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Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art

Caroline L. McEneaney

Transformative Use and Comment on the Original

THREATS TO APPROPRIATION IN CONTEMPORARY VISUAL ART

INTRODUCTION

Art and rules do not often go well together. To imagine an artist pondering the Copyright Act and conforming to case law as part of the creative process is bizarre if not laughable. Some United States courts, however, seem to disagree. In March of 2011, a district court in the Southern District of New York held that appropriation artist Richard Prince had unlawfully infringed photographer Patrick Cariou's copyrighted works when he tore pages from Cariou's photography book *Yes, Rasta* and used them in collages for his own collection entitled *Canal Zone*.[1] Prince unsuccessfully argued that his work constituted fair use—a defense to copyright infringement that deems an otherwise infringing use to be lawful for policy reasons.[2] The *Cariou v. Prince* decision is a high profile, yet not unprecedented,[3] reaction to visual art that comments on prior works through appropriation.

The contemporary concept of appropriation in the visual arts originated about a century ago with the advent of artists such as Pablo Picasso and Georges Braque and their use of

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[1] Cariou v. Prince, 784 F. Supp. 2d 337, 342-43 (S.D.N.Y. 2011). This past April, the Second Circuit Court of Appeals issued an opinion reversing in part the District Court's decision. Finding that the lower court incorrectly required that the new work comment on the original, the Court of Appeals determined that twenty-five of the thirty paintings in the *Canal Zone* series constitute fair use. While this decision substantially thaws Judge Batts' initial ruling, together, the three *Cariou* opinions, one from the district court and the two from the Second Circuit, only underscore the need for a clearer fair use standard. Cariou v. Prince *Cariou (II)*, 714 F.3d 694 (2d Cir. 2013).

[2] *See generally Cariou*, 784 F. Supp. 2d at 346-47.

[3] *See* Rogers v. Koons, 950 F.2d 301, 309-10 (2d Cir. 1992) (rejecting pop artist's fair use defense despite the use of different medium and evidence of social commentary in work); Morris v. Guetta, No. LA CV12-00684, 2013 WL 440127, at *13 (C.D. Cal. Feb. 4, 2013) (rejecting street artist's fair use defense); Friedman v. Guetta, No. Civ. 10-00014, 2011 WL 3510890, at *7 (C.D. Cal. May 27, 2011) (same).

collage.[4] While occasionally throughout the twentieth century artists have faced copyright claims, these cases have settled for the most part, with few lasting long enough to set any legitimate precedent.[5] But recently, artists have become increasingly litigious.[6] And many of these modern cases involve major art world players, such as Shepard Fairey, Ryan McGinley, and, of course, Richard Prince.[7] These wealthy and successful artists might not face crippling financial consequences by defending or settling these lawsuits, and they are often unsympathetic defendants, but the effect of a decision against one of them could have vast consequences.

The goal of copyright law, under the U.S. Constitution, is "[t]o promote the Progress of Science and useful Arts."[8] Too often, however, in an effort to zealously protect the rights of authors, courts and litigants lose sight of this end. More importantly, overprotection of copyright can actually hinder

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[4] Picasso and Braque are typically associated with the beginnings of appropriation art for their use of collage in works of art. Clement Greenberg, *Collage*, *in* ART AND CULTURE: CRITICAL ESSAYS 70-71 (1961); *see also* Timothy Anglin Burgard, *Picasso and Appropriation*, 73 ART BULL. 479, 479 (1991) ("[Picasso] perceived appropriation as a magical transference of power that could be applied to both historical and contemporary art and to objects and people.").

[5] Cat Weaver, *Law vs. Art Criticism: Judging Appropriation Art*, HYPERALLERGIC (May 5, 2011), http://hyperallergic.com/23589/judging-appropriation-art/ ("[M]ost copyright infringement cases defer to a 'tradition of settling'."). Renowned pop-artist Andy Warhol faced infringement claims for using another artist's image of flowers and for his use of the Campbell's soup can images, but he wound up settling both claims out of court. *See* William M. Landes, *Copyright, Borrowed Images, and Appropriation Art: An Economic Approach*, 9 GEO. MASON L. REV. 1, 4 n.10, 18 (2000); E. Kenly Ames, Note, *Beyond* Rogers v. Koons*: A Fair Use Standard for Appropriation*, 93 COLUM. L. REV. 1473, 1475 n.12, 1484 (1993). The transformative use standard is derived from *Campbell v. Acuff-Rose*, a case dealing with music sampling. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 569 (1994).

[6] Sergio Muñoz Sarmiento, *Why Is Copyright (Suddenly) a Hot Topic for Artists?*, CLANCCO, (Feb. 19, 2010), http://clancco.com/wp/2010/02/hot-topics-copyright-art/. Mr. Sarmiento argues that the current economic recession, the increased awareness of the value of visual art, and education about legal rights are all factors that have contributed to the rise in copyright litigation in recent years. *Id.*; *see also* Randy Kennedy, *Apropos Appropriation*, N.Y. TIMES, Dec. 28, 2011, at AR1, *available at* http://nytimes.com/2012102/01/arts/design/richard-prince-lawsuit-focuses-on-limits-of-appropriation.html ("[A]rt lawyers say that legal challenges are now coming at a faster pace . . . because the art market has become a much bigger business and because of the extent of the borrowing ethos.").

[7] Randy Kennedy, *Artist Sues the A.P. Over Obama Image*, N.Y. TIMES, Feb. 9, 2009, at C1; Walter Robinson, Cariou v. Prince*: More on Artists' Copyright Claims*, ARTNET (Dec. 16, 2011), http://www.artnet.com/magazineus/news/robinson/artists-copyright-claims-12-16-11.asp. Not to be forgotten, superstar artist Jeff Koons has singlehandedly contributed to much of the American case law concerning fair use and appropriation art. *See generally Rogers*, 950 F.2d 301, Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006), and Cariou v. Prince, 784 F. Supp. 2d 337 (S.D. N.Y. 2011).

[8] U.S. CONST. art. I, § 8, cl. 8.

progress when too much material is off limits. The fair use exception is designed to redirect copyright toward its goal by allowing uses that are desirable. In other words, fair use applies when the law would otherwise deem a work infringing that, for policy reasons, should be permitted.[9]

Determining whether a specific act of copying falls under fair use involves a four-factor analysis.[10] Although courts examine all four factors,[11] the first factor—which considers "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"[12]—is often central to the analysis. In *Campbell v. Acuff-Rose Music, Inc.*,[13] the Supreme Court relied on a *Harvard Law Review* article written by Judge Pierre N. Leval to introduce the "transformative" nature of the work as a prong of the first fair use factor.[14] According to Judge Leval, a transformative work "must be productive and must employ the quoted matter in a different manner or for a different purpose than the original."[15] The transformative use question is now "at the heart of . . . fair use" claims, particularly those that deal with appropriation art.[16] Moreover, the Supreme Court has

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[9] *See Campbell*, 510 U.S. at 575.

[10] Under § 107, the fair use analysis examines:

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

17 U.S.C. § 107 (2006). These four factors provide a guideline for courts to analyze fair use. However, they are not exclusive or determinative—a point that the Second Circuit recently made plain in its *Cariou* decision reversing in part the district court's finding that none of Prince's works constituted fair use. *Cariou (II)*.

[11] *See, e.g.*, *Campbell*, 510 U.S. at 577 ("All [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright.") In some areas, however, doctrine has evolved that favors certain factors over others. One example of this is the doctrine of transformative use—the central topic of this note. Another is the emphasis on the second factor in cases where the underlying work is unpublished. *See, e.g.*, Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557 (1985); New Era Publ'ns Int'l v. Henry Holt & Co., Inc., 873 F.2d 576, 583-84 (2d Cir. 1989).

[12] 17 U.S.C. § 107.

[13] 510 U.S. at 578.

[14] *See id.* at 578-92.

[15] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990). In the context of this note, the "quoted matter" means the appropriated work.

[16] Meir Feder & Rajeev Muttreja, *Circuit Addresses Limits of Fair Use in Visual Art*, N.Y. L.J., June 30, 2011; *see also Campbell*, 510 U.S. at 578; Blanch v. Koons, 467 F.3d 244, 251-52 (2d Cir. 1996); Cariou v. Prince, 784 F. Supp. 2d 337, 347-48 (S.D.N.Y. 2011).

explained that a finding of transformativeness will render the other factors less persuasive.[17]

The long-term dangers of an overly conservative transformative use (and, by extension, fair use) standard could drastically affect the art world and contemporary art movements. If the cost of paying for these lawsuits begins to outweigh the benefits of using appropriation, then the world's most well-known artists might stop employing such practices.[18] The fear of facing a copyright infringement claim could have a chilling, if not silencing, effect on creative expression. It is important, therefore, to develop a more forgiving standard for dealing with claims of fair use in the visual arts in order to discourage litigation and thereby protect artists' creative expression. Copyright law should adhere to the Constitutional purpose set out in Article 1 §8 cl. 8, and explained in greater detail in Judge Leval's article, while protecting against legitimately threatening forms of infringement. A standard that evaluates whether the new work serves a different *artistic* purpose would allow artists the most freedom and still protect against piracy and counterfeiting.

This note primarily addresses the visual arts.[19] In the context of visual art, current fair use law does not effectively promote the goals of copyright. Accordingly, for visual art that incorporates images that would otherwise be infringing, fair

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[17] *See Campbell*, 510 U.S. 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. . . . [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." (citations omitted)).

[18] A common response to this issue is that the artists should license the images that they plan to use. This seems obvious from a legal standpoint; however, several practical problems can arise in a regime that requires artists to license every image that they use. *See* Landes, *supra* note 5, at 20 ("Transaction costs are likely to be large if the law required the artist to obtain permission to appropriate from multiple sources. Other things being the same, this implies that the law should be more sympathetic to the artist whose work borrows from multiple copyrighted sources."); Weaver, *supra* note 5 (referring to appropriation artist Hank Willis Thomas's commentary about the difficulties associated with securing permissions and the eighty-two images used in one of his projects, Cat Weaver stated: "One could spend a few *years* garnering enough permissions to compile eighty-two relevant images." (emphasis added)).

[19] While some commentators believe that "the objective of copyright could be better achieved if the visual arts had a distinct and separate fair use regime," Stephen E. Weil, *Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood*, 62 OHIO ST. L.J. 835, 835 (2001), it is plausible that other areas of copyright could benefit from the standard set forth below as well. In order to translate, the weight of each factor and the qualities that are deemed important would likely vary from literature to the visual arts to the dramatic arts, etc.

use—and particularly transformative use—analysis should focus not on whether the secondary work comments specifically on the original, but instead on whether the new work serves a different artistic purpose than the original. This new interpretation would distinguish impermissible counterfeiting from permissible and desirable uses.

Part I begins by outlining the major topics necessary for the analysis. First, it surveys the history of appropriation art. It then provides a brief background of copyright law, fair use, and transformative use. Finally, Part I emphasizes the policy goals behind the transformative use doctrine and introduces how the doctrine functions in the context of visual arts litigation.

Part II introduces *Cariou v. Prince*. It explains the facts behind the case, illustrates the arguments made by each party, and details the reasoning the court relied on to reach its decision.

Part III spells out the issues that this note attempts to address. It predicts the implications that *Cariou* might have for the art world and artists and warns of the dangers of a strict fair use and transformative use standard. It also explains and critiques two existing attempts at tackling these issues: the Creative Commons movement and Professor Lawrence Lessig's approach, which earmarks certain restrictions and deems all other copying fair use.

Part IV attempts to solve the problems introduced in Part III by proposing a new standard for transformative use. This standard, which is rooted in Judge Leval's seminal article, suggests that a secondary work need not comment on the original and instead must have a different artistic purpose. This section then explains the factors that would determine whether a work has a different artistic purpose and is therefore transformative. This interpretation of Leval's theory leaves more room for artists to work freely, yet respects the rights of copyright owners by essentially granting a thin copyright protection and preventing pure piracy.

Appropriation often has the effect of making artwork more accessible to the public. When people recognize an image, they can engage with the work; viewers are then able to relate to and understand the work and, ideally, find some meaning within the work.[20] While movements like abstract expressionism can be incredibly powerful to the learned observer, the layperson

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[20] *See* Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art's Exclusion from* Campbell v. Acuff-Rose Music, Inc., 60 BROOK. L. REV 1653, 1656 (1995).

often has more difficulty connecting with a work of art. Amateur viewers cannot take the first step of engaging with the piece and often leave frustrated or confused. Surely the copyright clause was not written with only art historians in mind. With respect to the visual arts, the ends of copyright are better served if more people can extract meaning from the visual arts. If copyright law becomes so restrictive that the risks of appropriating outweigh the benefits, however, modern culture will suffer.

I. APPROPRIATION ART AND FAIR USE

A. Appropriation in the Visual Arts

Appropriation has long been a device artists use to comment on their contemporary surroundings. From Picasso to Duchamp and the Dada to Pop Art and other postmodern movements, appropriation of images or objects has served to communicate messages about contemporary society and the nature of art itself.[21] Appropriation art, as a movement, often refers to a period during the 1980s where artists experimented with using recognizable images from pop culture in works of fine art.[22] Richard Prince—along with artists such as Jeff Koons, Barbara Kruger, and Sherrie Levine—is often cited as an integral voice in the movement.[23]

Today, artists continue to use appropriation as a method of reaching wider audiences, developing consistency in a body of work, or commenting on the work of others.[24]

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[21] *See generally Appropriation*, TATE GLOSSARY, http://webarchive.nationalarchives.gov.uk/20120203094030/http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=23 (last visited Mar. 9, 2013).

[22] *See* Johanna Burton, *Subject to Revision//2004*, *in* DAVID EVANS, APPROPRIATION 206 (2009) ("In the 1980's, appropriation came to be seen as one particularly effective means to reveal the working mechanisms of various cultural, social and psychic institutions—and thus considerations of subjectivity and identity necessarily surfaced in such deconstructive terrain.").

[23] *See* Thomas Crow, *The Return of Hank Herron*, *in* EVANS, *supra* note 22, at 88; Roberta Smith, *Pilfering From a Culture Out of Joint*, N.Y. TIMES, Sept. 28, 2007, at E33, *available at* http://www.nytimes.com/2007/09/28/arts/design/28prin.html?pagewanted=all.

[24] There are several contemporary movements and artists that use appropriation in their work. Superflat is a contemporary art movement attributed to the painter Takashi Murakami. Marc Steinberg, *Otaku Consumption, Superflat Art, and the Return to Edo*, 16 JAPAN F. 449, 450 (2004). The style incorporates images of Japanese comics and characters called *manga*. *Id.*

Artist Roger Shimomura uses images of superheroes, cartoons, and racist imagery in contemporary American culture to point out the way that Asians and Asian Americans are perceived in America. KARA KELLEY HALLMARK, ENCYCLOPEDIA OF ASIAN AMERICAN ARTISTS: ARTISTS OF THE AMERICAN MOSAIC 191(2007).

Moreover, a new culture created by the Internet has had a massive effect on the arts and is "radically reordering the concept of appropriation."[25] Indeed, art reporter Randy Kennedy suggests that contemporary artists use appropriation "as a way to participate thoughtfully and actively in a culture that is highly circulated."[26]

The practice, however, lies directly in conflict with the law of copyright. The use of an image to create another work through appropriation almost necessarily implicates the derivative work right—and often the reproduction right as well.[27] The conflict is unavoidable. Copyright offers an artist exclusive rights to reproduce and to create derivative works from her protected material,[28] whereas appropriation art reproduces the work of another in order to create a new work.

B. A Brief History of Copyright and Fair Use as Applied to Appropriation Art

Copyright law is a fundamental body in the American legal system. Indeed, the right is preserved in the U.S. Constitution.[29] The U.S. Copyright Act recognizes fixed works of authorship demonstrating sufficient originality.[30] It bestows the exclusive right to, *inter alia*, reproduce, distribute, and create derivative works—subject to some exceptions.[31] The

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Murakami and Shimomura are not the only artists that incorporate appropriated images in their work. Many street artists use images from popular culture as references in their artwork. Anny Shaw, *Street Artist Mr. Brainwash Sued over "Copied" Image*, ART NEWSPAPER, issue 222, Mar. 9, 2011, *available at* http://www.theartnewspaper.com/articles/Street-artist-Mr-Brainwash-sued-over-copied-image/23237. In recent years, street art—a movement grown out of graffiti art, but incorporating methods including stencil, collage, sticker art, and mosaic—has exploded from the underground to the mainstream art market. Seth Kugel, *To the Trained Eye, Museum Pieces Lurk Everywhere*, N.Y. TIMES, Mar. 9, 2008, at TR13, *available at* http://www.nytimes.com/2008/03/07/travel/07iht-09weekend.10790192.html?_r=0.

[25] Kennedy, *supra* note 6.

[26] *Id.*

[27] *See infra* Part I.B. for explanation of the derivative work right and the reproduction right. Daniel Grant, *Will the Legal Status of Appropriation Art Be Decided This Year?*, HUFFINGTON POST ARTS (Jan. 4, 2012, 11:30 AM), http://www.huffingtonpost.com/daniel-grant/art-appropriation-laws_b_1179326.html (quoting Robert J. Kasunic, principal legal adviser at the U.S. Copyright Office) ("Where derivativeness ends and transformative begins is not all clear.") Often, the reproduction right is at issue as well, when an actual copy is fixed to the work.

[28] 17 U.S.C. § 106 (2006).

[29] U.S. CONST. art. I, § 8, cl. 8 grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]" *Id*.

[30] 17 U.S.C. § 106.

[31] *Id.* §§ 107-112.

reproduction right is fairly straightforward in that it deems as infringing any unauthorized, fixed copy of the original that is more than de minimis.[32] A derivative work, on the other hand, is a "work based upon one or more preexisting works."[33] The derivative work right focuses on whether the copyrighted work has been "recast, transformed, or adapted" in the new work.[34] While the law recognizes these as distinct rights, the derivative work right and the reproduction right essentially overlap.[35] This is especially true in the visual arts where the reference must be visual and reproducing the original in the new work is critical.[36] When an artist appropriates an image from another artist, several of the exclusive rights might be implicated. For example, Richard Prince's *Canal Zone* collages would qualify as derivative works and reproductions.[37]

Fair use is an affirmative defense to copyright infringement;[38] accordingly, an infringing work that is deemed fair use is lawful.[39] There are four factors considered in determining whether an otherwise infringing act will constitute fair use. These factors, codified in 17 U.S.C. § 107, are:

> 1. the purpose and character of the use; 2. the nature of the copyrighted work; 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; [and finally] 4.

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[32] *See* JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 302-03 (2010).

[33] 17 U.S.C. § 101.

[34] *Id.*; *see also* Castle Rock Entm't v. Carol Publ'n Grp., 150 F.3d 132, 143 (2d Cir. 1998).

[35] *See* Twin Peaks Prods.v. Publ'ns Int'l, Ltd., 996 F.2d 1366, 1373 (2d Cir. 1993) (citing 2 NIMMER § 8.09[A]).

[36] Whereas words can capture ideas in many different ways, in a work of visual art, references to other works are not explained, they are illustrated. Richard Prince captures this challenge when he discusses and defends his use of "re-photography," where he photographs other photographs:

> By generating what appears to be a double, it might be possible to represent what the original photograph or picture *imagined* . . . . More technological than mechanical, more a simulation than an expression, the result is a photograph that's *the closest thing to the real thing*. And since I feel a bit more comfortable, perhaps more reassured around a picture that appears to be truer than it really is, I find the best way for me to make it real is to make it again, and making it again is enough for me and certainly, personally speaking, almost me.

LISA PHILLIPS, RICHARD PRINCE 28 (1992).

[37] Cariou v. Prince, 784 F. Supp. 2d 337, 349-50 (S.D.N.Y. 2011).

[38] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

[39] 17 U.S.C. § 107.

> the effect of the use upon the potential market for or value of the copyrighted work.[40]

Not all factors must be met in order for a work to qualify as fair use—instead, courts will engage in a balancing test.[41] When dealing with appropriation art, however, the analysis typically involves an emphasis on the first factor and more specifically whether the use is transformative—a question under the first factor analysis.[42]

In the first U.S. case to introduce the idea of a fair use defense, *Folsom v. Marsh*, Justice Story held that the defendant's copy of a George Washington biography was an infringing copy, stressing that the test was whether the secondary use "superseded the use of the original work."[43] While this case did not find fair use or, in the court's terms, "fair abridgement," it acknowledged that there are instances where otherwise infringing uses might be excused.[44] From *Folsom*, the fair use doctrine continued to develop. The Supreme Court has acknowledged that this defense "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[45] Fair use thus developed as an effort to steer the law toward copyright's ultimate goal—to foster the progress of art and science—where the exclusive rights themselves would hinder such progress.

Fair use analysis is intentionally vague.[46] Courts engage in a subjective analysis when considering the fair use defense, focusing on the facts of each case to determine whether the exception applies.[47] Originally, this approach was necessary to balance the conflicting interests of copyright protection and

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[40] *Id.*

[41] *See supra* note 10.

[42] *See* Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006); *Cariou*, 784 F. Supp. 2d at 347.

[43] *See* Folsom v. Marsh, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4901) ("[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.").

[44] *Id.* at 345.

[45] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend, 495 U.S. 207, 236 (1990)).

[46] Congress "eschewed a rigid, bright-line approach to fair use." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448 n.31& 449 (1984).

[47] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2539 (2009).

free expression.[48] But as the law has developed, and as the tendency to litigate over copyright infringement has increased,[49] the unpredictable nature of the inquiry has given way to dangerous results, particularly for genres of art that rely on the use of appropriated images.

C. The Evolution of the Transformative Use Doctrine

Traditionally, the first factor of the fair use defense—"the purpose and character of the use"—has been essential to fair use analyses dealing with the visual arts.[50] And prior to the introduction of the transformative use prong in 1994, courts evaluated the first fair use factor only slightly differently than they do today. In *Rogers v. Koons*, for example, the Court of Appeals for the Second Circuit was not persuaded by artist Jeff Koons's defense that his life size, colorful sculpture, *String of Puppies*, was a parody of modern society and therefore a fair use of photographer Art Rogers's black and white photographic postcard, *Puppies*.[51] The court determined that Koons copied Rogers's photograph "in bad faith, primarily for profit making motives, and [in a way that] did not constitute a parody of the original work."[52]

The Second Circuit explained that Koons's use failed under § 107 because the original was not necessary to the work; in other words, Koons was not communicating a message about Rogers's *Puppies*, but instead he was making a more general statement about banality and kitsch.[53] The court "insist[ed] that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist."[54]

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[48] Fair use is considered one of the ways that copyright law remains in balance with the First Amendment. Eldred v. Ashcroft, 537 U.S. 186, 190-91 (2003).

[49] Erin Coe, *IP Litigation Takes Off in First Half of 2011*, LAW360 (July 6, 2011, 5:37 PM), http://www.law360.com/articles/256106/ip-litigation-takes-off-in-first-half-of-2011.

[50] *See, e.g.*, Blanch v. Koons, 467 F.3d 244, 250-56 (2d Cir. 2006); Rogers v. Koons, 960 F.2d 301, 309-10 (2d Cir. 1992).

[51] *Rogers*, 960 F.2d at 308-10.

[52] *Id.* at 310.

[53] *Id.*

[54] *Id.* The Second Circuit explained that parody is "when one artist, for comic effect or social commentary, closely imitates the style of another artist and in doing so creates a new work that makes ridiculous the style and expression of the original." *Id.* at 309-10. While the court in *Rogers* did not discuss the doctrine of transformative use, it nevertheless explained that a parody will likely constitute fair use. *Id.* Later, in *Campbell*, the Supreme Court framed parody as part of the transformative use question. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). The Court also

Two years later, in *Campbell v. Acuff-Rose*, the U.S. Supreme Court introduced "transformative use" into the fair use analysis.[55] Originating with an article written by Judge Pierre N. Leval, the transformative use doctrine asks whether the secondary work "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message . . . ."[56] The Court adopted the Leval standard, stating that "the central purpose of [the first factor] is to see . . . whether and to what extent the new work is 'transformative.'"[57] The Court, however, also embraced the concept, central to the *Rogers* court, which requires the appropriating artist to comment on the specific original work.[58]

Although *Campbell* dealt with the issue of music sampling, in the years since the Supreme Court's decision, visual arts cases have tracked the Supreme Court's reasoning, branding *Campbell* an important landmark in fair use law and analysis.[59] Written by Justice Souter, the Court in *Campbell* unanimously held that when determining fair use, "[a]ll [of the factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[60] The Court determined that the hip-hop group 2 Live Crew's parody of the song "Pretty Woman" by Roy Orbison and William Dees was "not presumptively unfair [use]" of the copyrighted original.[61] According to Justice Souter, and the rest of the majority, "the goal of copyright . . . is

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distinguished between parody and satire—stating that parody is accorded more fair use protection than satire. *Id.* at 580-81. The Second Circuit noted in *Blanch*, however, that "the broad principles of *Campbell* are not limited to cases involving parody" and found both that Koons's painting was satirical and that it was transformative. *Blanch*, 467 F.3d at 255. Accordingly, parody is an important and oft-emphasized inquiry in applying the transformative use doctrine, but should not be the end of the discussion.

[55] *Campbell*, 510 U.S. at 578-79.

[56] *Id.* at 579 (quoting Leval, *supra* note 15, at 1111).

[57] *Id.* at 579.

[58] *Id.* at 580 ("For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.").

[59] *Blanch*, 467 F.3d at 246; Friedman v. Guetta, No. CV 10-00014, 2011 WL 3510890 (S.D.N.Y. May 27, 2011); Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011).

[60] *Campbell*, 510 U.S. at 578 (citing Leval, *supra* note 15, at 1110-11).

[61] *Id.* at 594. The Court remanded the case to the lower court, which eventually found that 2 Live Crew's song did not constitute fair use. *Id.*; *see also* Kennedy, *supra* note 25.

generally furthered by the creation of transformative works."[62] Thus, the transformative nature of a work should be given some degree of deference in a fair use analysis.[63]

In *Campbell*, the Court deemed 2 Live Crew's song transformative because it parodied the original work thus commenting directly on the "naiveté" of the original.[64] The Supreme Court explained that, "[parody] can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one."[65] According to Judge Leval's article, however, transformative use covers not just parody, but "may include . . . symbolism, aesthetic declarations, and innumerable other uses."[66] Like the standard proposed in this note, Judge Leval supports protecting a variety of uses rather than uses that focus only on the actual original. Judge Leval believes that the first factor is "a question of justification," and that:

> [If] the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—[it is transformative because] this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.[67]

In the years since *Campbell*, courts have had difficulty shaping a test for whether a work is transformative absent instances where direct parody of the original work can be reasonably perceived in the secondary work.[68]

In 2006, Jeff Koons once again found himself before the Second Circuit Court of Appeals. This time, however, Koons successfully put forth a fair use defense. In *Blanch v. Koons*, the court found that Koons's painting, *Niagra*, was a fair use of photographer Andrea Blanch's photograph published in *Allure* magazine.[69] The court found that because Blanch had a different purpose in creating her advertisement than Koons did

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[62] *Campbell*, 510 U.S. at 579.

[63] *Id.* at 579.

[64] *Id*. at 583.

[65] *Id*. at 579.

[66] Leval, *supra* note 15, at 1111.

[67] *Id.*

[68] *See, e.g.*, Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (use of fashion photographer's image in a collaged painting is transformative); Castle Rock Entm't, v. Carol Publ'n Grp., 150 F.3d 132, 141-43 (2d Cir. 1998) (quiz book based on popular television show is not transformative of the television show); Warner Bros. Entm't, v. RDR Books, 575 F. Supp. 2d 513, 540-41 (S.D.N.Y. 2008) (encyclopedia of fictional stories is not transformative of the original novels).

[69] *Blanch*, 467 F.3d at 244.

in creating his painting, the use was transformative.[70] Moreover, the court found that Koons was commenting on Blanch's photograph "by using Blanch's image as fodder for his commentary on the social and aesthetic consequences of mass media."[71] Although the Second Circuit mentioned the importance of commenting on the original, this explanation seemingly stretched the standards adopted in *Campbell*. Essentially, the court used a standard that looked at the purposes of the works themselves instead of rigidly requiring that the artist comment on the original.[72]

The court emphasized the purposes for which each work was created, stating that Koons's purpose in creating his painting was "sharply different" than Andrea Blanch's in making her photograph.[73] The court then concluded that the different "objectives" of each artist "confirm[ed] the transformative nature of the use."[74] In other words, the court was extremely sensitive to the "meaning" of Koons's work and to the social commentary that he was making through his paintings.[75]

Nevertheless, while this decision seemed to indicate sensitivity to the practice of appropriation, the court did not clearly condone this technique. As a result, artists remained susceptible to liability. And in *Cariou*, the federal district court attempted to narrow any freedom created by the *Blanch* decision.

II. *CARIOU V. PRINCE*

A. Factual Background

For six years photographer Patrick Cariou lived with and photographed Rastafarians in their Jamaican landscape.[76] In 2000, Cariou published the photographs in a book entitled

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[70] *Id.* at 252 ("The sharply different objectives that Koons had in using, and Blanch had in creating [the original work] confirms the transformative nature of the use.").

[71] *Id.* at 253.

[72] Quoting *Campbell*'s adoption of Judge Leval's article, the court in *Blanch* stated that "[t]he test for whether [the secondary work's] use of [the original] is 'transformative,' then, is whether it 'merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression meaning or message.'" *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994)). This standard more closely adheres to the one laid out in Judge Leval's article.

[73] *Blanch*, 467 F.3d at 252.

[74] *Id.*

[75] *Id.* at 252-53.

[76] Cariou v. Prince, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011).

Yes, Rasta.[77] Cariou did not display the photographs and did not market them other than in the book.[78]

From the end of 2007 to February 2008, Richard Prince, a world-renowned appropriation artist,[79] exhibited several of his new works at the Eden Rock Hotel in St. Barths.[80] In one of the paintings, *Canal Zone*, Prince used thirty-five photographs from the *Yes, Rasta* book and applied them to a wooden board using "primitive collage technique."[81] This piece was to be the title work in Prince's forthcoming collection and planned screenplay of the same name.[82] Toward the end of 2008, *Canal Zone* opened at the Gagosian Gallery in the Chelsea neighborhood of New York City.[83]

Canal Zone, the show, consisted of twenty-nine paintings, each featuring images collaged, sometimes tinted or cropped, often with Prince's own drawing or brushstrokes overlaid.[84] Most of the paintings were several feet tall.[85] Richard Prince used at least forty-one photographs from Patrick

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[77] *Id.*

[78] *Id.* at 344.

[79] Richard Prince "is a leading member of the sprawling appropriation generation . . . that continues to add new recruits. . . ." Smith, *supra* note 23. "He started his career as a figure painter," but was making collages by 1975. PHILLIPS, *supra* note 36, at 21. Prince's rise to fame and recognition in the art world, however, came with his "rephotography" of magazine ads. The ultimate form of appropriation, Prince would photograph photographs. The result was puzzling: "To the viewer, Prince's alterations may have seemed minimal, even nonexistent, but there was in fact dramatic transformation." *Id.* at 27. Accordingly, the techniques he used in the *Canal Zone* series were hardly new to the artist's process and arguably far less egregious to copyright owners than some of his past work. In the 1980s and 1990s, Prince created a body of work entitled *Untitled (Cowboy)*, which consisted of photographs of advertisements as the entirety of the work. The Metropolitan Museum of Art described one of the pieces as "a copy (the photograph) of a copy (the advertisement) of a myth (the cowboy)." Heilbrunn Timeline of Art History, *Richard Prince: Untitled (Cowboy)*, METROPOLITAN MUSEUM OF ART, http://www.metmuseum.org/toah/works-of-art/2000.272 (last visited Apr. 26, 2013). The collection became one of Prince's most acclaimed exercises in social commentary and expression; it was a symbol of the power of appropriation.

[80] *Cariou*, 784 F. Supp. 2d at 343; *see also* Deidre Woollard, *Artist Richard Prince Exhibits in St. Barths at the Eden Rock Hotel*, LUXIST (Nov. 17, 2007, 11:03 AM), http://www.luxist.com/2007/11/17/artist-richard-prince-exhibits-in-st-barths-at-the-eden-rock-ho/.

[81] *Cariou*, 784 F. Supp. 2d at 343; *Richard Prince "Canal Zone*," ARTNEWS.ORG, (Nov. 20, 2008), http://artnews.org/gallery.php?i=1263&exi=13838.

[82] *Prince*, *supra* note 81.

[83] *Id.*

[84] *Id.*

[85] *See AO On Site: Richard Prince's* Canal Zone, *Gagosian Gallery, Saturday, November 8th, Chelsea, New York*, ART OBSERVED (Nov. 13, 2008), http://artobserved.com/2008/11/ao-on-site-richard-princes-canal-zone-gagosian-gallery-saturday-november-8th-chelsea-new-york/.

Cariou's photography book *Yes, Rasta*.[86] Some of Prince's paintings "consist[ed] almost entirely of images taken from *Yes, Rasta*, . . . collaged, enlarged, cropped, tinted and/or over-painted, while other[] [paintings] . . . use[d] [only] portions of *Yes, Rasta* as collage elements."[87] Additionally, Prince appropriated several images from other sources.[88] Richard Prince was developing a storyline in this collection.[89] Prince was channeling rock music, contemporary apocalyptic theories, heroes of the art world, such as DeKooning and Cezanne, and notions of his own life.[90] The District Court for the Southern District of New York noted that some of the paintings in *Canal Zone*[91] contained "substantial original painting," while others relied on different artistic devices to alter the *Yes, Rasta* photographs and other collage elements in the scenes.[92]

Though Cariou had only licensed the photographs in *Yes, Rasta* for that book—with the exception of a small few that he sold to friends—he testified that around the time *Canal Zone* showed in Chelsea, he had been negotiating with Christiane Celle, the owner of a small SoHo gallery in New York City to put on an exhibition of the collection.[93] According to the record, negotiations came to a halt when Celle encountered the *Canal Zone* show.[94] Alleging that she did not want to "capitalize" on Prince's success or to show work that had "been 'done already,'" Celle cancelled all plans.[95] Cariou's hopes of becoming a gallery artist almost a decade after he shot the *Yes, Rasta* series were dashed.[96]

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[86] *Cariou*, 784 F. Supp. 2d at 344.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 343-44.

[90] *Id.* at 344.

[91] Hereinafter *Canal Zone* refers to the entire body of work at issue in *Cariou*, unless otherwise indicated.

[92] *Cariou*, 784 F. Supp. 2d at 344.

[93] *Id.* Although the court did not question the arrangement between Celle and Cariou, attorneys for Prince challenged its credibility. *See* Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, at 20-22, *Cariou*, 784 F. Supp. 2d 337 (No. 08 Civ. 11327), 2009 WL 3054517. The gallery was Clic Bookstore and Gallery owned by Celle. *See id.*; CLIC GALLERY, http://clicgallery.com/about/index.htm (last visited Mar. 9, 2013).

[94] *Cariou*, 784 F. Supp. 2d at 344.

[95] *Id.*

[96] While Celle was indeed interested in representing Cariou, the deal never really materialized. In her testimony regarding the desire to represent the French photographer, Celle stated, "[w]e agree[d] on it but we never really pursue[d] it." Memorandum of Law, *supra* note 93, at 21. Moreover, the Court of Appeals decision revealed that Celle was initially interested in an entirely different body of work by

In December 2008, Cariou filed a lawsuit against Richard Prince, Gagosian Gallery, Inc., and Lawrence Gagosian alleging, *inter alia*, copyright infringement.[97] The defendants claimed fair use as an affirmative defense.[98]

B. The Court's Reasoning

On March 18, 2011, Judge Deborah Batts issued her opinion granting summary judgment for plaintiff Patrick Cariou.[99]

While the court noted that, in determining fair use, "all of the four factors are to be explored," much of the opinion concentrated on the first factor: "the purpose and character of the use."[100] The court articulated the first factor as a three-pronged inquiry: first, evaluating the transformative nature of the secondary work, then the commerciality, and finally whether the defendant acted in bad faith.[101]

In determining whether *Canal Zone* employed a transformative use of the *Yes, Rasta* photos, Judge Batts emphasized the extent to which *Canal Zone* commented specifically on Cariou's photographs, as well as Prince's facial alterations to the photographs and his intent in making the art.[102]

Whereas the Second Circuit Court of Appeals in *Blanch* focused on the difference in the respective purposes of the artists, the *Cariou* court concentrated on whether the secondary work commented on the original.[103] The district court opened the discussion by stating that "all of the precedent [the court could] identify imposes a requirement that the new work in some way comment on, relate to the historical context of, or critically refer back to the original works."[104] Judge Batts found that since

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Patrick Cariou—one that dealt with surfers and surfing culture. *See* Cariou v. Prince, 714 F.3d 694, 703 (2d Cir. 2013).

[97] Amended Complaint and Demand for Jury Trial, at 2-3, *Cariou*, 784 F. Supp. 2d 337 (No. 08 Civ. 11327), 2009 WL 956547.

[98] Answer of Defendant, at ¶ 33, *Cariou*, 784 F. Supp. 2d 337 (No. 08 Civ. 11327), 2009 WL 1632977.

[99] *Cariou*, 784 F. Supp. 2d at 355.

[100] *Id.* at 347-48 (citing 17 U.S.C. § 107) (internal quotation marks omitted).

[101] *See id.* at 347-52.

[102] *See id.* at 348-50.

[103] *Id.* at 349 ("Prince's [p]aintings are transformative only to the extent that they comment on the [p]hotos.").

[104] *See id.* at 348. Of course, this ignores *Blanch*, in which Jeff Koons' painting appropriated Andrea Blanch's photograph "as fodder for his commentary on the social and aesthetic consequences of mass media," rather than to make a comment about Blanch's work. Blanch v. Koons, 467 F. 3d 244, 252 (2d. Cir. 2006).

Prince was not referring directly or commenting specifically on Cariou's work, it was not analogous to other transformative use cases.[105] She relied on *Rogers* for the notion that a "different artistic use"[106] is not a justifiable basis for the transformative nature of a work and held that the paintings were "transformative only to the extent that they comment[ed] on [Cariou's photographs]."[107]

Richard Prince's own testimony was integral in this line of analysis. Noting that "Prince testified that he has no interest in the original meaning of the photographs he used," the court found that Prince therefore had no message to convey and that he "did not intend to comment on Cariou." Instead, the court found that he endeavored to make "creative and new" work, which was "not transformative within the meaning of Section 107."[108] Moreover, the court remarked on Prince's testimony that his intent in using pictures, like the ones he took from *Yes, Rasta*, was to import truth and fact into his work, and the court took this to mean that Prince's purpose in using Cariou's pictures was "the same as Cariou's original purpose in taking them: a desire to communicate to the viewer core truths about Rastafarians and their culture."[109]

The court further examined the actual facial transformations of the photographs. Judge Batts concluded that the transformative elements varied, and that "in the works most heavily drawn from Cariou's [p]hotos . . . there is vanishingly little, if any, transformative element[.]"[110] Conversely, the court noted that "in those [works] where Cariou's [p]hotos play a comparatively minor role, [Prince] has a stronger argument that his work is transformative of Cariou's original [p]hotos."[111] The opinion, however, went on to grant summary judgment with respect to all of the works in the

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[105] *Cariou*, 784 F. Supp. 2d at 359.

[106] *Id.* (quoting Rogers v. Koons, 960 F.2d 301, 310 (2d Cir. 1992)).

[107] *Id.*

[108] *Id.* at 349.

[109] *Id.* The court also used Prince's testimony to find that he acted in bad faith. Since he explained that he did not implement a different standard in his use of copyrighted work as opposed to images in the public domain, and instead based the decision on "whether he likes the image," Judge Batts found that Prince acted improperly. *Id.* at 9. Moreover, she found that because Prince did not attempt to contact Cariou in an effort to procure a license, this further supported a finding of bad faith. *Id.* However, if Prince thought at all about whether his use was lawful, he likely would have seen his work as fair use, and thus free from a licensing requirement.

[110] *Id.* at 350.

[111] *Id.*

Canal Zone series that used Cariou's photographs, ordering that they be destroyed.[112]

III. NARROW INTERPRETATION OF FAIR USE WILL CHILL ARTIST SPEECH

A. Analysis and Implications of Cariou v. Prince

Although this decision "set off alarm bells" in the art world, the legal reasoning is not unprecedented or extraordinarily unique.[113] On one hand, *Blanch* seems to provide more freedom for these types of artists, while on the other, the precedent set by *Rogers*, and even *Campbell*, limits transformative use to parodies that comment on the specific original work.[114] The *Cariou* decision relies on the second line of reasoning.[115] Because courts have not yet set a definitive standard by which to judge whether a work of art is transformative, the analysis is much more subjective than necessary.

Plainly, it was not Prince's intent to portray "core truths about Rastafarians and their culture."[116] Prince incorporated Cariou's images of Rastafarians in collages, both next to and beneath images of naked women, guitars, as well as his own lines, shapes, and brushstrokes. First, the title *Canal Zone* indicates that he must have had some personal connection to the work because Prince was born in the Panama Canal Zone.[117] Furthermore, the hints that Prince *did* give about the meaning of the work all dealt with apocalyptic landscapes; Prince even had a storyline to go along with the collection.[118] There were

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[112] *Id.* at 355-56. The court also found that Prince's gallery, Gagosian Gallery, as well as its owner, Lawrence Gagosian, was liable for vicarious and contributory infringement. *Id.* at 354. This finding prompted several prominent museums to file amicus briefs urging that the decision could "deter museums from acquiring and displaying important works." Abigail Rubenstein, *Museums, Google Back Richard Prince Fair Use Appeal*, LAW360 (Nov. 3, 2011, 7:47 PM), http://www.law360.com/newyork/articles/283044.

On appeal, however, the Second Circuit analyzed the works individually, ultimately determining that twenty five of the thirty do constitute fair use. *See* Cariou v. Prince, 714 F.3d 694 (2013).

[113] Kennedy, *supra* note 25.

[114] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579-80 (1994); Rogers v. Koons, 960 F.2d 301, 309-10 (2d Cir. 1992).

[115] *Cariou*, 784 F. Supp. 2d at 349.

[116] *Id.*; *see also* Kennedy, *supra* note 25 ("[T]he primary intention was to create a work of art . . . and that is the kind of creativity the law seeks to encourage.").

[117] *See supra* text accompanying note 103; *see also Biography*, RICHARD PRINCE, http://www.richardprince.com/bio/.

[118] *See supra* text accompanying notes 103-105.

reasons that he chose Cariou's pictures rather than any of the myriad images that might return on an online image search.[119] No critics or viewers interpreted Prince's collages as imparting truthful accounts of Rastafarian culture, and instead they remarked on the title—which served to place the characters in Panama—as well as the collage techniques that Prince used in their creation.[120] Most of Prince's career has been spent appropriating images where his message is not about the image itself, but something bigger, deeper, and more powerful.[121] In response to questions about his reasons for using appropriation in his work, Prince said that he "wanted to contribute to something that already existed in the world."[122] For an artist that has been using the images of others for decades, to now have to guess whether his future work will land him at a defendant's table will surely affect his freedom to work going forward.

B. The Dangers of Strict Fair Use and Transformative Use Standards

The importance of the visual arts cannot be understated. Notably, the advancement of the arts is more important than the protection of intellectual property because, as Judge Leval points out, it is the end to which copyright law is the means.[123] But starting with its introduction in *Campbell*, and now, after *Cariou*, the transformative use defense has become a legal gray area, leaving artists unable to predict whether their use is lawful. This state of purgatory will surely stunt the future development of the arts. This is especially true as appropriation becomes more suited to audiences. The threat of litigation is ever increasing and has the consequence of

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[119] *See* Grant, *supra* note 27 ("[Cariou's attorney] noted that Prince could have avoided the problem altogether by traveling to Jamaica and taking his own photographs that he scanned onto his canvases, but the entire point of Prince's art is commentary on images that already exist in the world."). Presumably, there was also a reason Prince used Cariou's photographs and not other images of Rastafarians, though he would have been vulnerable to this kind of claim regardless of whose image he used.

[120] *See* Eugene Kan, *Richard Prince "Canal Zone" Exhibition Recap*, HYPEBEAST (Nov. 12, 2008), http://hypebeast.com/2008/11/richard-prince-canal-zone-exhibition-recap/; Martha Schwendener, *Female Trouble: Richard Prince and Cindy Sherman*, VILLAGE VOICE (Dec. 10, 2008), http://www.villagevoice.com/2008-12-10/art/female-trouble-richard-prince-and-cindy-sherman/.

[121] *See generally* Smith, *supra* note 23.

[122] Transcript of Videotaped Deposition of Richard Prince at 43, Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011) (No. 08 Civ. 11327 (DAB)).

[123] Leval, *supra* note 15, at 1118-19.

discouraging artists. Moreover, licensing can be too burdensome to undertake. Fair use could support an environment of creativity and sharing within the art world if courts realize the importance of a visual language to artists and relax the requirement that artist's testimony and intent fit squarely into a legal standard.

Many have suggested, quite correctly, that copyright law as it has developed, and continues to develop, is ill-suited to the schools of art that employ appropriation in their work.[124] If the Southern District's decision is upheld, the effect will not only chill Richard Prince's forthcoming work, but also that of all artists that "build upon previous works in ways that add value and create new meanings, but do not necessarily comment on the earlier work."[125] Furthermore, appropriation is becoming an increasingly useful visual tool. With the proliferation of the Internet and digital technologies, the current generation has only become more visual and commercial.[126] The law should not push back on the natural evolution of culture, but should embrace these popular forms of expression and conform to the practices that are relevant in the modern day.[127] If the visual arts are to remain relevant and meaningful, then artists who choose to comment on society and contemporary issues will continue to find it necessary to refer to images, popular culture, and their own surroundings. While classical styles and expressive veins in art will surely remain, new movements often incorporate references to pop culture, photography, or any countless number of works that do not originate with the secondary user.[128]

While artists rarely consider the legal implications of their work during the creative process, the ramifications can be devastating. Indeed, one of the most influential collage artists, Robert Rauschenberg, "grew so sick of copyright squabbles that

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[124] *See generally* Weil, *supra* note 19; Badin, *supra* note 20; Rachel Isabelle Butt, Note, *Appropriation Art and Fair Use*, 25 OHIO ST. J. DISP. RESOL. 1055 (2010).

[125] Feder & Muttreja, *supra* note 16.

[126] *See* Louise Story, *Anywhere the Eye Can See, It's Now Likely to See an Ad.*, N.Y. TIMES, Jan. 15, 2007, at A1, *available at* http://www.nytimes.com/2007/01/15/business/media/15everywhere.html?pagewanted=all, for discussion.

[127] Some argue that the speed with which the network of image sharing is growing cannot be slowed *regardless* of what courts deem lawful. *See* Kennedy, *supra* note 25 ("[T]oday's flow of creative expression, riding a tide of billions of instantly accessible digital images and clips, is rapidly becoming so free and recycling so reflexive that it is hard to imagine it being slowed, much less stanched, whatever happens in court.").

[128] *See supra* note 68.

he eventually abandoned the practice of exploiting the photography of others . . . ."[129] Artists that become aware of the massive damages that Prince and his gallery face will have no choice but to pursue other techniques, because it is a rare artist that can afford such a financial blow and survive. Cariou and his legal counsel argue that art can only benefit from a stricter fair use standard, even if artists must defend the work in court.[130] They are misguided. Art history undoubtedly benefits from having Robert Rauschenbergs and Richard Princes. While the *Cariou* decision protects the exclusive rights set forth in the Copyright Act, it loses sight of the Constitutional goal of promotion of creativity and the arts. In other words, the exclusive rights are protected at the expense of copyright law's ultimate goal; the forest is lost for the trees.

Over the past few years, copyright litigation has become increasingly frequent.[131] One article posted on *Clancco*, an art law blog created by Associate Director of Volunteer Lawyers for the Arts Sergio Munoz Sarmiento, argues that a reason for the increased litigation is an effort to develop more pro-plaintiff law.[132] Artists such as Chapman Kelly, Shepard Fairey, Thierry Guetta, and of course, Richard Prince have all been involved in copyright litigation that threatens certain of their works.[133] And more and more lesser known artists are also becoming involved in copyright litigation.[134] The substantial damages available provide an incentive to diligently monitor one's work. In turn, this creates a dangerous environment in which to create.

A major problem is that judges will order that work be destroyed, like the court in *Cariou* ordered. To prevent viewers from experiencing an entire body of work by an important contemporary artist seems inconsistent with the goals of copyright. "When the copyright law is used—as it was in

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[129] SUSAN M. BIELSTEIN, PERMISSIONS: A SURVIVAL GUIDE: BLUNT TALK ABOUT ART AS INTELLECTUAL PROPERTY 87 (2006). On the other hand, if—as I am proposing—fair use offers broader protection for artists, it is "not likely" that the authors of the originals would similarly stop creating work simply because another may legally use the work in a new piece. *See* Weaver, *supra* note 5.

[130] *See* Sarmiento, *supra* note 6; Weaver, *supra* note 5.

[131] *See* Sarmiento, *supra* note 6 ("More and more, artists, other individuals, and corporations are suing artists . . . ."); *see also* Coe, *supra* note 49.

[132] Sarmiento, *supra* note 6.

[133] Kelley v. Chi. Park Dist., 635 F.3d 290 (7th Cir. 2011), *cert. denied* 132 S. Ct. 380 (2011); Friedman v. Guetta, No. CV 10-00014, 2011 WL 3510890 (C.D. Cal. May 27, 2011); Cariou v. Prince, 784 F. Supp. 2d 337 (S.D.N.Y. 2011); Kennedy, *supra* note 7.

[134] Sarmiento, *supra* note 6. Several articles explain the history of appropriation as a tool in the visual arts. *See, e.g.*, Landes, *supra* note 5; Weil, *supra* note 19; Butt, *supra* note 124.

[*Rogers*]—not merely to award damages but actually to suppress a work of art, then its effect is to diminish the stock of reality available to all of those who might one day have come into contact with that work."[135]

Advocates for copyright plaintiffs argue that there is no problem with requiring artists to license the images that they choose to incorporate in their work just as music samplers must license the songs that they use in their mixes.[136] But this is not as simple as these licensing proponents make it out to be. Licensing in the visual art world is impractical, sometimes impossible, and serves only the copyright holders and not the objectives of copyright laid out in the Constitution. If the artist cannot obtain a license, then the work will suffer. Where it is difficult or impossible to obtain a license, the goals of copyright are arguably deterred because by prohibiting the use of certain images, the artist's choices are narrowed, stifling artistic progress.[137]

It is important that artists be able to use images from other sources than their own creation. The reason for this is colloquially explained in the phrase "a picture is worth a thousand words." Indeed, "images cannot be adequately defined at all, either by words or by other images."[138] The image itself is necessary. If Prince had painted slightly similar images of Rastafarians, the message would be muddied, if not lost altogether.

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[135] Weil, *supra* note 19, at 838.

[136] *See* LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 7:54; *see also* Jarvis v. A & M Records, 827 F. Supp. 282 (D.N.J. 1993); Grand Upright Music, Ltd. v. Warner Bros. Records., Inc. 780 F. Supp. 182 (S.D.N.Y. 1991).

[137] The issue of obtaining a license often informs another prong of the first factor: bad faith. However, the relationship between attempts to license and bad faith is often murky, and whereas Judge Batts used Prince's failure to seek permission as support for a finding of bad faith, "*Blanch* squarely held that, in assessing fair use, the failure to seek permission cannot be deemed bad faith." Feder & Muttreja, *supra* note 16. Additionally, because of the heavily image based society that has come about since the rise of the internet, the "ideological baggage" that used to be associated with appropriation has all but vanished. Kennedy, *supra* note 25 (internal quotation marks omitted).

Judge Leval strongly opposes any consideration of bad faith in determining fair use. Leval, *supra* note 15, at 1126. Bad faith should not be a consideration in the fair use defense. This factor is irrelevant to the purposes of both copyright and the fair use doctrine and serves only to muddy the waters. Judge Leval expressed his disagreement with the use of a bad faith factor in his article, saying that "[t]his practice . . . is misguided." *Id.* ("[Questioning the morality of the use] produces anomalies that conflict with the goals of copyright and adds to the confusion surrounding the doctrine.") In correctly pointing out that such a question is "tempting" to judges, Leval argues that there is no legal reason for such a "morality test." *Id.* These questions often pollute fair use questions, especially when dealing with cryptic and sometimes arrogant artists who have limited legal tact.

[138] Weil, *supra* note 19, at 839.

An artist's work is not devoid of a legally condoned use (that is, that the work is a commentary on an appropriated work) merely because the artist does not correctly assert a legal ground for the use (that is, that they intended to comment on the work). The very idea behind appropriation art is that it "create[s] a new situation, and therefore, a new meaning or set of meanings, for a familiar image."[139] The creator often sees the work very differently from others and rarely has a true sense of the legal consequences of his own words. Artists are frequently called upon to talk about their work. To an individual who is unfamiliar with the case law, even with guidance by counsel, that person's own vanities, sensitivities, and tendencies are likely to obstruct their answers in a deposition or on the stand.

Judge Batts emphasized that "[Prince's] *intent* was not transformative within the meaning of Section 107."[140] But this is not the test that Judge Leval proposed when he coined the transformative use idea. And it is not the test that judges should apply today. To rely so heavily on the testimony of the artist leaves society's exposure to valuable cultural reference in the hands of art makers, who are not versed in the law, have very different perspectives than judges and lawyers, and may not realize the impact that their words can have.[141]

Moreover, heavy reliance on the need to comment on the original closes a tremendous door for artists. The Supreme Court in *Campbell* noted that 2 Live Crew's comment on the Roy Orbison original was important to the analysis, but to make this a requirement for fair use in the visual arts is too narrow of an analysis and bars key uses that should be deemed legal.[142]

C. Current Solutions

There have been many suggestions on how to loosen the constraints on fair use and transformative use. Some attempts at expanding the public domain are the Creative Commons Project, and a similar project attempted by the BBC.[143]

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[139] *See Appropriation*, TATE GLOSSARY, http://webarchive.nationalarchives.gov.uk/20120203094030/http://www.tate.org.uk/collections/glossary/definition.jsp?entryId=23 (last visited Mar. 9, 2013).

[140] Cariou v. Prince, 784 F. Supp. 2d 337, 349 (S.D.N.Y. 2011) (emphasis added).

[141] On appeal, the two opinions disagreed as to whether the court should have considered Richard Prince's testimony. *See* Cariou v. Prince, 714 F.3d 694, 713 (2d Cir. 2013) (Wallace, J., dissenting).

[142] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[143] *About*, CREATIVE COMMONS, http://creativecommons.org/about (last visited Jan. 17, 2012). The BBC "Creative Archive" project ended in 2006, shortly after its

Essentially, these programs allow creators to designate their material as usable by others, with options of how their work may be used and which uses are protected.[144] These programs take a welcome step in the right direction; however they ultimately rely on individual creators' altruism or personal beliefs, and the artists' willingness to actively pursue these licenses.[145] Moreover, the scheme is one that approaches this problem by limiting copyright protections as opposed to expanding fair use exceptions.[146] While an expansion of fair uses necessarily implies a limitation on copyright, it makes sense for the change to come from the fair use front because that is the camp more closely devoted to free expression.[147]

Courts should err on the side of dissemination of the arts. Lawrence Lessig proposes an alternative approach to fair use, arguing that the United States articulate a strict set of protected uses and deem all other uses presumptively fair.[148] This approach is essentially the opposite of many international copyright schemes.[149] Such a dramatic overhaul of the fair use jurisprudence would likely take years and would be incredibly complicated, contested, and subject to fierce lobbying. But in the context of appropriation, a less drastic measure could provide the freedom necessary to keep artists creating while protecting copyright's necessary and beneficial facets.

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advent. *BBC Creative Archive Pilot*, BBC, http://www.bbc.co.uk/creativearchive/ (last visited Jan. 19, 2012).

[144] *See* CREATIVE COMMONS, http://creativecommons.org/ (last visited Jan. 17, 2012).

[145] In order to secure a Creative Commons or similar license, one needs to affirmatively designate that the work is under a Creative Commons license. *See* CREATIVE COMMONS, http://creativecommons.org/ (last visited Jan. 17, 2012).

[146] Several suggestions for a more liberal copyright scheme take this approach. *See, e.g.*, Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 738-58 (2012).

[147] *See supra* note 35.

[148] *See* LAWRENCE LESSIG, FREE CULTURE 295 (2004) ("[T]he law should mark the uses that are protected, and the presumption should be that other uses are not protected.").

[149] Most other countries have a much more strictly codified fair use doctrine where the types of non-infringing uses are listed and "rarely, if ever, [will their courts] depart from the statutes to find limitations of their own for other types of conduct not envisioned ex-ante by the legislature." JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 531 (2010). This highlights a positive aspect of the U.S. fair use doctrine—that we *do* have more leeway. Unfortunately, courts are often reluctant to take advantage of this freedom when faced with visual art incorporating appropriated works.

IV. COURTS SHOULD USE A SEPARATE FAIR USE ANALYSIS FOR THE VISUAL ARTS

A. Fair Use Should Focus on the Distinct Artistic Purpose

Fair use is purposefully ambiguous.[150] However, a lack of a bright line rule should not turn the courts into arbiters of social value. While an ambiguous transformative use standard may provide more opportunities for attorneys who can pose strong arguments on either side, it can be troubling and limiting for artists that must balance creativity with legality.[151] The deeper question of transformative use should therefore be clarified to help guide courts when dealing with these kinds of cases. Works should be deemed transformative whenever the secondary use serves a different *artistic* purpose.

Both Richard Prince's *Canal Zone* and Jeff Koons's *String of Puppies* used the original work for a different purpose than the original artist: to comment on societies. Prince was creating a fictional world, whereas Cariou was portraying a reality. Similarly, Koons was highlighting kitsch and cliché, whereas Rogers was capturing an adorable image to print on greeting cards. The respective messages—while both valid—were entirely distinct.[152] "Visual artists, above all, need a fair use rule that is both flexible and spacious enough to permit them a considerable degree of appropriation."[153]

According to Judge Leval, "[T]he [secondary] use must be productive and must employ the [original work] in a different manner or for a different purpose from the original"[154]; it must "add[] value to the original."[155] The transformative use question is central to issues involving appropriation art and

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[150] "Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts." H.R. REP. NO. 94-1476, at 65 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5679.

[151] *See* Grant, *supra* note 27.

[152] Patrick Cariou's photographs in *Yes, Rasta* are documentary style "portraits." Cariou v. Prince, 784 F. Supp. 2d 337, 343 (S.D.N.Y. 2011). Richard Prince, on the other hand, used Cariou's photos as "ingredients" in the "recipe" that became *Canal Zone*. Videotaped Deposition, *supra* note 122, at 30. Prince was creating a set of collaged paintings that paid tribute to his predecessors such as Willem DeKooning. *Id.* at 156.

[153] As Weil points out, this would also apply to "slides, transparencies, and printed illustrations," so that the art world could function efficiently from artist to collector to museum to gallery. Weil, *supra* note 19, at 839.

[154] Leval, *supra* note 15, at 1111.

[155] *Id.*

therefore adjustments to the transformative use law will likely have an actual effect on the outcomes of these cases. Courts must unequivocally abandon the notion that in order for a secondary work of visual art to be deemed transformative it must comment on the original. This limitation severely limits artistic freedom. Art that uses appropriated images does so for a variety of reasons, far beyond a desire to critique or parody a specific work.[156] Art law scholar Stephen E. Weil points out that "[a]rtists have always perceived the environment around them as both inspiration to act and as raw material to mold and remold."[157]

Artists must have the freedom to play with images, particularly in an age where images dominate daily life and the internet makes access to images and visual culture effortless.[158] In the past, the Court of Appeals for the Second Circuit has been receptive to this idea,[159] but no court has yet to confidently establish a precedent that allows artists the legal safety to work in this way. Instead, a preference for parody has dominated ever since the Supreme Court decided *Campbell* and, while parody is certainly an effective tool, and one that should be protected, "[p]arody is by no means the only mode by which one work of art may refer to another in order to achieve a desired artistic effect."[160] Indeed, statements that extend to society at large and comment on contemporary culture are arguably more important to art history and expression than those that are specific to a certain work. Jeff Koons's message about banality and kitsch is arguably more profound than 2 Live Crew's statement about Roy Orbison's pop song. Both statements should be protected, and in both cases, the original

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[156] *See* Julie C. Van Camp, *Originality in Postmodern Appropriation Art*, 36 J. ARTS, MGMT., L., & SOC'Y 247, 247 (2007).

[157] Weil, *supra* note 19, at 836.

[158] *See supra* Part III.B.

[159] *See* Feder & Muttreja, *supra* note 16 (quoting Bill Graham Archives v. Doris Kindersley, 448 F.3d 605, 609 (2006)) ("[T]he Second Circuit rejected a 'limited interpretation of transformative use' under which 'each reproduced image should have been accompanied by comment or criticism related to the artistic nature of the image.'").

[160] Weil, *supra* note 19, at 838. Parody is a desirable fair use because, often, authors and creators are not inclined to license their work if they feel they are going to be made light of or have their reputation belittled. *See* Landes, *supra* note 5, at 21 ("When the parody targets the plaintiff's work, the parties are unlikely to come to terms on a price that allows the defendant to make fun, embarrass, or even humiliate the plaintiff's work."). The problem is that fear of parody is not the only reason an artist might keep their work from being used by others.

artist is likely to dislike the message that his work is being used to convey.[161]

B. Factors to be Weighed Under the Artistic Purpose Standard

Copyright law needs a new transformative use standard that gives artists more freedom to engage in uses that should be allowed, while outlawing those that are purely piracy. There are several factors, a balancing of which could determine whether the work serves a different artistic purpose and thus is transformative of the original. These factors include: (i) the objective difference between the two works, (ii) expert testimony from art historians and critics, and (iii) the artist's intent. This approach would widen the fair use defense, but would bring the law closer to achieving the policy goals laid out in the Constitution.

First, the objective difference between the original and the new work will serve as an important prong under this standard. This factor has traditionally been important to the first factor of the fair use analysis.[162] If the important legal difference between a transformative work and the original is that it serves a new artistic purpose, then the visual difference that a viewer experiences plays a part in that analysis. The objective difference can distinguish secondary works that use the original for inspiration from those that use the original in a more substantial way, which would deserve more explanation.[163] If the visible differences between the original and the secondary use are great, that difference will weigh heavily toward a finding of fair use.

The second element in this new standard—expert testimony from art historians and critics—will work towards

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[161] If a reason to offer fair use protection is a reluctance to license for fear of reputational damage, an artist like Art Rogers might understandably be offended that his work is being used to comment on the banal.

[162] Although courts have not typically analyzed the objective differences in their own category, most transformative use visual arts cases begin with a detailed description of the two works, indicating that the medium and overall aesthetic of the work is important to the court. *See* Blanch v. Koons, 467 F.3d 244, 247-48 (2d Cir. 2006); Rogers v. Koons, 960 F.2d 301, 304-05 (2d Cir. 1992); Cariou v. Prince, 784 F. Supp. 2d 337, 343-44 (S.D.N.Y. 2011).

[163] An example of an artist using the original as "inspiration" would be Jeff Koons's use in *Blanch* where that particular style of advertising informed the secondary work. *See Blanch*, 467 F.3d at 247. Under this standard, frivolous claims will be dismissed, but this initial inquiry will heavily tip the scale in favor of fair use where just enough use remains to survive a motion to dismiss.

revealing the outside purpose of the work: that which "may reasonably be perceived."[164] An article in *Hyperallergic*, a forum for art related issues and topic discussions, addresses some of these issues and advocates for introducing expert testimony so that judges are not acting as art historians.[165] Experts in the art world such as critics, curators, and historians can provide substantial information about the artistic value and purpose of a work of art. This will particularly help with cases dealing with major art players.[166] Experts can testify on both the artistic functions of each work—meaning both the original and the secondary—as well as each artist's reputation and body of work. Such information can often—though not always—say a great deal about an artist, give insight into whether an appropriated work falls within a market that the original artist would be likely to exploit and, in some cases, add context to the work of the secondary artist.[167]

The artist's intent—a factor that currently plays a substantial role in fair use analysis—should still serve as an important element in evaluating the purpose and character of the use and whether the use is transformative.[168] This is despite

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[164] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 582 (1994).

[165] Weaver, *supra* note 5.

[166] Because many of the cases that reach this stage deal with highly successful artists, this testimony will be relatively valuable. Such high profile cases set the bar for lesser-known artists in the field.

[167] This analysis is related to the fourth factor of fair use, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4) (2006), in that often, works with different purposes will pose less of a risk to each other's markets. *See Campbell*, 510 U.S. at 591 ("[W]hen . . . the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred."). By analyzing the purpose as determinative of transformative nature, the subjectivity of the fourth factor as it relates to the visual arts is removed. Weil argues that "little or no weight" should be given to the fourth factor of § 107, and instead more weight to the first factor. Weil, *supra* note 19, at 840-41. This seems to square somewhat with Judge Leval's argument.

> The ultimate objective in forming this new standard would be to reduce copyright litigation. Just as it might be sound copyright policy to provide contemporary visual artists with greater latitude than other creative practitioners as to what they may incorporate into their own work, it may also be sound policy to limit the ability of such artists to use copyright to impede the free circulation of images of that work within the cultural and commercial marketplaces.

Id. at 840. The solution has several elements, however, all of which are necessary and overdue. This would, in effect, often make the fourth factor irrelevant because it is most unlikely that a work that expresses a different message and has a different purpose than the original will supplant the market for the original. Certainly there will nevertheless be anomalies, as in the case of Christiane Celle's testimony in *Cariou*.

[168] Historically, the way an artist testifies about the work at issue has had a substantial impact on the outcome of the case. Some argue that one of the central

the complications that this inquiry sometimes causes. While artist testimony can often be misleading, the importance of the appropriator's vision often reflects the function of the work in the public. In some ways, an ingredient of morality might return in this element; however it would appear in a very different way than that which courts use today.[169] If the artist used the original with the "good faith" intent of creating work with a new artistic purpose then, perhaps, that would be important to the question of remedies.[170]

This new standard recognizes the importance of appropriation in art and is sensitive to and respects artist's creative prerogative. The standard is more clearly defined and is forgiving to the visual arts, while maintaining the traditional flexibility of U.S. copyright law. Establishing this standard

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reasons for the Second Circuit's seemingly divergent opinions in *Rogers* and *Blanch* was the difference in the testimony and attitude of Jeff Koons. *See* Grant, *supra* note 27 ("Jessica Litman, a professor at the University of Michigan Law School, claimed that part of the reason that Koons lost [*Rogers*] but won [*Blanch*] was that 'the first time he came into court with a lot of art world attitude about "I'm the artist, I can do whatever I want," and the second time he made a more reasonable statement about the kind of message that appropriation art sends. That goes a long way.'").

Indeed, "[l]awyers and artists sometimes just don't speak the same language." Eric Randall, *Lawyers and Artists Don't Always Speak the Same Language*, ATL. WIRE, Dec. 28, 2011, *available at* http://www.theatlanticwire.com/entertainment/2011/12/lawyers-and-artists-dont-always-speak-same-language/46740/. Courts like to hear testimony that connects directly to the legal test to be applied and often, artists pontificate in broad, abstract terms with several meanings, few of which speak to the elements of the legal standard.

[169] For example, in *Cariou*, the court emphasized Prince's "bad faith" for failing to seek permission to use the photos. Cariou v. Prince, 784 F. Supp. 2d 337, 351 (S.D.N.Y. 2011).

[170] Remedies play an extremely important role in copyright litigation. This is because of the massive damages that can be awarded—particularly when statutory damages are available—as well as the crushing equitable remedies and, finally, the availability of attorney's fees.

Statutory damages, which are available under the circumstances listed in 17 U.S.C. § 412, can range from $750 to $30,000 per infringement, and can be raised to $150,000 per infringement upon a showing of "willful[ness]." 17 U.S.C. § 504. For a critical analysis of statutory damages in copyright law, *see* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

The *Cariou* case ordered significant remedies for the plaintiff. It has been described as a "very harsh decision." Weaver, *supra* note 5. Judge Batts ordered that the defendants be "enjoined and restrained permanently" from continuing to exploit any of the work that used Cariou's images, and that they "deliver up for impounding, destruction, or other disposition, . . . all infringing copies of [Cariou's] [p]hotographs," as well as "notify in writing any current or future owners of [Prince's infringing] [p]aintings . . . that the [p]aintings were not lawfully made . . . and . . . cannot lawfully be displayed . . . ." *Cariou*, 784 F. Supp. 2d at 355-56.

Finally, attorney's fees provide an incentive for plaintiff's such as Cariou to initiate these lawsuits. *See* Fogarty v. Fantasy, Inc., 510 U.S. 517, 524 (1994). After *Fogarty*, there is also an incentive for defendants to litigate infringement cases because attorney's fees may be available for prevailing defendants. *Id.* at 534.

would provide a regime that artists could look to, and would give more freedom to artists who use these techniques in their work. This would encourage more creation and lessen the bureaucracy associated with licensing images and with defending a claim in court. Moreover, the elements of this new transformative use question provide boundaries to fair use that protect the limited monopoly that copyright is meant to provide. Uses that clearly steal the image for no new artistic purpose, with minimal objective differences, and with purely economic intent will not pass this transformative use analysis, and will therefore, in all likelihood, fail the fair use test. This standard tracks the expectation of artists—as well as the arguments presented by their lawyers—and therefore avoids the impossible result of forcing artists to engage in a legal analysis in order to use appropriation in a body of artwork. Adoption of this standard ensures that artists have the freedom to create and that the goals of the Copyright Act are respected.

CONCLUSION

Aptly touching on many of the important points in the battle between copyright and appropriation art, Stephen E. Weil predicts that

> if our society is to continue to be enriched by the vigorous production and distribution of original works of visual art, then visual artists need a license to forage widely—far more widely than conventionally interpreted copyright law might permit—in gathering the raw materials out of which to compose their work.[171]

Judge Leval believed it was important to remember that copyright is not a natural right inherent in the fabric of our nation or moral customs.[172] Instead, copyright is granted in the Constitution as an incentive for people to create. Fair use, and thus transformative use, is the other side of the same coin. These doctrines protect creativity by creating space in which authors and artists may work. This space must be protected. And although fair use will likely remain a subjective, fact-based question, some parameters must be set if the defense is to be useful to artists in any way.

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[171] Weil, *supra* note 19, at 840.

[172] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).

If artists have the freedom to use images without the restriction of having to comment on the original, the goals of copyright will ultimately be realized. Moreover, the requirement that the secondary work serve a distinct artistic purpose will maintain the balance that protects the copyright holders. Artists still must create work with a message and for a purpose—with a goal of creating their own work—if they are to use the images of others. For art to be productive, it must have some message, even if the message is about art-making in general. This standard does not legalize piracy or useless copying. Instead, it promotes valuable art and protects artists' prerogative to experiment, comment, and promote creativity. It is true that "sometimes art and law don't align well,"[173] but if the goal of copyright is to promote the arts, then when art and law collide, it should be the law that yields.

Caroline L. McEneaney[†]

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[173] Randall, *supra* note 168.

[†] J.D., Brooklyn Law School, 2013; B.F.A. Studio Art, University of Connecticut, 2010. Thank you to the *Brooklyn Law Review* for their hard work during the editing process. I am also enormously grateful to Professor Beryl Jones-Woodin for her continued advice and guidance in the note writing process and equally, if not even more, for her support throughout my time at Brooklyn Law School. Finally, thank you to my family: you are my home.