevation was, in her view, often used as a BASIS for copyright. More importantly, when I argue that art creation & viewing of art can function as a crucial way to have access to noninstrumental aspects of life, Martha might argue that that I've simply fallen into the traditional explanation of the elevation of the arts as a substitute for religion, as a refuge for operation of the spiritual faculty. She says elevation of the arts "traditoinally... has been attributed to secularization: with the erosion of orthodox belief beginning in the Renaissance, art has inherited the task of interpreting human experience." p 20 She also suggests that this is absurdly off point: that the elevation of art occurred in part as a reaction of Germany's best poets to the increasing spread of reading among people who simply didn't like their work. As the "best" of the German literati failed to please the mass buying public, she argues, those same literati developed an aesthetic in which the true purpose of art wasn't to PLEASE the audience --because after all the literati were failures by that measure-- but rather where the true purpose of

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<sup>17</sup>also: Larry's point about incentives on both sides

art was to exist for its own sake, a noninstrumental artifact of intrinsic value. By such a measure, the literati can be successes even if they don't sell-- and they can intimidate the haute bourgeoisie in buying more of the "proper" kinds of products.

So have I simply fallen into a rhetorical trap set for me by the self-interest of certain 18th century rhetoricians? Of course I don't think so. Even truths can emerge from self-interest, and I think that while my account doesn't account for all art, it's true enough for some. (Tho of course one can never know one's own illusions at the moment of being deluded) But there is an important distinction betw the Germanic noninstrumentalism and mine. They said art exists for its own sake. I say that art exists for its own sake only as much as any of us, and any of the world, exists for our own sake. And what that "sake" is-- like the IT in my title-- is open. If one is religious, then art can embody the expression of divinity in the world. If one is existentialist, then art calls us to recognize authenticity and freedom. Martha implicitly denigrates the contributions of one aesthetician, Mortiz, by artuing that he merely projected onto art the religion of his youth" (p. 18) I think that we all do that -- we project our ontological beliefs on to art-- and that this is precisely a good thing. It is noninstrumental in experience but

instrumental in its end: we look at the river not simply to find out which way is home but rather to see it. we look at a painting not simply to write an art history paper or rest our eyes but simply to see it. But there is a human need for simply seeing.